

September 12, 2022

Suzanne B. Goldberg  
Acting Assistant Secretary for Civil Rights  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202

**Re: Public Comment: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (RIN 1870-AA16)**

Dear Acting Assistant Secretary Goldberg,

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 of Proposed Rulemaking related to Title IX of the Education Amendments of 1972 (“Title IX”).<sup>1</sup>

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”)<sup>2</sup> people. Our work has been relied upon by courts, legislatures, and federal and state agencies serving LGBT community members. Williams Institute scholars have long worked with federal agencies to provide analysis on existing data to inform public policy choices, and expert recommendations on ways the federal government can improve data collection on LGBT people.<sup>3</sup> Of particular relevance to the Proposed Rulemaking, Williams Institute scholars have conducted extensive analysis of LGBTQ students’ experience in higher education using data from the Access to Higher Education Survey (“AHES”)—an anonymous, representative and cross-sectional survey developed to shed light on the factors that support the completion of higher education among a diverse group of adults.<sup>4</sup>

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<sup>1</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390 (July 12, 2022) (to be codified at 34 C.F.R. § 106).

<sup>2</sup> Note: Use of ‘LGBT,’ ‘LGB,’ and ‘LGBTQ’ in this comment varies depending on the population being measured or discussed.

<sup>3</sup> *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>.

<sup>4</sup> WILLIAMS INST., *Access to Higher Education Survey*, <https://williamsinstitute.law.ucla.edu/projects/higher-education/>; KERITH J. CONRON ET AL., WILLIAMS INST., EDUCATIONAL EXPERIENCES OF TRANSGENDER PEOPLE 17 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Apr-2022.pdf> [hereinafter CONRON ET AL., TRANSGENDER PEOPLE]

## I. Title IX Protections Affect a Significant Number of LGBT People in the U.S.

LGBT-identified people comprise approximately 4.5% of the U.S. adult population and 9.5% of youth between ages 13 and 17.<sup>5</sup> Applying these figures to the U.S. population, we estimate that approximately 11 million adults and 2 million youth ages 13 to 17 in the U.S. identify as LGBT. These estimates include approximately 1.3 million adults and 300,000 youth ages 13 to 17 who are transgender.<sup>6</sup> The number of youth identifying or perceived by their peers as gender nonconforming is likely much higher; for example, a Williams Institute study found that 27% of California youth—approximately 796,000 students—identify or are perceived as gender nonconforming.<sup>7</sup>

Many of these LGBT youth and adults are or have been students. A 2020 Williams Institute analysis of federal government data sources estimated that approximately 3.5 million LGBT people ages 15 and older were current high school students or enrolled in higher education programs.<sup>8</sup> Our analysis of AHES data found that nearly three in five (58.3%) LGBTQ people ages 18–40 had attended a four-year college at some point in their lives and nearly a third (32.7%) of LGBTQ people ages 18–40 had attended a community college.<sup>9</sup> Over half of LGBT students live in states without express protections from discrimination based on sexual orientation or gender identity.<sup>10</sup>

Additionally, many LGBT people are parents of K-12 students. The Census Bureau estimated based on 2019 data from the American Community Survey that approximately 980,000 households were headed by a same-sex couple.<sup>11</sup> The Census Bureau further determined

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<sup>5</sup> 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>; 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>.

<sup>6</sup> JODY L. HERMAN ET AL., WILLIAMS INST., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 4 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>.

<sup>7</sup> BIANCA D.M. WILSON ET AL., 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>.

<sup>8</sup> KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., LGBT PEOPLE IN THE US NOT PROTECTED BY STATE NON-DISCRIMINATION STATUTES (2020), <https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes/>. Using government-collected data, we separately estimated that approximately 218,000 students ages 18–40 in the U.S. are transgender. CONRON ET AL., TRANSGENDER PEOPLE 5, *supra* note 4.

<sup>9</sup> KATHRYN O'NEILL ET AL., WILLIAMS INST., EXPERIENCES OF LGBTQ PEOPLE IN FOUR-YEAR COLLEGES AND GRADUATE PROGRAMS 11 (2022) [hereinafter O'NEILL ET AL., FOUR-YEAR COLLEGE]; KERITH J. CONRON ET AL., WILLIAMS INST., COMMUNITY COLLEGE AND THE EXPERIENCES OF LGBTQ PEOPLE 7 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Community-College-May-2022.pdf> [hereinafter CONRON ET AL., COMMUNITY COLLEGE].

<sup>10</sup> CONRON & GOLDBERG, *supra* note 5, at 1.

<sup>11</sup> LAQUITTA WALKER & DANIELLE TAYLOR, U.S. CENSUS BUREAU, SAME-SEX COUPLE HOUSEHOLDS: 2019 (2021), <https://www.census.gov/content/dam/Census/library/publications/2021/acs/acsbr-005.pdf>. Using data from the

that nearly 181,000 of those households were raising children under the age of 18. Thus, a significant number of LGBT couples are raising children who may be attending educational institutions or programs covered by Title IX. Many additional students are likely being raised by LGBT individuals who are not part of a same-sex couple.

## II. LGBTQ Individuals Face Significant Discrimination in Educational Institutions and Programs

Research has documented the discrimination and harassment that LGBT people experience in almost all aspects of public life,<sup>12</sup> including in employment,<sup>13</sup> housing,<sup>14</sup> health care,<sup>15</sup> financial services,<sup>16</sup> government programs,<sup>17</sup> the judicial system,<sup>18</sup> and public accommodations.<sup>19</sup> Below we present evidence of discrimination specific to the educational

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Current Population Survey, the Census Bureau also estimated that as many as 191,000 children may be living with same-sex parents. *Who is Living Together? Same-Sex Couples in the United States*, CENSUS.GOV (Nov. 19, 2019), <https://www.census.gov/library/visualizations/2019/comm/living-together-same-sex.html>.

<sup>12</sup> See, e.g., Letter from Williams Inst. Scholars to Members of the S. Comm. on the Judiciary (Mar. 22, 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-Equality-Act-State-Governments-Mar-2021.pdf>.

<sup>13</sup> See, e.g., Letter from M.V. Lee Badgett, Professor of Econ., Univ. of Mass. Amherst, to Members of the S. Comm. on the Judiciary (Mar. 17, 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-Equality-Act-LGBT-Employment-Mar-2021.pdf> (discussing employment discrimination experienced by LGB and transgender people).

<sup>14</sup> See, e.g., DIANE K. LEVY ET AL., URBAN INST., A PAIRED-TESTED PILOT STUDY OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES AND TRANSGENDER INDIVIDUALS xiii (2017), [https://www.urban.org/sites/default/files/publication/91486/2017.06.27\\_hds\\_lgt\\_final\\_report\\_report\\_finalized\\_0.pdf](https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_0.pdf); ADAM P. ROMERO ET AL., WILLIAMS INST., LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS 4 (2020), <https://williamsinstitute.law.ucla.edu/publications/lgbt-housing-instability/>; CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., EVIDENCE OF HOUSING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY 1 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Discrimination-US-Feb-2016.pdf> [hereinafter MALLORY & SEARS, HOUSING DISCRIMINATION]. LGBT people are also more likely to rent their homes and thus have less stable housing. See BIANCA D.M. WILSON ET AL., WILLIAMS INST., LGBT RENTERS AND EVICTION RISK 2 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Eviction-Risk-Aug-2021.pdf>.

<sup>15</sup> See LAMBDA LEGAL, WHEN HEALTH CARE ISN'T CARING 5–6 (2010), [https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report\\_when-health-care-isnt-caring.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf).

<sup>16</sup> See Hua Sun & Lei Gao, *Lending Practices to Same-Sex Borrowers*, 116 PROC. NAT'L ACAD. SCI. U.S.A. 9293, 9293 (2019), <https://www.pnas.org/doi/pdf/10.1073/pnas.1903592116>.

<sup>17</sup> See, e.g., KERITH J. CONRON & BIANCA D.M. WILSON, WILLIAMS INST., LGBT YOUTH OF COLOR IMPACTED BY THE CHILD WELFARE AND JUVENILE JUSTICE SYSTEMS 4–5 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-YOC-Social-Services-Jul-2019>.

<sup>18</sup> See, e.g., Letter from Todd Brower, Jud. Educ. Dir., Williams Inst., to Members of the S. Comm. on the Judiciary (Mar. 17, 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-Equality-Act-Judicial-System-Mar-2021.pdf>.

<sup>19</sup> See CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., EVIDENCE OF DISCRIMINATION IN PUBLIC ACCOMMODATIONS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY 1 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Public-Accomm-Discrimination-Feb-2016.pdf>

context, focusing on the experiences of LGBT students, LGBT teachers and other school employees, and LGBT parents.

### A. Discrimination Experienced by LGBT Students

Decades of research highlight the ways in which LGBT students of all ages face bullying, harassment, and discrimination across the nation due to sexual orientation, gender identity, and sex characteristics. These experiences have been documented across a variety of sources, including analyses of survey data, lawsuits and judicial opinions, and media reports. Moreover, a number of states have enacted state-level laws and policies that exclude and further stigmatize LGBT students.

#### a. Survey Data

##### i. K-12 Education

Bullying, harassment, and violence are significant factors in the lives of LGBT youth. The Centers for Disease Control and Prevention’s (“CDC”) Youth Risk Behavior Survey (“YRBS”), a nationally representative survey, provides annual data that shed light on how the experiences of LGBT high school students differ from their non-LGBT counterparts. Data collected through YRBS consistently show that LGBT youth experience higher rates of bullying and violence than their non-LGBT peers. For example, CDC’s analysis of 2019 YRBS data, the most recent data available, found that about one-third of LGB students (32.0%) reported being bullied on school property within the past year, nearly double the rate of heterosexual students (17.1%).<sup>20</sup> LGB students (26.6%) were also nearly twice as likely to report being bullied electronically in the past year as heterosexual students (14.1%).<sup>21</sup> LGB students were also more likely to report experiencing violence at school: 11.9% of LGB students reported being threatened or injured with a weapon on school property in the past year compared to 6.3% of non-LGB students.<sup>22</sup> The Department’s own Civil Rights Data Collection (“CRDC”) data for the

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[hereinafter MALLORY & SEARS, PUBLIC ACCOMMODATIONS]; LINDSAY MAHOWALD ET AL., CTR. FOR AM. PROGRESS, THE STATE OF THE LGBTQ COMMUNITY IN 2020 4 (2020), <https://www.americanprogress.org/wp-content/uploads/2020/10/LGBTQpoll-report.pdf>.

<sup>20</sup> 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, 31 (2020), <https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2019/su6901-H.pdf>. These results were noted as being statistically significant. *Id.*

<sup>21</sup> *Id.* These results were noted as statistically significant. See also: 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>.

<sup>22</sup> Johns, *supra* note 21.

2015–2016 school year indicate that 16% of allegations of harassment or bullying in public schools were made on the basis of sexual orientation.<sup>23</sup>

Studies indicate that gender minority students, such as transgender students, experience even higher rates of bullying, harassment, and discrimination. For example, a CDC analysis of 2019 YRBS data from ten states and nine large, urban districts revealed that over one-third of transgender students (34.6%) reported being bullied at school, nearly thirty percent (29.6%) reported electronic bullying, one-quarter (26.9%) felt unsafe at or traveling to school, and nearly one-quarter (23.8%) reported being threatened or injured with a weapon at school in the last year.<sup>24</sup> An earlier CDC study examining a representative sample of 5,469 students from 2013 YRBS data conducted in four urban school districts found a “significant linear relationship” between gender nonconformity and bullying; each additional unit of a student’s perceived gender nonconformity resulted in a 15% greater likelihood of experiencing bullying.<sup>25</sup> Similarly, the 2015 U.S. Transgender Survey (“USTS”), which is the largest survey of transgender and gender non-conforming people, found that over half of respondents (54%) reported verbal harassment, one-quarter (24%) reported physical assault, and over one in ten (13%) reported sexual assault while in kindergarten through 12<sup>th</sup> grade because of openly identifying or being perceived as transgender.<sup>26</sup>

Academic sources highlight some of the other ways in which anti-LGBT discrimination particularly impacts gender minority students, including denials of access to appropriate facilities, dress codes prohibiting them from wearing clothing matching their gender identities, and inappropriate and ineffective teacher and administrator responses to mistreatment.<sup>27</sup> Evidence also shows that harassment is common. For example, a mixed-method study on school climate for transgender youth found that over four-fifths of transgender students (82%) reported hearing negative comments based on their gender identity or expression from other students

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<sup>23</sup> U.S. DEPT. OF EDUC., 2015–16 CIVIL RIGHTS DATA COLLECTION: SCHOOL CLIMATE AND SAFETY 5 (2019), <https://ocrdata.ed.gov/assets/downloads/school-climate-and-safety.pdf>.

