

CHALLENGES FACING LGBTQ YOUTH

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I. INTRODUCTION

This Article will discuss the myriad of challenges lesbian, gay, bisexual, transgender, and questioning¹ (LGBTQ) youth face in the United States. The Article will focus on issues LGBTQ youth confront in school as well as the issues faced by families with LGBTQ children, including increased risk of violence, abuse, housing instability, and inadequate access to appropriate medical care. The Article also examines and summarizes legal protections for LGBTQ youth at the federal and state levels.

II. CHALLENGES FACING LGBTQ YOUTH IN SCHOOLS

A. OVERVIEW OF FEDERAL AND STATE PROTECTIONS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

Since the turn of the twentieth century, public education has grown in importance across the United States. Today, every state constitution contains an education provision.²

1. When we use the term “transgender” youth, unless otherwise stated, we are referring to youth who have already begun transitioning, youth who have already transitioned and now identify as a gender other than the one they were assigned at birth, and youth who may view themselves, and/or may be viewed by others, as not conforming to traditional gender norms for the gender they were assigned at birth. For a history of transgenderism in society, see Blaise Vanderhorst, *Whither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex*, 9 HARV. L. & POL’Y REV. 241, 246–55 (2015). Alternatively, cisgender is an adjective we will use that denotes someone whose sense of identity corresponds with the sex assigned to them at birth. See *Cisgender*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/35015487> (last visited Apr. 18, 2022).

2. ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1, *amended by* ARK. CONST. amend. 53; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1 (amended 1998); GA. CONST. art. VIII, § 1, ¶. (1); HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2nd, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, part 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, Ch. V, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1, cl. a; MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1 (amended 1972); NEV. CONST. art. XI, § 2 (amended 1938); N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4, ¶. 1; N. M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1 (amended 2001); N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14 (amended 1967); R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12 (amended 1977); TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. Ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3 (amended 1972); WYO. CONST. art. VII, § 1.

LGBTQ students face several challenges that may prevent them from attaining equal access to the benefits of public education: administrators, teachers, and peers may play a role in the harassment or bullying of LGBTQ students,³ and transgender students are routinely denied access to gender-corresponding sex-segregated facilities and educational and athletic programs.⁴

While there is no federal law explicitly protecting K-12 public school students from discrimination based on actual or perceived sexual orientation or gender identity, Title IX's prohibition against sex-based discrimination has begun to be interpreted to extend to sexual orientation and gender identity. In March 2021, the U.S. Department of Justice issued a memo clarifying Title IX's prohibition on discrimination. It explained that "on the basis of sex" includes discrimination on the basis of gender identity or sexual orientation. Shortly thereafter, the U.S. Department of Education confirmed that it will enforce Title IX protections on this basis.⁵ Despite these clarifications, students and their parents still must navigate a patchwork of federal and state laws when they seek to hold their schools accountable for such discrimination.⁶ This subsection will summarize the various laws that provide students with some protection against discrimination based on sexual orientation and gender identity. This section will discuss, in respective order, how (i) federal constitutional law, (ii) federal statutory law, and (iii) state law apply to some of the more common challenges facing LGBTQ students at school.

1. Federal Constitutional Law

*a. The Fourteenth Amendment's Equal Protection Clause*⁷.

i. Sexual Orientation and the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying "any person"

3. See *infra* Section II.E.

4. See *infra* Section II.B.ii.

5. See *Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1747 (2020) (Title VII prohibition against discrimination on the basis of sex protects gender identity and sexual orientation discrimination in employment contexts); Exec. Order No. 13988-86 Fed. Reg. 7023 (January 20, 2021); Pamela S. Karlan, Application of *Bostock v. Clayton County* to Title IX of the Education, United States Department of Justice Civil Rights Division (2021), <https://www.justice.gov/crt/page/file/1383026/download>; *Enforcement of Title IX with Respect to Sexual Orientation and Gender Identity in Light of Bostock v. Clayton Cty.*, 86 Fed. Reg. 32637 (June 22, 2021).