<sup>24</sup> 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*, 68 MORBIDITY & MORTALITY WKLY. REP. 67, 69 (2019), <https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm>.

<sup>25</sup> 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), <https://pubmed.ncbi.nlm.nih.gov/29498058/>. Investigators used a scale of self-reported gender expression, where 1 was “most gender conforming” and 7 was “most gender nonconforming.”

<sup>26</sup> 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>.

<sup>27</sup> See, e.g., Aaron Curtis, *Conformity or Nonconformity? Designing Legal Remedies to Protect Transgender Students from Discrimination*, 53 HARVARD J. ON LEGIS. 459 (2016), [https://harvardjol.com/wp-content/uploads/sites/17/2016/05/HLL201\\_crop.pdf](https://harvardjol.com/wp-content/uploads/sites/17/2016/05/HLL201_crop.pdf).

“sometimes or often[,]” and nearly one-third (31%) even heard such comments from school personnel.<sup>28</sup>

Additionally, survey data indicate that LGBT students are at increased risk of sexual harassment and assault. For example, the CDC’s analysis of 2019 YRBS data indicated that LGBT students are more than twice as likely to report experiences of sexual dating violence in the last year as compared to their heterosexual peers (16.4% v. 6.7%).<sup>29</sup> Additionally, data from GLSEN’s National School Climate Survey highlighted that over half of all LGBT students (58.3%) reported experiencing sexual harassment at school in the last year, with over one in ten (13.4%) reporting that such experiences were frequent.<sup>30</sup>

## ii. Higher Education

Survey data also indicate that discrimination and harassment impact LGBTQ students in higher education. Survey data on students’ experiences come from a wide range of sources, including academic research, campus climate surveys, and surveys by non-governmental organizations. Williams Institute analysis of AHES data sheds light on the experiences of LGBTQ people in community colleges, four-year colleges, and graduate schools. We have also developed focused analyses on transgender people<sup>31</sup> and LGBTQ People of Color<sup>32</sup> in higher education. Key findings from our AHES reports and other sources are summarized below.

### *Overall*

Our analysis of AHES data found that over one-quarter of transgender people (26%) and nearly one in ten LGBTQ cisgender people (9.4%) reported barriers hindering their academic success in a higher education program, which included experiencing unfair treatment, harassment, or bullying for being LGBTQ.<sup>33</sup> Significantly, LGBTQ people of color were nearly twice as likely to report unfair treatment impeding their academic success, as compared to white LGBTQ people (10.4% v. 4.4%).<sup>34</sup>

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<sup>28</sup> 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), <https://pubmed.ncbi.nlm.nih.gov/20428933/>.

<sup>29</sup> Basile et al., *supra* note 20, at 23, 31.

<sup>30</sup> 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 (2020), [https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web\\_0.pdf](https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf).

<sup>31</sup> CONRON ET AL., TRANSGENDER PEOPLE, *supra* note 4; ABBIE E. GOLDBERG, WILLIAMS INST., TRANSGENDER STUDENTS IN HIGHER EDUCATION 6 (2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Aug-2018.pdf>.

<sup>32</sup> KERITH J. CONRON, KATHRYN O’NEILL, MARIELLA ARREDONDO & RUBEEN GUARDADO, WILLIAMS INST., EDUCATIONAL EXPERIENCES OF LGBTQ PEOPLE OF COLOR: FINDINGS FROM A NATIONAL PROBABILITY SURVEY (forthcoming 2022) [Hereinafter: CONRON ET AL., LGBTQ PEOPLE OF COLOR].

<sup>33</sup> CONRON ET AL., TRANSGENDER PEOPLE, *supra* note 4.

<sup>34</sup> CONRON ET AL., LGBTQ PEOPLE OF COLOR, *supra* note 32.

These findings are consistent with earlier research showing that transgender students in higher education are at increased risk of discrimination and harassment. The Williams Institute’s 2018 report on transgender students in higher education highlights that transgender students nationwide “report greater levels of harassment and discrimination, have a more negative perception of campus and classroom climates, and feel less accepted as part of the campus community, as compared to cisgender students.”<sup>35</sup> The USTS results from 2015 also reflected similar experiences in higher education, with one-quarter of respondents (24%) who were out as transgender in college or vocational school reporting verbal, physical, or sexual harassment at school.<sup>36</sup> One study found that transgender college students’ lacking access to bathrooms that correspond with their gender identity is correlated with suicidality.<sup>37</sup>

### *Community Colleges*

Williams Institute analysis of AHES data also highlights some of the specific obstacles LGBTQ students face in community colleges.<sup>38</sup> LGBTQ people who had attended community college were more likely than non-LGBTQ people to report unfair treatment by teachers, staff, or administrators (22% v. 12%) and were almost three times as likely to experience bullying, harassment, or assault at their community college (19% v. 7%).<sup>39</sup> LGBTQ people were about four times as likely to report being bullied or harassed in person at community colleges as their non-LGBTQ peers (13.7% v. 3.5%).<sup>40</sup> LGBTQ people were also bullied or harassed online, or by notes or anonymous messages, or had offensive material left at their workspace, car, or someplace else nearly four times as often (7.9%) as non-LGBTQ participants (1.9%).<sup>41</sup> LGBTQ people who had attended community colleges were approximately three times as likely to report “covering” behaviors—including having changed their dress, appearance, or mannerisms to avoid discrimination compared to non-LGBTQ participants (9.4% and 3.1%, respectively).<sup>42</sup> Covering or concealing one’s LGBTQ status is associated with elevated risk of poor mental health for LGBTQ people relative to non-LGBTQ people.<sup>43</sup>

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<sup>35</sup> GOLDBERG, TRANSGENDER STUDENTS IN HIGHER EDUCATION, *supra* note 31, at 6.

<sup>36</sup> JAMES ET AL., *supra* note 26, at 136.

<sup>37</sup> Kristie L. Seelman, *Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. OF HOMOSEXUALITY 1378 (2016), <https://doi.org/10.1080/00918369.2016.1157998>.

<sup>38</sup> CONRON ET AL., COMMUNITY COLLEGE, *supra* note 9.

<sup>39</sup> *Id.* at 10.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 8.

<sup>43</sup> Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations*, 129 PSYCH. BULL. 674, 674 (2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2072932/> [hereinafter Meyer, *Prejudice*].

### *Four-Year Colleges and Graduate Schools*

In four-year colleges, our research found that nearly one-third of LGBTQ people (32.6%) experienced bullying, harassment, or assault at college, compared to 18.9% of non-LGBTQ people.<sup>44</sup> More specifically, nearly one in five (19.1%) LGBTQ people reported experiencing in-person bullying or harassment, and 12.5% of LGBTQ people experienced online or other indirect bullying or harassment while at a four-year college.<sup>45</sup> Other students were the most frequently identified perpetrators of bullying and harassment of LGBTQ and non-LGBTQ people. LGBTQ people who had attended four-year colleges were also about twice as likely to report “covering” behaviors as their non-LGBTQ peers (15.7% and 7.0%, respectively).<sup>46</sup>

In graduate school, we found that LGBTQ people were more than twice as likely to report unfair treatment by faculty, staff, or school administrators, compared to non-LGBTQ people (33.8% and 14.8%, respectively).<sup>47</sup> Almost a third (31.0%) of LGBTQ people reported unfair treatment by faculty, compared to 14.8% of non-LGBTQ people.<sup>48</sup> LGBTQ people were also more likely to report unfair treatment by staff (17.3% vs. 3.5%) and by school administrators (13.8% vs. 3.5%) in graduate programs, compared to non-LGBTQ people.<sup>49</sup> About a quarter (25.7%) of LGBTQ people reported hearing slurs or negative comments about LGBTQ people at their school.<sup>50</sup> And, more than one in ten (11.6%) LGBTQ people changed their dress, appearance, or mannerisms to avoid discrimination at graduate school— far more than their non-LGBTQ peers (1.5%).<sup>51</sup>

LGBTQ students in four-year colleges and graduate schools also report higher rates of sexual violence and harassment than non-LGBTQ students. For example, our analysis of AHES data found that LGBTQ people who had attended four-year institutions were more likely than non-LGBTQ students to be sexually harassed (17.6% to 5.8%) or experience sexual assault (11.8% v. 2.0%).<sup>52</sup> Similar disparities have been documented in earlier studies. The 2017 Campus Climate Survey by Association of American Universities (“AAU”) found that roughly two thirds of lesbian/gay or bisexual students (60% and 69%, respectively) had experienced sexual harassment, intimate partner violence, or stalking while in college or graduate school, as compared to less than half (46%) of heterosexual students.<sup>53</sup> These figures were even higher for

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<sup>44</sup> O’NEILL ET AL., FOUR-YEAR COLLEGE, *supra* note 9, at 2.

<sup>45</sup> *Id.*

<sup>46</sup> O’NEILL ET AL., FOUR-YEAR COLLEGE, *supra* note 9, at 14.

<sup>47</sup> *Id.* at 26.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 27.

<sup>51</sup> *Id.* at 25.

<sup>52</sup> O’NEILL ET AL., FOUR-YEAR COLLEGE, *supra* note 9, at 3.

<sup>53</sup> DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 104 (2017), <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>.

transgender, genderqueer, and gender non-conforming students, with three-quarters (75%) experiencing sexual harassment, intimate partner violence, or stalking as an undergraduate student and over two-thirds (69%) experiencing sexual harassment as a graduate student.<sup>54</sup> The 2019 Association of American Universities Campus Climate Survey on Sexual Assault and Misconduct also found that LGBTQ undergraduate and graduate/professional students were more likely than non-LGBTQ students to report experiencing non-consensual sexual contact, involving physical force or inability to consent.<sup>55</sup> Roughly one in ten heterosexual students reported such experiences (11.5%), as compared to one one-quarter of bisexual students (25.6%), one-fifth of those selecting more than one sexual orientation category (22.2%) or identifying as asexual, queer, questioning, or unlisted (18.5%), and fifteen percent (15.1%) of gay or lesbian students.<sup>56</sup> Gender minority students reported similar rates to those of cisgender women (22.8% v. 25.9% for undergraduate students and 14.5% v. 9.7% for graduate students).<sup>57</sup>

b. Lawsuits, judicial opinions, and anecdotal reports

Experiences of discrimination and harassment against LGBT students have also been documented in lawsuits, judicial opinions, media reports, and other sources, particularly in K-12 education. The examples below illustrate the different forms of mistreatment that LGBT students face, but do not reflect a complete record of instances of discrimination, harassment, and bullying against LGBT students documented in these sources.

- Transgender students across the country have brought suits against their schools, having been denied access to restrooms and other facilities consistent with their gender identity.<sup>58</sup>
- In 2022, a transgender high school student in South Dakota admitted that he hates being at school due to the hostility he faces from students and the reluctance of some teachers

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<sup>54</sup> *Id.*

<sup>55</sup> DAVID CANTOR ET AL., 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).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 78.

<sup>58</sup> *Parents for Priv. v. Barr*, 949 F.3d 1210 (9th Cir.), *cert. denied*, 141 S. Ct. 894, 208 L. Ed. 2d 452 (2020); *Adams by & through Kasper v. Sch. Bd. Of St. Johns Cty., Fla.*, 968 F.3d 1286 (11th Cir. 2020), *opinion vacated and superseded sub nom. Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted, opinion vacated*, 9 F.4th 1369 (11th Cir. 2021); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878, 210 L. Ed. 2d 977 (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); *A.H. by Handling v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536 (M.D. Pa. 2019); *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); *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); *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. Ct. App. 2020).

to use his correct pronouns.<sup>59</sup> One teacher even gave him and other non-cisgender students letters “urging them to accept ‘the biological truth.’”<sup>60</sup> The previous year, he was followed to his car by a student yelling slurs, and, in a separate incident, a group of students threatened to beat him up if he used the boys bathroom.<sup>61</sup> Some teachers have asserted that they cannot be required to use affirming pronouns, even if it causes harm to the student.<sup>62</sup>

- In 2020, the parents of a sixth-grade child sued a school district in Nevada, alleging school administrators failed to appropriately address both the frequent verbal and physical harassment their son experienced, which included being stabbed in the leg with a pencil and repeatedly berated with homophobic slurs, and sexual harassment from his classmates.<sup>63</sup>
- In 2019, a head coach of a Texas women’s basketball team, who was ultimately fired for her conduct, removed two female student-athletes from the team because they were dating.<sup>64</sup>
- In 2019 the mother of a gay teenager in West Virginia filed suit against the school board and other individuals associated with a youth program, who allegedly ignored incidents of bullying, including being forcibly outed, that led to her son being raped.<sup>65</sup> One of the teachers was purportedly aware of the rape and assaults for almost a year but had chosen to not report the incidents.<sup>66</sup>
- In 2018, the assistant principal of a high school in West Virginia allegedly followed a transgender male teen into the bathroom and ordered him to use a urinal while the assistant principal watched, in order to “prove” that the student was a boy.<sup>67</sup> The

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<sup>59</sup> Patrick Wall, ‘I’m Terrified’: As New Laws Take Effect, LGBTQ Students and Allies Fear the Consequences, CHALKBEAT (Jul. 8, 2022), <https://www.chalkbeat.org/2022/7/8/23198792/lgbtq-students-law-florida-don’t-say-gay>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See, e.g.,* Vlaming v. W. Point Sch. Bd., 480 F. Supp. 3d 711 (E.D. Va. 2020) (arguing the school breached the plaintiff’s employment contract in firing him for refusal to use the student’s appropriate pronouns); Meriwether v. Trustees of Shawnee State Univ., No. 1:18-CV-753, 2019 WL 2052110, at \*1 (S.D. Ohio May 9, 2019) (asserting that sincerely-held religious beliefs meant the plaintiff should not be required to use appropriate pronouns for a student because it violated his religious beliefs); *see also* Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021); Yeboah-Kankam v. Prince William Cty. Sch. Bd., 1:17-cv-549 (LMB/JFA), 2017 WL 6758449, at \*4 (E.D. Va. Dec. 29, 2017) (claiming the plaintiff experienced discrimination, hostile work environment, and retaliation under Title VII when fired for mistreating a transgender student).

<sup>63</sup> Clark Cty. Sch. Dist. v. Bryan, 163 Nev. 689, 689 (2020).

<sup>64</sup> Brown v. Robinson, No. 14-17-00754-CV, 2019 WL 1339651, at \*1 (Tex. App. Mar. 26, 2019).

<sup>65</sup> Matt Harvey, *Gay Youth and Mom File Lawsuit Accusing Monongalia County WV BOE of Sweeping His R’pe ‘Under the Rug,’* MORGANTOWN NEWS (Oct. 3, 2019), [https://www.wvnews.com/morgantownnews/news/gay-youth-and-mom-file-lawsuit-accusingmonongalia-county-wv/article\\_2cb849b1-6006-535c-b183-dbf4d6581ff5.html](https://www.wvnews.com/morgantownnews/news/gay-youth-and-mom-file-lawsuit-accusingmonongalia-county-wv/article_2cb849b1-6006-535c-b183-dbf4d6581ff5.html).

<sup>66</sup> *Id.*

<sup>67</sup> Complaint at 2, M.C. ex rel. C.C. and J.C. v. Harrison Cty. Bd. of Educ., 859 S.E.2d 762 (W. Va. 2021), <https://www.wboy.com/wpcontent/uploads/sites/43/2019/08/Complaint8-28-19.pdf>.

complaint also alleged that the principal blocked the bathroom door, preventing the student from leaving, and then told the student, “You freak me out.”<sup>68</sup>

- In a 2015 lawsuit, students at a Tennessee school alleged that they were told in front of other students that they could not wear “any [] shirt referencing LGBT rights” and were punished for engaging in a peaceful protest to raise awareness about anti-LGBT bullying.<sup>69</sup>
- In 2013, a student at a Florida high school was disciplined for participating in the National Day of Silence, which peacefully protests and brings awareness to anti-LGBT bullying.<sup>70</sup>
- In 2012, A Missouri student brought suit against his school alleging that it had installed an internet filter that blocked websites with positive messages about LGBT issues, but not those with negative messages.<sup>71</sup>
- In a 2011 lawsuit, the parent of a student who died by suicide alleged that teachers engaged in disparaging language and name-calling when they received complaints that the student’s peers had called him derogatory names and assaulted him for coming out.<sup>72</sup> The teachers reportedly referred to him as “fruity” and “in need of help.”<sup>73</sup>
- In a 2010 lawsuit, students reported they were prohibited from attending prom either with a same-sex date or in clothes that do not conform to sex or gender stereotypes.<sup>74</sup>

### c. Anti-LGBT state laws and policies

Many jurisdictions maintain explicit anti-LGBT laws and policies that exclude or further stigmatize LGBT students. These policies include restrictions on restroom use by transgender students in schools, limits on transgender students’ ability to participate in school sports, and restrictions on LGBT-related discussion in classrooms. Six states currently prohibit or limit schools’ ability to discuss content related to LGBT experience and school districts in at least 26 states ban LGBT books from school campuses.<sup>75</sup> While nondiscrimination protections such as Title IX may not directly regulate curricula,<sup>76</sup> the culture and environment created by these laws may have downstream effects. Students across the nation have reacted with fear and concern as

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<sup>68</sup> *Id.* at 3.

<sup>69</sup> *Young v. Giles Cty. Bd. Of Educ.*, 181 F. Supp. 3d 459, 462 (M.D. Tenn. 2015).

<sup>70</sup> *Hatcher v. Desoto Cty. Sch. Dist. Bd. Of Educ.*, 939 F. Supp. 2d 1232 (M.D. Fla. 2013), *aff’d sub nom. Hatcher ex rel. Hatcher v. Fusco*, 570 F. App’x 874 (11th Cir. 2014).

<sup>71</sup> *Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888 (W.D. Mo. 2012).

<sup>72</sup> *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1112–13 (E.D. Cal. 2011).

<sup>73</sup> *Id.*

<sup>74</sup> *McMillen v. Itawamba Cty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010).

<sup>75</sup> *LGBTQ Curricular Maps*, MOVEMENT ADVANCEMENT PROJECT (Aug. 23, 2022), [https://www.lgbtmap.org/equality-maps/curricular\\_laws](https://www.lgbtmap.org/equality-maps/curricular_laws); Elliot Ramos, *More Than Half Of States Have Banned Books As Anti-LGBTQ And Anti-Race Education Laws Spread*, NBC NEWS (Apr. 16, 2022), <https://www.nbcnews.com/data-graphics/map-book-bans-rise-rcna25898>.

<sup>76</sup> *See, e.g.*, 34 C.F.R. § 106.42.

more and more states have considered—and enacted—these types of policies. For example, when a school in Florida removed a young adult memoir illuminating the experiences of being a Black, queer boy, *All Boys Aren't Blue*, a student led a protest in response to the book's removal.<sup>77</sup> He noted that he felt “[his] community was under attack, that they were trying to silence LGBTQ+ experiences and voices[.]”<sup>78</sup> A student in Tennessee described the “near-constant feeling of being attacked at school because of his identity.”<sup>79</sup> The same student described being booed by a group of parents when he led his school's Pride club at the homecoming parade.<sup>80</sup>

LGBT student organizations may also be affected by these types of policies. In 2022, politicians, parents, and anti-LGBT advocates in Texas pressured school districts across the state to remove any books with LGBT themes; at one high school, teachers were even asked to scrape off rainbow pride stickers.<sup>81</sup> Despite students' emotional pleas to the school board to reinstate the stickers – during which one student came out as bisexual and another as transgender – the trustees unanimously voted to block the stickers.<sup>82</sup> Ultimately, three of the five Gay Straight Alliance (“GSA”) student group sponsors were either removed or resigned, GSA meetings went from weekly to monthly, and attendance decreased from 40 students to ten.<sup>83</sup> LGBT students in both New York and Florida have reported their schools' refusal to recognize the GSA student club in a manner consistent with other student groups.<sup>84</sup>

## **B. Discrimination Experienced by LGBT Faculty, Staff, and School Personnel**

LGBT faculty, staff, and other school personnel also experience harassment and discrimination based on sexual orientation, gender identity, and sex characteristics. Research has documented widespread and persistent discrimination against LGBT employees in private and public sector employment. For example, a 2021 survey conducted by the Williams Institute found that 46% of LGBT workers experienced employment discrimination or harassment

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Matt Lavietes, *From Book Bans to 'Don't Say Gay' Bill, LGBTQ Kids Feel 'Erased' in the Classroom*, NBC NEWS (Feb. 20, 2022), <https://www.nbcnews.com/nbc-out/out-news/book-bans-dont-say-gay-bill-lgbtq-kids-feel-erased-classroom-rcna15819>.

<sup>80</sup> *Id.*

<sup>81</sup> Tyler Kingkade, *A Texas Teacher Faces Losing Her Job After Fighting for Gay Pride Symbols in School*, NBC NEWS (Apr. 7, 2022), <https://www.nbcnews.com/news/us-news/lgbtq-students-texas-school-rainbow-stickers-rcna23208>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Carver Middle Sch. Gay-Straight Alliance v. Sch. Bd. of Lake Cty., Fla.*, 842 F.3d 24 (11th Cir. 2016); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135 (N.D.N.Y. 2011); see also Press Release, AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, *Federal Appeals Court Upholds Students' Rights in Gay-Straight Alliance Case* (Dec. 6, 2016), <https://www.aclufl.org/en/press-releases/federal-appeals-court-upholds-students-rights-gay-straight-alliance-case>.

because of their sexual orientation or gender identity at some point in their lives.<sup>85</sup> Nearly one-third (31.1%) experienced discrimination or harassment within the past five years. Among LGBT workers who had worked for state or local government employers, 28.2% experienced discrimination or harassment at some point in their lives. More specifically, about 1 in 10 reported being fired or not hired by a state or local government employer because of their sexual orientation or gender identity and about one-fifth (19%) reported experiencing verbal harassment while working for a state or local government employer. Research on LGBT employees in U.S. public schools confirms similar patterns of discrimination and harassment.<sup>86</sup> As one study noted, “the public record over the past five decades is filled with examples of discriminatory treatment of gay and gender non-conforming teachers, both in state laws that sanction inequitable practices and on the part of state officials who interpret regulations and statutes in a discriminatory manner.”<sup>87</sup>

a. Survey data

A number of campus climate surveys in states across the U.S. have documented the existence of harassment and discrimination against LGBT faculty and staff. Overall, these surveys show that LGBT faculty and staff often face unsupportive workplace climates, and many have either experienced discriminatory treatment based on their sexual orientation or gender identity or have witnessed such mistreatment. Examples of campus climate surveys that illuminate the prevalence, nature, and scope of such harassment, discrimination and rejection in higher education include:

- A 2017 survey of faculty and staff at the University of West Florida revealed that nearly one-fifth (18.6%) of LGBQ 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%), harassment or bullying (4.7%), and exclusion (2.3%).<sup>88</sup>

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<sup>85</sup> BRAD SEARS ET AL., WILLIAMS INST., LGBT PEOPLE’S EXPERIENCES OF WORKPLACE HARASSMENT AND DISCRIMINATION (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

<sup>86</sup> Stuart Biegel, *Unfinished Business: The Employment Non-discrimination Act (ENDA) and the K-12 Education Community*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 357 (2011), <http://www.nyuilpp.org/wp-content/uploads/2012/10/Stuart-Biegel-UnfinishedBusiness-The-Employment-Non-Discrimination-Act-and-the-K-12-EducationCommunity.pdf>; Todd A. DeMitchell et al., *Sexual Orientation and the Public School Teacher*, 19 BOSTON U. PUB. INTEREST L. J. 65 (2009), <https://www.bu.edu/pilj/files/2015/09/19-1DeMitchellEckesandFosseyArticle.pdf>.

<sup>87</sup> Biegel, *supra* note 86, at 385.

<sup>88</sup> Unpublished data from campus diversity climate survey gathered by Susan E. Walch and colleagues in 2017 (on file with authors).

- A 2016 survey of faculty at the University of Michigan reflected similar findings, with more than one-quarter (28%) of LGBTQ+ faculty members reporting experiencing at least one discriminatory event over the last year.<sup>89</sup>
- A 2016 survey of faculty at Kent State University found that LGBTQ faculty were more likely than non-LGBTQ faculty to report being uncomfortable with the department's climate (23% vs. 16%) and more likely to say they had to work harder than their colleagues to achieve the same recognition (46% vs. 37%).<sup>90</sup> The same study also highlighted that LGBTQ faculty were more likely to report reluctance in bringing up issues that concerned them out of fear it would negatively impact their job (46% vs. 35%).<sup>91</sup>
- A 2015 survey conducted at Virginia Tech similarly found that LGBT faculty and staff felt less comfortable than their non-LGBT counterparts reporting acts of discrimination (72.9% vs. 83%).<sup>92</sup> They were also more likely to witness discriminatory behavior (29.6% vs. 19.5%), as well as experience such behavior themselves (18.8% vs. 12.2%).<sup>93</sup>
- A 2014 survey of faculty and staff at the University of Arizona revealed that nearly three-quarters (75%) of LGBTQ+ faculty and staff and roughly one in five trans faculty and staff (18%) said they heard anti-LGBTQ+ slurs and comments on campus, with some reporting hearing such comments once per day (6% and 9%, respectively).<sup>94</sup>

Experiences or fear of discrimination and harassment may prevent LGBT teachers, faculty, and school staff from being open about their LGBT identity at work. A 2021 Williams Institute study found that around half of LGBT employees who have worked in K-12 education (49.1%) and higher education (54.6%) were not open about being LGBT to their supervisors.<sup>95</sup> One-quarter (25.0%) of LGBT employees who worked in K-12 education and 21.5% of LGBT employees who worked in higher education were not out to any of their co-workers.<sup>96</sup>

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<sup>89</sup> RESULTS OF THE 2016 UNIVERSITY OF MICHIGAN FACULTY CAMPUS CLIMATE SURVEY ON DIVERSITY, EQUITY AND INCLUSION 4 (2016), <https://diversity.umich.edu/wp-content/uploads/2017/11/DEI-FACULTY-REPORT-FINAL.pdf>.

<sup>90</sup> RANKIN & ASSOCIATES, KENT STATE UNIVERSITY: CAMPUS CLIMATE RESEARCH STUDY 65 (2017), <https://www-s3-live.kent.edu/s3fs-root/s3fs-public/file/Kent%20State%20University%20-%20Aggregate.pdf>.

<sup>91</sup> *Id.*

<sup>92</sup> 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](https://www.inclusive.vt.edu/content/dam/inclusive_vt_edu/resources/publications/reports/lgbtq-climate-survey.pdf).

<sup>93</sup> *Id.*

<sup>94</sup> LAUREN PRING ET AL., UNIV. OF ARIZ., LGBTQ+ NEEDS ASSESSMENT REPORT (2014), <https://health.arizona.edu/sites/default/files/CampusHealthServiceSub-ReportFINAL.pdf>; see CHRISTY MALLORY ET AL., WILLIAMS INST., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN ARIZONA (2018), <https://williamsinstitute.law.ucla.edu/publications/impact-discrimination-lgbt-az/>.

<sup>95</sup> CHRISTY MALLORY ET AL., WILLIAMS INST., WORKPLACE DISCRIMINATION AND HARASSMENT AGAINST LGBT STATE & LOCAL GOVERNMENT EMPLOYEES 2 (2021), <https://williamsinstitute.law.ucla.edu/publications/public-sector-workplace-discrim/>.

<sup>96</sup> *Id.*

## b. Lawsuits, judicial opinions, and anecdotal reports

Experiences of harassment and discrimination against LGBT teachers, faculty, and school staff have also been documented in lawsuits, judicial opinions, media reports, and other sources.

### *Harassment*

Just as LGBT students face harassment by their peers and wider educational community, LGBT school employees regularly report allegations of harassment by co-workers, students, parents, and other community members based on their sexual orientation and gender identity. For example, in one instance, after the principal of a Maryland middle school revealed a teacher's status as a transgender woman without her permission, the teacher was subjected to verbal harassment by her students – who called her names such as 'fag,' 'gay,' 'homo,' and 'tranny' – and physical harassment in the hallways.<sup>97</sup> Fellow teachers frequently misgendered her and used her former name even when corrected.<sup>98</sup> When the teacher complained about the treatment from students and fellow teachers, the administrators "demanded that she present as male." Even after transferring to teach at a high school, she alleged similar treatment from staff, students, and parents.<sup>99</sup> Despite reporting upwards of 16 incidents throughout the years, school administrators considered the conduct to be disrespectful, but not harassment or discrimination.<sup>100</sup>

Similar workplace conditions have been reported by LGB school employees: allegations of a teacher's social media profiles being hacked to indicate an "interest[] in boys and men;"<sup>101</sup> a lesbian teacher's being prevented from using the women's restroom by fellow teachers;<sup>102</sup> a transgender employee in Nevada reported being denied access to all-gender restrooms;<sup>103</sup> and community members' objecting to employees' showing photos of their same-sex spouses, claiming it "promot[es] the homosexual agenda."<sup>104</sup>

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<sup>97</sup> *Eller v. Prince George's Cty. Pub. Sch.*, No. CV TDC-18-3649, 2022 WL 170972, at \*1 (D. Md. Jan. 14, 2022).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at \*2.

<sup>100</sup> *Id.*

<sup>101</sup> 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/>.

<sup>102</sup> 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/>.

<sup>103</sup> *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015–16 (D. Nev. 2016).

<sup>104</sup> *Bailey v. Mansfield Independent Sch. Dist.*, 425 F. Supp. 3d 696, 706 (N.D. Tx. 2019); 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-mansfieldteacher.html>.

LGBT school employees also report schools' failure to investigate instances of anti-LGBT harassment,<sup>105</sup> as well as outright hostility and retaliation for making such reports.<sup>106</sup> In one such case, a teacher whose supervisor addressed him with "expletives and threats concerning [his] sexual orientation" in the classroom was subsequently fired after filing a complaint with human resources for such treatment by a supervisor.<sup>107</sup>

### *Discrimination*

LGB school employees report being terminated or not having their contracts renewed upon discovery of their sexual orientation,<sup>108</sup> including after marrying a same-sex partner,<sup>109</sup> despite having received no criticism for their job performance prior to the discovery. For example, when a former employee of a community college revealed her sexual orientation, she suffered hostile treatment from her supervisor until ultimately being terminated, despite having received above-average performance reviews throughout her career, as well as the Chancellor's Excellence Award for her achievements.<sup>110</sup> In another case, an Alaska woman submitted a letter to the legislature in 2013 describing the experiences of harassment and discrimination she suffered at her public school job, resulting in other LGBT employees remaining closeted out of fear of retaliation.<sup>111</sup> She reported that her boss told her co-workers that she would not "have anyone with that lifestyle in [her] building."<sup>112</sup> The *New York Times* reported a story about an

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<sup>105</sup> Ariel Sobel, *After Relentless Harassment, Gay Kansas Teacher Driven From Job*, ADVOCATE (Apr. 20, 2018), <https://www.advocate.com/crime/2018/4/20/after-relentless-harassment-gay-kansas-teacher-driven-job>.

<sup>106</sup> 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 J. (Dec. 10, 2015), <https://www.cjonline.com/news/2015-12-10/ku-under-fire-handling-lgbt-discrimination-claim>.

<sup>107</sup> *Currie v. Cleveland Metro. Sch. Dist.*, No. 1:15-CV-262, 2015 U.S. Dist. LEXIS 87311 (N.D. Ohio July 6, 2015).

<sup>108</sup> *Tarrant Cty. Coll. Dist. v. Sims*, 621 S.W.3d 323 (Tex. App. 2021) (alleging the defendant community college discriminated against and ultimately unjustly terminated the former plaintiff employee upon discovery of her sexual orientation); *Breiner v. Ledford*, No. 2020-CA-0327-MR, 2021 WL 840356, at \*1 (Ky. Ct. App. Mar. 5, 2021), *review denied* (Aug. 18, 2021); 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>; *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); *Burrows v. College of Central Fla.*, No. 5:14-cv-197-Oc-30PRL (M.D. Fla. Dec. 17, 2014); *Sexton v. Kipp Reach Acad. Charter Sch., Inc.*, 260 P.3d 435 (Okla. Civ. App. 2011) (finding that the plaintiff suffered a breach of contract, having had his contract cancelled upon the school's discovery of his sexual orientation, which violated the school's non-discrimination policy).

<sup>109</sup> *Fitzgerald v. Roncalli High Sch. Inc.*, No. 119CV04291RLYTAB, 2021 WL 4953237, at \*1 (S.D. Ind. Mar. 31, 2021) (alleging that the defendant high school declined to renew the plaintiff's contract upon discovery of her marriage to another woman); *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).

<sup>110</sup> *Tarrant Cty. Coll. Dist.*, 621 S.W.3d at 326.

<sup>111</sup> Letter from Anchorage Resident to Rep. Beth Kerttula (Apr. 6, 2013) (writing in support of HB139) (on file with author).

<sup>112</sup> *Id.*

adjunct professor at a community college in St. Louis who, after a decade of teaching in the communications department, was laid off following the arrival of a new chairwoman.<sup>113</sup> The chairwoman “kept finding reasons to try to discredit” him and claimed that students complained he was promoting “the gay agenda.”<sup>114</sup> When the professor complained that the chairwoman had changed a student’s grades without the professor’s knowledge, he was promptly fired.<sup>115</sup> In some cases of termination or failure to hire, school administrators have expressed outward antipathy for the LGBT community, stating that their institutions “d[o] not like homosexuals”<sup>116</sup> and even that “separate but equal treatment of gay people might be best.”<sup>117</sup> In a recent case in Missouri, a bisexual teacher alleged he was harassed for his sexual orientation, demoted, suspended, and ultimately terminated, having been told by his supervisor that his “kind should not be able to be around these kids.”<sup>118</sup>

Transgender school employees also report being terminated shortly after disclosing their transgender status.<sup>119</sup> In one such case, a transgender woman in Florida alleged she was explicitly told that she was being fired from her university job due to her transition, having been placed on a ‘performance plan’ six months earlier when she came out as transgender.<sup>120</sup> In another case, described by State Representative Joshua Boschee in testimony to the North Dakota legislature, a speech debate coach at a public school in Fargo alleged she was terminated after the school discovered she was transgender.<sup>121</sup> In a similar instance, a transgender man in Ohio was placed on an ‘action plan’ after coming out as transgender, despite receiving no negative feedback, verbally or in writing, from the school district.<sup>122</sup> After a year of ‘walking on eggshells,’ the principal concluded that the man’s ‘lifestyle’ and ‘way he presented himself’ were “unprofessional,” and he was terminated on the spot.<sup>123</sup> In another case, a transgender employee was fired upon coming out to her supervisor, who responded with derogatory statements such as

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<sup>113</sup> Tara Siegel Bernard, *Fired for Being Gay? Protections Are Piecemeal*, N.Y. TIMES (May 31, 2013), [https://www.nytimes.com/2013/06/01/your-money/protections-for-gays-in-workplace-arepiecemeal.html?pagewanted=1.&\\_r=0](https://www.nytimes.com/2013/06/01/your-money/protections-for-gays-in-workplace-arepiecemeal.html?pagewanted=1.&_r=0).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Gill v. Devlin*, 867 F. Supp. 2d 849, 856 (N.D. Tex. 2012).

<sup>117</sup> *Philpott v. New York*, 252 F. Supp. 3d 313, 317 (S.D.N.Y. 2017).

<sup>118</sup> *Leslie D. Avis, III v. Hillsboro R-3 Sch. Dist., et al.*, No. 4:22-cv-00596-CDP, 2022 WL 3026919, at \*1–2 (E.D. Mo., Aug. 1, 2022).

<sup>119</sup> *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 Aug. 31, 2022) [hereinafter *Conservative Woman*, FREEDOM FOR ALL AMS.]; *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 Aug. 31, 2022) [hereinafter *Transgender Ohioan*, FREEDOM FOR ALL AMS.].

<sup>120</sup> *Conservative Woman*, FREEDOM FOR ALL AMS., *supra* note 119.

<sup>121</sup> Williams Institute Scholars, Comment Letter to Committee on the Judiciary, U.S. Senate, for Legislative Record of S. 393/H.R. 5, the Equality Act (Mar. 22, 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-Equality-Act-State-Governments-Mar-2021.pdf>.

<sup>122</sup> *Transgender Ohioan*, FREEDOM FOR ALL AMS., *supra* note 119.

<sup>123</sup> *Id.*

“You disgust me! I can’t even stand to look at you! This is not about your so-called ‘gender identity.’ This is about you being a liar.”<sup>124</sup>

### *Other Adverse Outcomes*

LGBT employees have faced other adverse employment actions because of their sexual orientation and gender identity. For example, LGBT school employees have brought suits alleging denial of promotions upon discovery of their sexual orientation<sup>125</sup> or gender identity. Notably, one transgender professor received a \$1.16 million settlement from a jury for such treatment, after they determined she had been wrongfully denied tenure.<sup>126</sup> In the case described above, the transgender teacher from Maryland faced several adverse actions following her harassment complaints, including having her classroom moved farther away and removing her from teaching AP English.<sup>127</sup>

#### c. Anti-LGBT state laws and policies

State and local policies can contribute to unsupportive climates for LGBT teachers, faculty, and school staff. There is evidence of a long history of such discriminatory policies. One study documented historical ballot initiatives to prevent LGBT teachers from working in schools and examined anti-LGBT language in the education regulations of eleven states as of 2017.<sup>128</sup> Before Florida’s “Don’t Say Gay” bill in 2022,<sup>129</sup> there were multiple states with anti-LGBT curriculum laws that explicitly called out LGBT issues for disfavored treatment, including in Alabama, Louisiana, Mississippi, Oklahoma, and Texas.<sup>130</sup>

Research indicates that such laws create an environment that is hostile to LGBT teachers and youth, impeding a productive classroom experience and creating stigmatization and isolation.<sup>131</sup> LGBT teachers in South Carolina, Virginia, and other states across the nation

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<sup>124</sup> Kate Wells, *Transgender Professor Sues Saginaw Valley State University for Alleged Discrimination*, MICHIGAN RADIO (Apr. 8, 2016), <https://www.michiganradio.org/post/transgender-professor-sues-saginaw-valley-stateuniversity-alleged-discrimination>.

<sup>125</sup> *Hively v. Ivy Tech Cmty. Coll.*, No. 3:14-CV-1791, 2015 WL 926015, at \*1 (N.D. Ind. Mar. 3, 2015) (alleging that the plaintiff was denied a full-time position at the defendant community college due to her sexual orientation).

<sup>126</sup> Eric Bachman, *\$1.16 Million Awarded in Transgender Employment Discrimination Jury Trial*, NAT’L L. REV. (Dec. 4, 2017), <https://www.natlawreview.com/article/116-million-awarded-transgender-employment-discrimination-jury-trial>.

<sup>127</sup> *Eller v. Prince George’s Cty. Pub. Sch.*, *supra* note 97.

<sup>128</sup> Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUMBIA L. REV. 1461, 1465 (2017), <https://columbialawreview.org/content/anti-gay-curriculum-laws/>.

<sup>129</sup> H.B. 1557, 2022 Sess. (Fla. 2022), <https://www.flsenate.gov/Session/Bill/2022/1557/?Tab=BillText>.

<sup>130</sup> #DontEraseUs: FAQ about Anti-LGBT Curriculum Laws, LAMBDA LEGAL, <https://www.lambdalegal.org/dont-erase-us/faq#Q2> (last visited Aug. 31, 2022).

<sup>131</sup> GLSEN, LAWS THAT PROHIBIT THE “PROMOTION OF HOMOSEXUALITY”: IMPACTS AND IMPLICATIONS 1 (2018), [https://www.glsen.org/sites/default/files/GLSEN%20Research%20Brief%20-%20No%20Promo%20Homo%20Laws\\_1.pdf](https://www.glsen.org/sites/default/files/GLSEN%20Research%20Brief%20-%20No%20Promo%20Homo%20Laws_1.pdf).

describe being afraid to be their full selves in the workplace, remaining closeted at their jobs out of fear.<sup>132</sup> Teachers and school administrators report fear of retribution for discussing LGBT issues in class, and there is evidence of significant consequences, particularly in jurisdictions that have laws restricting discussion of LGBT issues.<sup>133</sup> For example, a North Carolina middle school teacher was suspended for showing a popular music video featuring a positive message about same-sex marriage,<sup>134</sup> and a South Carolina teacher alleged she was discharged for allowing a transgender student to use a teacher’s restroom, rather than the designated one, which was a quarter mile from their classes.<sup>135</sup> For these same reasons, some teachers fear responding to reports of LGBT bullying or harassment or even sponsoring Gay Straight Alliance clubs.<sup>136</sup> When school districts in Texas were directed to remove books with LGBT themes, one teacher, who also sponsored the Gay-Straight Alliance club, was promptly placed on administrative leave after advocating to keep the books and rainbow stickers up for her LGBT students.<sup>137</sup>

Following the passage of Florida’s “Don’t Say Gay” law in 2022, many educators opted to quit rather than face backlash from parents or be forced to hide who they are.<sup>138</sup> When one Florida teacher shared with his sixth-grade students that he would be marrying a man, a group of parents wrote in demanding ‘consequences,’ ultimately pushing him to resign.<sup>139</sup> Another Florida teacher lost her job upon openly revealing her pansexuality to her middle school students.<sup>140</sup> A different Florida teacher had already experienced animosity from colleagues regarding her marriage to a woman, but she ultimately quit when the new legislation created the potential for a parent lawsuit to stem “from just one awkward exchange about her personal life.”<sup>141</sup> As these types of state laws and policies proliferate, more such experiences are likely to occur.

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<sup>132</sup> Madeline Will, *LGBTQ Teachers Await Decision on Discrimination Protections*, EDUC. WEEK (Jan. 14, 2020), <https://www.edweek.org/policy-politics/lgbtq-teachers-await-decision-on-discrimination-protections/2020/01>.

<sup>133</sup> HUMAN RIGHTS WATCH, “LIKE WALKING THROUGH A HAILSTORM”: DISCRIMINATION AGAINST LGBT YOUTH IN US SCHOOLS 39–42 (2016), [https://www.hrw.org/sites/default/files/report\\_pdf/uslgbt1216web\\_2.pdf](https://www.hrw.org/sites/default/files/report_pdf/uslgbt1216web_2.pdf).

<sup>134</sup> 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/>.

<sup>135</sup> Complaint at 1–3, 5–6, *Matlis v. Sch. Dist. of Pickens Cty.*, No. 2016-CP-39-01232 (Ct. Com. Pl. Oct. 26, 2016).

<sup>136</sup> HUMAN RIGHTS WATCH, *supra* note 133.

<sup>137</sup> Kingkade, *supra* note 81.

<sup>138</sup> Matt Lavietes, *‘I Cannot Teach in Florida’: LGBTQ Educators Fear Fallout from New School Law*, NBC NEWS (Apr. 1, 2022), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/-cannot-teach-florida-lgbtq-educators-fear-fallout-new-school-law-rcna22106>.

<sup>139</sup> *Id.*

<sup>140</sup> Hannah Natanson, *This Florida Teacher Married a Woman. Now She’s Not a Teacher Anymore*, WASH. POST (May 19, 2022), <https://www.washingtonpost.com/education/2022/05/19/gay-florida-teacher-desantis-lgbtq/>.

<sup>141</sup> *Id.*

### C. Discrimination Experienced by LGBT Parents Interacting with the Education System

LGBT parents with children in schools or interacting with educational programs and activities may also experience discrimination. A 2008 report by GLSEN based on a nationally representative sample emphasized that LGBT parents of children in K-12 schools may face difficulties in their educational communities, and the children of LGBT parents may face harassment or bullying due to their family structure.<sup>142</sup> Although LGBT parents reported relatively low incidence of mistreatment by school personnel, 16% still indicated that they felt they could not fully participate in their child’s school community because of their LGBT identity.<sup>143</sup> Over one-quarter (26%) reported mistreatment by other parents, and one-fifth (21%) reported hearing negative comments about being LGBT from students.<sup>144</sup> Anecdotally, parents described situations in which they were excluded from the wider school community, subjected to hostile behavior from community members, confronted with ignorance, and forced to defend their parenting skills being called into question because they were LGBT.<sup>145</sup>

The alienation of LGBT parents from their children’s schools impacts them, their children, and the entire school system. Experts in the field of education maintain that “the family-school relationship is an important factor in academic success for the student.”<sup>146</sup> Evidence shows that parental involvement is directly linked to academic achievement,<sup>147</sup> not just for the parents’ own children, but for other children in the community as well.<sup>148</sup> Parental involvement is also linked to better health outcomes—the CDC recommends that school administrators and districts encourage participation by parents in a wide variety of activities in order to promote adolescent health.<sup>149</sup> Activities range from good communication with schools and teachers, helping with homework and reinforcing behavioral norms to participation in Parent-Teacher Associations, and volunteering for school programs and events.<sup>150</sup> Research suggests that the “amount and variety” of involvement is more important than the specific form

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<sup>142</sup> JOSEPH G. KOSCIW & ELIZABETH M. DIAZ, GLSEN WITH COLAGE & FAMILY EQUALITY COUNCIL, THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER PARENTS AND THEIR CHILDREN IN OUR NATION’S K-12 SCHOOLS xiii (2008), [https://www.glsen.org/sites/default/files/2020-01/Involved\\_Invisible\\_Ignored\\_Experiences\\_of\\_LGBT\\_Parents\\_and\\_Their\\_Children%20\\_Full\\_Report\\_2008.pdf](https://www.glsen.org/sites/default/files/2020-01/Involved_Invisible_Ignored_Experiences_of_LGBT_Parents_and_Their_Children%20_Full_Report_2008.pdf) [Hereinafter: KOSCIW & DIAZ, EXPERIENCES OF PARENTS].

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at xvii.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at xx.

<sup>147</sup> See, e.g., David R. Topor, et. al, *Parent Involvement and Student Academic Performance: A Multiple Mediation Analysis*, 33 J PREV INTERV COMMUNITY 183 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3020099/pdf/nihms-262106.pdf>.

<sup>148</sup> A.T. HENDERSON & NANCY BATES, NAT. CMTE. FOR CITIZENS IN EDUCATION, A NEW GENERATION OF EVIDENCE: THE FAMILY IS CRITICAL TO STUDENT ACHIEVEMENT 15 (1995).

<sup>149</sup> *Promoting Parent Engagement: Improving Student Health and Academic Achievement*, CDC.GOV, [https://www.cdc.gov/healthyyouth/protective/factsheets/parentengagement\\_administrators.htm](https://www.cdc.gov/healthyyouth/protective/factsheets/parentengagement_administrators.htm) (last visited Sept. 2, 2022).

<sup>150</sup> *Id.*

of engagement.<sup>151</sup> Therefore, school communities may lose an important resource if they disengage any group of parents, including LGBT parents.

Students with LGBT parents have also reported negative experiences due to their parents' LGBT status. This includes non-LGBT students with LGBT parents.<sup>152</sup> Half (51%) of students in the GLSEN study reported not feeling safe in school due a personal characteristic, with about one-quarter (23%) attributing this to having LGBT parents.<sup>153</sup> Over one-third (40%) of students with LGBT parents reported being verbally harassed because of their family structure.<sup>154</sup> Students were not the only perpetrators of negative remarks; nearly one-quarter (23%) of students with LGBT parents reported mistreatment or negative comments from the parents of other students.<sup>155</sup> The report found that school staff were sometimes the perpetrators of derogatory remarks, with over one-third of respondents (39%) reporting homophobic remarks from teachers or school staff.<sup>156</sup> Over one in ten reported such mistreatment (11%) or negative commentary (15%) from teachers due to their family structure.<sup>157</sup> The harassment and mistreatment that children of LGBT parents face has serious consequences, with one-quarter (25%) of students reporting they did not feel they could fully participate in school because of how classmates or school personnel felt about their LGBT parents.<sup>158</sup>

#### **D. Discrimination has Harmful Effects**

Studies suggest that anti-LGBT discrimination may lead to negative outcomes for LGBT students. For example, a 2019 law review article, relying on surveys conducted between 2009 and 2016, found that LGBT students in the U.S. have poorer educational outcomes in terms of graduation rates, credits, GPA, and college attainment, even when controlling for demographic characteristics.<sup>159</sup>

Discrimination is also directly tied to negative health impacts for all LGBT people. LGBT people are exposed to stressors that stem from anti-LGBT stigma, which researchers refer

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<sup>151</sup> HENDERSON & BATES, *supra* note 148, at 16.

<sup>152</sup> Sophia Laurenzi, *The gaping hole in how we talk about the harmful effects of anti-LGBTQ laws*, NBC NEWS (July 20, 2022), <https://www.nbcnews.com/think/opinion/straight-kids-lgbtq-parents-face-unique-kind-challenge-right-now-rcna38768>.

<sup>153</sup> KOSCIW & DIAZ, EXPERIENCES OF PARENTS, *supra* note 142, at xvi.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at xv.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Dario Sansone, *LGBT Students: New Evidence on Demographics and Educational Outcomes*, 73 ECON. OF EDU. REV. (2019), <https://doi.org/10.1016/j.econedurev.2019.101933>.

to as “minority stress.”<sup>160</sup> Minority stress is defined by specific stress processes, including, among others, prejudice events and conditions and expectations of rejection and discrimination.<sup>161</sup> Minority-stress events can be characterized as either major (e.g., being fired from a job) or seemingly minor, “everyday” events (e.g., being refused service at a restaurant). Even “[a] seemingly minor event, such as a slur directed at a gay man, may evoke deep feelings of rejection and fears of violence [seemingly] disproportionate to the event that precipitated them.”<sup>162</sup>

Decades of research have demonstrated the negative effects of minority stress on the health and well-being of LGBT people. Studies have concluded that minority-stress processes are related to an array of mental health problems, including depressive symptoms, substance use, and suicide ideation and attempts.<sup>163</sup> Several studies have also demonstrated links between minority-stress factors and some physical health problems. For example, one study found that LGB people who had experienced a prejudice-related stressful life event were about three times more likely than those who did not experience such an event to have suffered a serious physical health problem over a one-year period.<sup>164</sup>

Conversely, highlighting the outcomes that a positive school environment can provide, one study found that anti-bullying state laws that specifically prohibit discrimination based on sexual orientation were correlated with lower risk for LGBT students’ suicide attempts and lower risk for forced sexual intercourse, as well as increased feelings of safety at school or in transit to or from school.<sup>165</sup>

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<sup>160</sup> See, e.g., Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38, 38 (1995), <https://www.jstor.org/stable/2137286> [hereinafter Meyer, *Minority Stress*]; Meyer, *Prejudice*, *supra* note 43; cf. Ilan H. Meyer et al., *Social Patterning of Stress and Coping: Does Disadvantaged Social Status Confer More Stress And Fewer Coping Resources?*, 67 SOC. SCI. & MED. 368, 371 (2008), <https://pubmed.ncbi.nlm.nih.gov/18433961/> (examining “social stress theory”) and Walter Bockting et al., *Adult Development and Quality of Life of Transgender and Gender Nonconforming People*, 23 CURRENT OP. ENDOCRINOLOGY, DIABETES & OBESITY 188, 188 (2016), <https://pubmed.ncbi.nlm.nih.gov/26835800/>.

<sup>161</sup> Meyer, *Prejudice*, *supra* note 43, at 680–82.

<sup>162</sup> Meyer, *Minority Stress*, *supra* note 160, at 42.

<sup>163</sup> See Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. PUB. HEALTH 1869, 1869, 1871 tbl.1 (2001), <https://pubmed.ncbi.nlm.nih.gov/11684618/>; Gregory M. Herek & Linda D. Garnets, *Sexual Orientation and Mental Health*, ANN. REV. CLINICAL PSYCH. 353, 359–60 (2007), <https://www.annualreviews.org/doi/abs/10.1146/annurev.clinpsy.3.022806.091510>; Michael King et al., *A Systematic Review of Mental Disorder, Suicide, and Deliberate Self Harm in Lesbian, Gay and Bisexual People*, 70 BMC PSYCHIATRY 1 (Aug. 18, 2008), <https://bmcp psychiatry.biomedcentral.com/track/pdf/10.1186/1471-244X-8-70.pdf>; Meyer, *Prejudice*, *supra* note 160, at 679–80; SUSAN D. COCHRAN & VICKIE M. MAYS, SEXUAL ORIENTATION AND MENTAL HEALTH, IN HANDBOOK OF PSYCHOLOGY AND SEXUAL ORIENTATION 204, 208–09 (Charlotte J. Patterson & Anthony R. D’Augelli eds., 2013).

<sup>164</sup> David M. Frost et al., *Minority Stress and Physical Health Among Sexual Minority Individuals*, 38 J. BEHAV. MED. 1, 1 (2015), <https://doi.org/10.1007/s10865-013-9523-8>.

<sup>165</sup> Ilan H. Meyer et al., *Sexual Orientation Enumeration in State Antibullying Statutes in the United States: Associations with Bullying, Suicidal Ideation, and Suicide Attempts Among Youth*, 6 LGBT HEALTH 9 (2019),

### **III. Proposed Changes Will Improve the Department’s Ability to Address Discrimination Prohibited by Title IX**

The Department relies on firm statutory authority and precedent for its rulemaking activities and proposes effective modifications for the elimination of sex discrimination in educational programs and activities – the central purpose of Title IX. The proposed changes meet the Department’s goal of “clarifying and specifying the scope and application of Title IX protections and recipients’ obligation not to discriminate on the basis of sex.”<sup>166</sup> We discuss the Department’s rulemaking power below, followed by a discussion of several proposed changes and how they would help prevent discrimination.

#### **A. The Department has Clear Statutory Authority to Enact Regulations Addressing Sexual Orientation and Gender Identity Discrimination**

The mission of the U.S. Department of Education is to “promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.”<sup>167</sup> The Department’s key functions include distributing Federal financial aid for education programs and activities, prohibiting discrimination, and ensuring equal access to education.<sup>168</sup>

Title IX provides protections from discrimination “on the basis of sex” against individuals, including students and employees, within educational programs or activities in receipt of Federal financial assistance.<sup>169</sup> The Department is explicitly authorized by statute to enact “rules, regulations, [and] orders of general applicability” in order to enforce Title IX within programs it oversees, provided such rules are “consistent with the achievement of the objectives” of the statutes authorizing the federal financial assistance under which the actions are taken.<sup>170</sup> One of the key purposes of the Department is to “strengthen the Federal commitment to assuring access to equal educational opportunity for every individual.” The Department’s Office of Civil Rights (“OCR”) was created for the express purpose of ensuring compliance and enforcement of

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<https://doi.org/10.1089/lgbt.2018.0194>; see Mark L. Hatzenbuehler et al., *Protective School Climates and Reduced Risk for Suicide Ideation in Sexual Minority Youths*, 104 AM. J. OF PUB. HEALTH 279 (2013), <https://doi.org/10.2105/AJPH.2013.301508>; see also STUART BIEGEL & SHEILA JAMES KUEHL, WILLIAMS INST., SAFE AT SCHOOL: ADDRESSING THE SCHOOL ENVIRONMENT AND LGBT SAFETY THROUGH POLICY AND LEGISLATION (2010), <https://nepc.colorado.edu/publication/safe-at-school>.

<sup>166</sup> 87 Fed. Reg. at 41,392.

<sup>167</sup> 20 U.S.C. § 3402.

<sup>168</sup> *About ED: Overview and Mission Statement*, ED.GOV, <https://www2.ed.gov/about/landing.jhtml> (last visited Aug. 31, 2022); see also General Education Provisions Act, 20 U.S.C. § 1221 et seq.

<sup>169</sup> 20 U.S.C. § 1681(a).

<sup>170</sup> 20 U.S.C. § 1682.

nondiscrimination requirements, including those created under Title IX, by participants in Department of Education programs.<sup>171</sup>

On June 15, 2020, the Supreme Court held in *Bostock v. Clayton County* that the prohibition on sex discrimination contained within Title VII of the Civil Rights Act of 1964 (“Title VII”) encompasses acts of SOGI discrimination.<sup>172</sup>

In January 2021, President Biden issued Executive Order 13988, mandating that the heads of all agencies review applicable sex nondiscrimination statutes to ensure their consistency with *Bostock*.<sup>173</sup> Shortly thereafter, the President signed Executive Order 14021 with the goal of ensuring “that all students [are] guaranteed an educational environment free from discrimination on the basis of sex, including...discrimination on the basis of sexual orientation or gender identity.”<sup>174</sup> The Department of Justice subsequently issued a memorandum directing that the protections of Title IX should be interpreted in light of *Bostock* to include discrimination based on sexual orientation and gender identity.<sup>175</sup> The Department published its own Notice of Interpretation on June 22, 2021, stating after thorough consideration that “OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department.”<sup>176</sup> Other agencies, such as the Equal Employment Opportunity Commission (“EEOC”),<sup>177</sup> the Bureau of Consumer Financial Protection,<sup>178</sup> and the Departments of Labor,<sup>179</sup> Health and Human

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<sup>171</sup> 20 U.S.C. § 3413.

<sup>172</sup> 140 S. Ct. 1731, 1737 (2020).

<sup>173</sup> 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).

<sup>174</sup> Executive Order on 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. 11, 2021).

<sup>175</sup> “After considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the Division has determined that the best reading of Title IX’s prohibition on discrimination ‘on the basis of sex’ is that it includes discrimination on the basis of gender identity and sexual orientation.” 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>.

<sup>176</sup> Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637, at 32,639 (June 22, 2021).

<sup>177</sup> *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, EEOC.GOV (June 15, 2021), <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>.

<sup>178</sup> Equal Credit Opportunity (Regulation B): Discrimination on the Bases of Sexual Orientation and Gender Identity, 86 Fed. Reg. 14,363 (Mar. 16, 2021) (to be codified at 12 C.F.R. § 1002).

<sup>179</sup> See, e.g., *DOL Policies on Gender Identity: Rights and Responsibilities*, DOL.GOV, <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/gender-identity> (last visited Aug. 31, 2022).

Services,<sup>180</sup> Housing and Urban Development,<sup>181</sup> and Agriculture (“USDA”),<sup>182</sup> have taken similar actions.<sup>183</sup>

The Department now seeks to strengthen this policy by enacting the Proposed Rule through notice-and-comment. Rules made through the notice-and-comment process have the force of law.<sup>184</sup> It is an established practice for executive agencies to incorporate Supreme Court precedent via notice-and-comment rulemaking.<sup>185</sup> Several rules have been promulgated in this manner to incorporate Supreme Court precedent specifically addressing the scope of non-discrimination laws,<sup>186</sup> much as the Department proposes to do here regarding *Bostock*. For example, in 2006, the EEOC promulgated and later adopted a rule change to reflect a Supreme Court decision regarding age discrimination.<sup>187</sup> The Department itself has also made rule changes to reflect previous Supreme Court precedents.<sup>188</sup> The Department has clear statutory authority to issue the Proposed Rule through the notice-and-comment process.

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<sup>180</sup> Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984 (May 25, 2021).

<sup>181</sup> Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs; Withdrawal; Regulatory Review, 86 Fed. Reg. 22,125 (April 27, 2021); *see also* Memorandum from Jeanine M. Worden, Acting Assistant Sec’y for Fair Housing & Equal Opportunity, U.S. Dep’t of Housing & Urban Development, on Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act (February 11, 2021), <https://www.hud.gov/sites/dfiles/FHEO/documents/WordenMemoEO13988FHActImplementation.pdf>.

<sup>182</sup> Supplemental Nutrition Assistance Program: Civil Rights Update to the Federal-State Agreement, 87 Fed. Reg. 35855 (Aug. 15, 2022) (to be codified at 7 C.F.R. § 272). This rule is currently being challenged.

<sup>183</sup> *See also* Eric Bachman, *The Bostock Decision One Year Later: How LGBTQ+ Employment Discrimination Laws Are Evolving*, FORBES (June 10, 2021), <https://www.forbes.com/sites/ericbachman/2021/06/10/the-bostock-decision-one-year-later-how-lgbtq-employment-discrimination-laws-are-evolving/?sh=5af40f39293d>.

<sup>184</sup> *See generally* *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 97 (2015) (discussing different types of rulemaking).

<sup>185</sup> *See, e.g.*, Longshore and Harbor Workers’ Compensation Act: Maximum and Minimum Compensation Rates, 81 Fed. Reg. 58,878 (Aug. 26, 2016) (Office of Workers’ Compensation Programs proposing to amend 20 C.F.R. Part 702 to “codify” the Supreme Court’s decision in *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93 (2012)); Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 79 Fed. Reg. 68,567 (Nov. 17, 2014) (Centers for Medicare & Medicaid Services proposing changes to 42 C.F.R. § 433 to reflect the Supreme Court’s decision in *Turner v. Rogers*, 564 U.S. 431 (2011)).

<sup>186</sup> *See, e.g.*, Revision of the Procedures for the Administration of Section 5 of the Voting Rights Act, 75 Fed. Reg. 33205 (June 11, 2010) (DOJ proposing to amend regulations pertaining to the Voting Rights Act in light of the Supreme Court’s decision in *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009)); Nondiscrimination Based on Disability in Federally Assisted Programs and Facilities, 82 Fed. Reg. 6388 (Jan. 19, 2017) (DOJ proposing to amend 28 C.F.R. § 42 to incorporate changes including multiple Supreme Court decisions).

<sup>187</sup> Coverage Under the Age Discrimination in Employment Act, 71 Fed. Reg. 46,177 (2006) (proposing to amend 29 C.F.R. § 1625 to reflect the Supreme Court’s decision in *General Dynamics Land Systems v. Cline*, 540 U.S. 581 (2004), regarding types of discrimination prevented).

<sup>188</sup> *See, e.g.*, Direct Grant Programs, State-Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program, 85 Fed. Reg. 59,916 (Sept. 23, 2020) (the Department amending multiple regulations to incorporate Supreme Court decisions regarding freedom of speech and expression); Equal Participation of Faith-Based Organizations in the Federal Agencies’

## **B. Proposed Changes Will Improve the Ability of the Department to Address Discrimination Affecting LGBT Students, Program Participants, Teachers and Parents**

The Department has proposed changes which will have a significant impact in addressing the forms of discrimination described above. In this section, we offer comment on specific changes that we believe will improve the Department’s ability to address discrimination against LGBT communities.

Several of the Department’s proposed changes will provide much-needed clarity to covered entities. Of paramount importance is the definitive clarification of the scope of sex discrimination as laid out in proposed section 106.10. As the Department notes, this is a new section.<sup>189</sup> The Department proposes to add provision 106.10 in order to “more closely align with Title IX’s text, purpose, and principles articulated in Federal case law and to more effectively protect people from all forms of sex discrimination, under federally funded education programs and activities.”<sup>190</sup>

Specifically, the Department proposes to add the following text:

**Scope.** Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.<sup>191</sup>

We agree with the Department’s extensive rationale for incorporating sexual orientation and gender identity into section 106.10, as laid out in the Proposed Rule.<sup>192</sup> The inclusion of sex stereotypes, sex characteristics,<sup>193</sup> pregnancy or related conditions, sexual orientation, and gender identity provides a useful and accurate range to define the class of people affected by sex discrimination, in alignment with *Bostock*, other Supreme Court precedent such as *Price*

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Programs and Activities, 85 Fed. Reg. 82,037 (Dec. 17, 2020) (the Department amending 2 C.F.R. Part 3474 and 34 C.F.R. Parts 75 and 76 to reflect Executive Orders and Supreme Court precedents).

<sup>189</sup> 87 Fed. Reg. at 41,531.

<sup>190</sup> 87 Fed. Reg. at 41,534.

<sup>191</sup> 87 Fed. Reg. at 41,571.

<sup>192</sup> 87 Fed. Reg. at 41,531–34.

<sup>193</sup> While we support the inclusion of sex characteristics as a de facto component of sex, we do not submit evidence here of intersex discrimination in education. We note the Department’s fact sheet on intersex discrimination and affirm the need for more research on the needs of intersex community members. Below, we include a suggestion as to better data collection on intersex people interacting with educational programs and activities. *See, e.g.*, OFFICE FOR CIVIL RIGHTS, SUPPORTING INTERSEX STUDENTS: A RESOURCE FOR STUDENTS, FAMILIES, AND EDUCATORS (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-intersex-202110.pdf>.

*Waterhouse v. Hopkins*,<sup>194</sup> and with other statutory sources of protection such as Title VII.<sup>195</sup> As described above, discrimination on the basis of sexual orientation and gender identity remains pervasive. The Proposed Rule brings clarity and efficiency for enforcement of these obligations by explicitly including sexual orientation and gender identity where the previous rule did not.

Another provision relevant to LGBT, and particularly transgender, students is laid out in Section 106.31(a). This section currently “describes generally the conduct prohibited by Title IX...[.]”<sup>196</sup>

Some separation based on sex is permitted under Title IX. For example, the statute itself provides that recipients may operate housing separated by sex.<sup>197</sup> The Department notes that separation by sex in bathrooms, locker rooms, and shower facilities is also permitted under the regulations.<sup>198</sup> Recipients may also maintain separate athletic teams, as laid out in section 106.41. However, the Department proposes:

Adding a new paragraph to clarify that in the limited circumstances in which Title IX or the regulations permit different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, unless otherwise permitted by Title IX or the regulations.

The Department goes on to add that “adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity causes more than de minimis harm.”<sup>199</sup> The Department states that such harms may include “emotional and dignitary harm,” and “differences in treatment that injure protected individuals,” as well as “significant harm on...mental health and well-being.”<sup>200</sup>

We agree with the Department’s rationale. As noted above, ample evidence demonstrates the discrimination that transgender people experience in educational programs and activities, including those related to denial of participation. We affirm the Department’s inclusion of this provision, and further recommend that the Department clarify under what circumstances these provisions might apply to covered entities other than students – such as staff, parents, and other parties interacting with educational programs and systems.

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<sup>194</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Sex stereotyping is a form of sex discrimination)

<sup>195</sup> *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020); *see also* 42 U.S.C. § 2000e(k) (defining discrimination “because of” and “on the basis of” sex to include pregnancy and related discrimination).

<sup>196</sup> 87 Fed. Reg. at 41,534.

<sup>197</sup> *See, e.g.*, 20 U.S.C. § 1686.

<sup>198</sup> 87 Fed. Reg. at 41,534; 34 C.F.R. § 106.33.

<sup>199</sup> 87 Fed. Reg. at 41,560.

<sup>200</sup> 87 Fed. Reg. at 41,535.

The Department does, however, note that where Congress has permitted exclusions, some harm is permitted. “Although the Department has the authority to interpret the statutes and promulgate regulations, its regulations must not contradict the express provisions of the statute.”<sup>201</sup> With regard to student housing, this limitation is clear because housing is specifically addressed in the statute. However, the Department also implies that it may be limited in its ability to apply the de minimis standard to athletic programs under section 106.41.<sup>202</sup> The reasons for these limitations are not clear, and we support the Department’s plan to engage in further rulemaking.

### **C. Any Administrative Burden Created by the Changes Is Likely Negligible and Outweighed by the Benefits**

The benefits of the proposed rule would outweigh any burden imposed on recipients of Title IX funding to comply with its requirements, including immediate costs necessary to implement regulatory changes being made by the Department. Specifically, our research suggests that the proposed rule will lead to increased access to education and other positive outcomes for LGBT students that, while difficult to quantify, would likely outweigh any costs associated with the rule.

We note our agreement with the Department that the proposed rule would serve “to ensure that no person experiences sex discrimination in education.”<sup>203</sup> As outlined above, our research indicates that LGBT people have historically and continue to experience discrimination in schools and educational environments. Implementation by the Department of a binding regulation clarifying the inclusion of SOGI discrimination within Title IX’s sex discrimination prohibition would allow the uniform enforcement of Title IX across all applicable educational programs and activities.

The proposed rule would also benefit students, their future employers, their families, and their communities by combatting the “profound and long-lasting economic costs” of discrimination.<sup>204</sup> The research cited above indicates that negative health, social and economic outcomes observed among LGBT people are often tied to their experiences with—and sometimes even due to their fear of or efforts to avoid encountering—SOGI discrimination.<sup>205</sup> Evidence suggests that nondiscrimination measures and more supportive environments can

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<sup>201</sup> 87 Fed. Reg. at 41,535.

<sup>202</sup> 87 Fed. Reg. at 41,536.

<sup>203</sup> 87 Fed. Reg. at 41,546.

<sup>204</sup> 87 Fed. Reg. at 41,547.

<sup>205</sup> See, e.g., CHRISTY MALLORY ET AL., WILLIAMS INST., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN PENNSYLVANIA (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-PA-Nov-2021.pdf> (documenting negative health, social, and economic outcomes associated with discrimination).

improve health, social, and economic outcomes by for example, reducing health disparities and increasing access to employment, education, and other paths to economic security.<sup>206</sup>

Available data indicate that enforcing sexual orientation and gender identity protections under Title IX will not be burdensome for the Department or individual schools to enforce. Several analyses of complaints filed with administrative enforcement agencies indicate that SOGI complaints are filed at a similar rate to complaints of race and sex discrimination, when adjusted by the underlying population most likely to file each type of complaint (LGBT people, people of color, and women).<sup>207</sup> However, these studies find that the raw number of complaints filed alleging SOGI discrimination is relatively low because the population of LGBT people is relatively small compared to the population of women and people of color. These analyses suggest that the increase in complaints filed on the basis of SOGI could be absorbed into existing enforcement systems with minimal impact on staff and resources.

The findings of these studies are consistent with existing, though limited, data on the frequency of allegations of SOGI-based harassment and bullying in schools. As noted above, existing data collected through the CRDC (2015-2016) indicate that 16% of allegations of bullying and harassment filed in public schools were based on students' sexual orientation. In addition, the Department will not likely experience an unanticipated influx of SOGI complaints, given that it has accepted complaints regarding SOGI related discrimination at various times dating back to at least 2010.<sup>208</sup>

In sum, the evidence suggests that updating the regulations to reflect *Bostock* and explicitly enumerate SOGI could lead to a slight increase in complaints being filed, but not to the extent that it would overwhelm the Department or schools and would not outweigh the significant long-term benefits associated with preventing SOGI discrimination in educational programs and activities.

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<sup>206</sup> Lindsay Mahowald, *LGBTQI+ Nondiscrimination Laws Improve Economic, Physical, and Mental Well-Being*, CTR. FOR AM. PROGRESS (Mar. 24, 2022), <https://www.americanprogress.org/article/lgbtqi-nondiscrimination-laws-improve-economic-physical-and-mental-well-being/>.

<sup>207</sup> MALLORY & SEARS, PUBLIC ACCOMMODATIONS, *supra* note 19; MALLORY & SEARS, HOUSING DISCRIMINATION, *supra* note 14; CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., EVIDENCE OF EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY: AN ANALYSIS OF COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES, 2008-2014 (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Employment-Discrimination-US-Oct-2015.pdf>.

<sup>208</sup> Russlynn Ali, Assistant Sec'y for Civil Rights, Dear Colleague Letter (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

#### **IV. The Department Should Take Additional Steps to Ensure That the Regulations Further the Nondiscrimination Goals of Title IX**

Although we generally support the changes in the Proposed Rule, there are a few areas where we recommend the Department consider making further changes to better meet the goal it lays out of ensuring “that no person experiences sex discrimination in education.”<sup>209</sup>

##### **A. The Department Should Provide Definitions for “Sexual Orientation,” “Gender Identity,” and Related Terms**

As part of the 2020 regulatory amendments, the Department created a new section of definitions specific to sexual harassment under section 106.30.<sup>210</sup> The Department now proposes to remove section 106.30 in its entirety, and consolidate all definitions under section 106.2, Definitions.<sup>211</sup> We affirm the Department’s proposal, which will make all of the definitions consistent and more accessible.

The Department also proposes a revised definition for “sexual harassment,” which incorporates the specific bases laid out under section 106.10, including sexual orientation, gender identity, sex stereotypes, sex characteristics, and pregnancy. We affirm the Department’s proposal to explicitly name these components of sexual harassment, which should contribute more clarity about what constitutes sexual harassment under Title IX.

However, although the department discusses the meaning of these terms in Notice of Proposed Rulemaking,<sup>212</sup> the Department does not propose including definitions for “sex,” “sexual orientation,” “gender identity,” “sex characteristics” or other categories newly added to the “Scope” section. We recommend that the Department include definitions for these terms in the regulations. One option would be to import definitions used by other Federal agencies.<sup>213</sup> Another option is to look to definitions used by an ad hoc panel by the National Academies of Sciences, Engineering, and Medicine focused on SOGI-related methodological issues (the “NASEM Panel”).<sup>214</sup> The NASEM Panel recently released a consensus study report offering guidance and best practices for collecting data on SOGI, as well as on variations in sex

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<sup>209</sup> 87 Fed. Reg. at 41,546.

<sup>210</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (codified at 34 C.F.R. § 106).

<sup>211</sup> 87 Fed. Reg. at 41,399.

<sup>212</sup> 87 Fed. Reg. at 41,531-41,534.

<sup>213</sup> See, e.g., *Frequently Asked Questions Sexual Orientation and Gender Identity*, DOL.GOV, <https://www.dol.gov/agencies/ofccp/faqs/lgbt#:~:text=%22Sexual%20orientation%22%20refers%20to%20an,lesbian%2C%20gay%2C%20and%20bisexual> (last visited Aug. 31, 2022) (definitions of Sexual Orientation and Gender Identity).

<sup>214</sup> *Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health*, NAT’L ACADEMIES OF SCIENCES, ENGINEERING, & MED., <https://www.nationalacademies.org/our-work/measuring-sex-gender-identity-and-sexual-orientation-for-the-national-institutes-of-health> (last visited Aug. 31, 2022) [Hereinafter: NAT’L ACADEMIES].

characteristics, in population-based surveys, as well as clinical and administrative settings, which included a set of definitions.<sup>215</sup> Including definitions in the Title IX regulations could further reduce any ambiguity about the scope of Title IX and enable more efficient enforcement.

## **B. The Department Should Mandate that Notices of Nondiscrimination Explicitly Include Sexual Orientation and Gender Identity**

We commend the Department for its proposal to consolidate—and build on—existing requirements related to provision of notice as outlined within proposed § 106.8(c).<sup>216</sup> Such requirements reflect a long-standing recognition by federal agencies that nondiscrimination notices are necessary to alert protected individuals to the existence of their legal rights and the processes for vindicating them.<sup>217</sup>

However, the Department should consider modifying this proposal so that the notice of nondiscrimination describes the full scope of Title IX, i.e., its prohibition of discrimination based on SOGI and other motivating factors. Currently, the proposed regulation requires only a statement that “the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any educational program or activity that it operates . . . .”<sup>218</sup> This language may not adequately signal to all readers that they are protected against discrimination based on SOGI. Other federal agencies implementing similar requirements have called for recipients to expressly state in their notices that applicable prohibitions on sex discrimination are bars on, for example, “sex (including pregnancy, sexual orientation, gender identity, or sex characteristics)” discrimination.<sup>219</sup>

Providing individuals with information on the full scope of this prohibition would be consistent with the Department’s position that providing pertinent information on Title IX within a “single policy or document . . . increase[s] the likelihood that persons entitled to notification of this information are aware of their rights under Title IX and the regulations.”<sup>220</sup> Such an amendment is also supported by the reasoning underlying the Department’s proposed scope regulation at § 106.10, that “the non-monetary benefits of providing clarity and recognizing the broad scope of Title IX’s protections outweigh[] the costs associated with the implementation of these robust protections.”<sup>221</sup> The Department should therefore ensure that its proposed § 106.8(c)

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<sup>215</sup> *Id.* at 17-24.

<sup>216</sup> 87 Fed. Reg. at 41,425.

<sup>217</sup> *See, e.g.*, 29 C.F.R. § 1601.30 (Title VII of the Civil Rights Act of 1964); 29 C.F.R. § 1627.10 (Age Discrimination in Employment Act of 1967); 45 C.F.R. § 84.8 (Section 504 of the Rehabilitation Act of 1973); 45 C.F.R. § 91.32 (Age Discrimination Act of 1975).

<sup>218</sup> Proposed § 106.8(c)(1)(a).

<sup>219</sup> Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824, at 47,852 (Aug. 04, 2022) (Section 1557 of the Patient Protection and Affordable Care Act).

<sup>220</sup> 87 Fed. Reg. at 41,427.

<sup>221</sup> 87 Fed. Reg. at 41,562.

will serve to provide individuals with adequate notice on the scope of Title IX’s protections against sex discrimination.

### **C. The Department Should Mandate Prior Written Statement to Establish Religious Exemption**

Section 106.12(a) of the current regulations permits a religious entity who may be exempt from the sex discrimination provisions of Title IX to “at any time raise its exemption by submitting in writing to the Assistant Secretary a statement....”<sup>222</sup> The addition of language permitting entities to declare exemption “at any time” allows for ambiguity as to whether a given school may tolerate or even promote anti-LGBT discrimination.<sup>223</sup> Students may choose to attend institutions and employees may choose to work there and not realize they would not be protected from such discrimination under Title IX. The proposed regulations do not change this *status quo*.

Under Title IX, private schools controlled by religious organizations are permitted to discriminate on the basis of sex to the extent that application of Title IX would be contrary to the religious tenets of the school.<sup>224</sup> Some religious schools openly discriminate against LGBT students, faculty, and staff.<sup>225</sup> Other religious schools welcome LGBT people.<sup>226</sup> Although Title IX permits exemptions for religious schools, LGBT students, faculty, and staff would benefit from receiving advanced notice that particular school may discriminate against them because of their sexual orientation or gender identity. In addition, LGBT people engaging with campus facilities at a religious school—for example, people seeking health care at a university hospital—may benefit from advanced notice of the entity’s non-discrimination policy.

Requiring a form of advance notice for religious exemption would permit students, employees, and others who may come into contact with religious schools to make an informed choice before engaging with an institution that may subject them to discrimination. We therefore

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<sup>222</sup> 34 C.F.R. § 106.12

<sup>223</sup> Williams Institute Scholars, Comment Letter on ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, 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>.

<sup>224</sup> 20 U.S.C. § 1681(a)(3).

<sup>225</sup> See, e.g., Elizabeth Redden, *Religious Freedom vs. Freedom From Discrimination*, INSIDE HIGHER ED (Apr. 6, 2021), <https://www.insidehighered.com/news/2021/04/06/lgbt-students-sue-education-department-over-title-ix-religious-exemption>; see also Maxon v. Fuller Theological Seminary, 549 F. Supp. 3d 1116 (C.D. Cal. 2020), *aff’d*, No. 20-56156, 2021 WL 5882035 (9th Cir. Dec. 13, 2021) (motion to dismiss granted where students stated a claim of sex discrimination under Title IX but application of Title IX was contrary to school’s religious tenets); Fitzgerald v. Roncalli High Sch. Inc., No. 119CV04291RLYTAB, 2021 WL 4953237 (S.D. Ind. Mar. 31, 2021).

<sup>226</sup> See, e.g., Dan Avery, *These 10 Religious Universities Earn High Marks For LGBTQ Inclusivity*, NBC NEWS (Aug. 31, 2021), <https://www.nbcnews.com/nbc-out/out-news/10-religious-universities-earn-high-marks-lgbtq-inclusivity-rcna1845>.

recommend that the Department clarify that religious exemptions pursuant to Section 106.12 must be made in advance.

#### **D. The Department Should Issue Clear Guidance on Nondiscrimination in Athletics**

In section 106.31(a)(2), the Department permits sex separation in programs and activities so long as it does not result in more than *de minimis* harm and specifies that denial of participation based on gender identity may constitute more than *de minimis* harm.<sup>227</sup> However, as the Department notes, “Exclusion from a particular male or female athletics team may cause some students more than *de minimis* harm, and yet that possibility is allowed under current section 106.41(b).” The Proposed Rule does not contain “any particular changes to 106.41 at this time.”

The question of whether and how transgender students may participate in school athletics is imminent. At the end of the 2022 State legislative session, 18 states have bans limiting participation in athletics by transgender youth.<sup>228</sup> While a number of these bans are stayed under injunction for the time being,<sup>229</sup> transgender youth nonetheless continue to suffer consequences.<sup>230</sup> In one of the active cases challenging the ban, a middle school transgender student who was preparing to enter the sixth grade at a new school in West Virginia was told she would be unable to join any girls’ sports teams, due to a newly enacted state law.<sup>231</sup> If the ban were enforced, she would either be the only girl on the boys’ sports teams or have to give up participating in school sports entirely.<sup>232</sup> The District Court enjoined the enforcement of the ban, finding that it “both stigmatize[d] and isolate[d]” the plaintiff, who “demonstrated a likelihood of success on the merits for her Title IX claim.”<sup>233</sup> Clear guidance from the Department will help the plaintiff in this case, and many other similarly situated students.

We therefore recommend that the Department ensure that the regulations clearly prohibit discrimination on the basis of gender identity and sexual orientation in athletics.

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<sup>227</sup> Proposed § 106.31; 87 Fed. Reg. at 41,571.

<sup>228</sup> *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (Aug. 23, 2022), [https://www.lgbtmap.org/equality-maps/sports\\_participation\\_bans](https://www.lgbtmap.org/equality-maps/sports_participation_bans).

<sup>229</sup> *B.P.J. v. W. Virginia State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D.W. Va. 2021); *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020); *A.M. vs. Indianapolis Pub. Schs.*, No. 1:22-cv-01075-JMS-DLP (S.D. Ind. Jul. 26, 2022); *Roe v. Utah High Sch. Activities Association*, No. 220903262 (Utah Third Jud. Dist. Aug 19, 2022).

<sup>230</sup> Catherine Jean Archibald, *Transgender and Intersex Sports Rights*, 26 VA. J. SOC. POL’Y & L. 246 (2019), <http://vjspl.org/wp-content/uploads/2020/03/12.3v2-Transgender-Sports-.pdf>; Meghan M. Pirics, *Undressing the Locker Room Issue: Applying Title IX to the Legal Battle Over Locker Room Equality for Transgender Student-Athletes*, 27 MARQUETTE SPORTS L. REV. 449 (2017), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1711&context=sportslaw>.

<sup>231</sup> *BPJ v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 351 (S.D. W. Va. 2021).

<sup>232</sup> *Id.* at 356.

<sup>233</sup> *Id.* at 356–57.

## **E. The Department Should Mandate Voluntary Data Collection on Sexual Orientation and Gender Identity**

Finally, we encourage the Department to broaden its data collection requirements by recipients and/or from students, teachers, parents, or other people protected under Title IX to ensure quality data on sexual orientation and gender identity, provided such data collection does not compromise the privacy or safety of protected individuals. President Biden’s June 2022 Executive Order 14075 specifically directs Federal agencies to participate in a process to “[strengthen] the Federal Government’s collection of SOGI data to advance equity for LGBTQI+ individuals.”<sup>234</sup> To further this process, the White House Office of Science and Technology Policy has released a Request for Information from the public to help build the “Federal Evidence Agenda on LGBTQI+ Equity.”<sup>235</sup> The RFI asks:

Where programmatic data is used to enforce civil rights protections, such as in... education settings, what considerations should the [Equitable Data Working Group] Subcommittee on SOGI Data keep in mind when determining promising practices for the collection of this data and restrictions on its use or transfer?<sup>236</sup>

The Department and OCR maintain the authority to require SOGI data collection, and to develop data collection practices to ensure thorough enforcement of Title IX and compliance with the Executive Order. For example, 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.]”<sup>237</sup> Relying on this authority, the Department may choose develop new data collection instruments to track and measure enforcement of and compliance with Title IX, building on and expanding data already collected through the CRDC.

We encourage the Department to include measures of sexual orientation and gender identity in any surveys it currently administers that collect other demographic information and any future surveys it develops under its authority to enforce Title IX. There are many existing models that the Department may use as guidance for collecting information on sexual orientation and gender identity, including from youth. For example, as noted above, the NASEM Panel recently released a consensus study report offering guidance and best practices for collecting data on SOGI, as well as on variations in sex characteristics, in population-based surveys, as well

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<sup>234</sup> Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals, Exec. Order No. 14,075, 87 Fed. Reg. 37,189 (June 15, 2022).

<sup>235</sup> Request for Information; Federal Evidence Agenda on LGBTQI+ Equity, 87 Fed. Reg. 52,083 (Aug. 24, 2022).

<sup>236</sup> 87 Fed. Reg. at 52,084.

<sup>237</sup> 20 U.S.C. § 3413(c)(1).

as clinical and administrative settings.<sup>238</sup> The report includes specific considerations for youth.<sup>239</sup> We recommend that the Department undertake a review of the available Federal SOGI data collection resources and develop improved models to ensure that SOGI data is available to ensure compliance with Title IX.

In addition, as scholars with experience in measurement development and testing, we would recommend that the Department consider longstanding research on SOGI measurement and assess the performance of any chosen SOGI measures or response options it might consider implementing through this or a future rulemaking. That includes any measures and question designs it may propose related to the assessment of sex characteristics or intersex status. Likewise, we note our concern with potential harm to respondents due to breach of confidentiality related to SOGI information or sex characteristics, and request that the Department take precautions to ensure that all data are collected and reported using appropriate privacy standards.

Finally, we strongly encourage the Department to assess the impact of changes to pre-admission inquiries, including the impact on students' privacy. In Proposed Rule 106.21(c)(2)(iii), the Department has expressed support for self-identification of "sex" in pre-admission inquiries. The Department explains that "nothing in the current or proposed regulations would prohibit a recipient from offering nonbinary options in addition to male and female options."<sup>240</sup> We agree. However, administrative records directly associated with individuals such as those which may be generated through pre-admission inquiries present different privacy considerations than surveys, and we strongly encourage a thorough consideration of privacy impacts and an impact assessment of the proposed changes to the pre-admission inquiry process.

## V. Conclusion

The Department proposes to make significant changes to the regulations guiding the enforcement of Title IX. As researchers and scholars studying the impact of public policy on anti-LGBT discrimination, we believe the proposed changes as discussed herein will make a positive difference in ensuring equal access to education for every individual.

Thank you for your consideration of the information and comments provided herein. Please direct any correspondence to [redfield@law.ucla.edu](mailto:redfield@law.ucla.edu).

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<sup>238</sup> NAT'L ACADEMIES, *supra* note 214.

<sup>239</sup> *Id.* at 92 (Section 5, Sexual Orientation); *id.* at 132, 133 (Section 6, Gender Identity).

<sup>240</sup> 87 Fed. Reg. at 41,517.

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