6. See *infra* Part II.A.i-iii.

7. This article addresses only the Fourteenth Amendment's Equal Protection Clause because plaintiffs have had less success holding schools accountable under the Fourteenth Amendment's Due Process clause; state actors only have a "duty to care" for citizens if they are in a special relationship with those citizens or if the state actors have "create[d], or substantially contribute[d] to the creation of, a danger or render[ed] citizens more vulnerable to that danger than they would have been." *Nabozny v. Podlesny*, 92 F.3d 446, 459 (7th Cir. 1996). Compulsory school attendance laws do not create a special relationship between schools (or school personnel) and students. See *Botello v. Morgan Hill Unified Sch. Dist.*, No. C09-02121 HRL, 2009 WL 3918930, at *3 (N.D. Cal. Nov. 18, 2009). At least in the context of schools' inadequate response to anti-gay bullying and harassment, courts have found that schools did not create or contribute to the danger. See *Nabozny*, 92 F.3d at 460. Some circuits have held

within their jurisdiction “equal protection of the laws.”⁸ Because the Equal Protection Clause protects individuals from unjustified discrimination based on their membership in an identifiable minority (including sexual orientation), the Equal Protection Clause prohibits discrimination based on sexual orientation.⁹ However, the Equal Protection Clause only guards against intentional discrimination.¹⁰ Moreover, the Supreme Court has repeatedly denied advocates’ entreaties to make sexual orientation a suspect class.¹¹ Lower courts have followed its lead, subjecting discrimination against LGBTQ youth in schools only to what the courts describe as rational basis review.¹² Still, since *Romer v. Evans*,¹³ many observers have suggested that courts actually apply a “rational review with bite” in cases pertaining to sexual orientation.¹⁴ Regardless of the standard applied, most courts have been unable to find any rational basis for discrimination against students based on their sexual orientation, particularly when that discrimination takes the form of harassment or assault at the hands of their classmates.¹⁵

ii. Gender Identity and the Equal Protection Clause. Although the Supreme Court has not identified transgender persons as members of a suspect class, a consensus is emerging that disparate or discriminatory treatment based on a person’s status as transsexual or transgender may constitute a denial of equal protection under the Fourteenth Amendment.¹⁶ Federal courts are split as to whether they

that schools can only be held liable for their actions, not for failing to act to protect students from harassment, or even assault, based on their sexual orientation. *Id.* However, other circuits have held that schools can be held liable for either their clearly unreasonable response or deliberate indifference to known student-on-student sexual harassment. *See* Feminist Majority Foundation v. Hurley, 911 F.3d 674, 706 (4th Cir. 2018); Hill v. Cundiff, 797 F.3d 948, 969 (11th Cir. 2015). For harassment based on a student’s sexual orientation, a school can be held liable for an equal protection violation for disparate treatment of one class of students complaining about bullying or deliberate indifference to discriminatory peer harassment. *See* Stiles ex rel. D.S. v. Grainger County, Tenn., 819 F.3d 834, 852 (6th Cir. 2016).

8. U.S. CONST. amend. XIV, § 1.

9. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996); *see also* *Nabozny*, 92 F.3d 446 at 457; *Seiwert v. Spencer-Own Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 951 (S.D. Ind. 2007).

10. *See* *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 874 (N.D. Ohio 2003).

11. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015) (finding that the Due Process clause and the Equal Protection clause similarly guarantee same-sex individuals the fundamental right to marry); ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES & POLICIES* 713–15 (Vicki Been et al. eds., 4th ed. 2013) (explaining that when an identifiable minority is classified as a suspect class, discrimination against that group is evaluated under heightened scrutiny).

12. *See, e.g., Seiwert*, 497 F. Supp. 2d at 951.

13. *See* Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2774–77 (2005).

14. *See id.*

15. *E.g., Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1089 (D. Minn. 2000); *see also Seiwert*, 497 F. Supp. 2d at 952.

16. *See* James Lockhart, *Discrimination on Basis of Person’s Transgender or Transsexual Status as Violation of Federal Law*, 84 *A.L.R. FED.* 2d 1, § 4 (2014); *see also* *Cummings v. Greater Cleveland Reg’l Transit Auth.*, 88 F. Supp. 3d 812, 819 (N.D. Ohio 2015); *Glenn v. Brumby*, 663 F.3d 1312, 1317

should apply a rational basis¹⁷ or intermediate scrutiny¹⁸ standard when a plaintiff alleges violation of equal protection on the basis of transgender status. Rational basis merely requires that there be a rational connection between the classification and a legitimate state interest. On the other hand, intermediate scrutiny requires that a statutory classification be substantially related to an important government objective.¹⁹

Various courts of appeals also consider discrimination against transgender individuals as unconstitutional sex-based discrimination.²⁰ This level of scrutiny may continue to be extended following the Supreme Court's decision in *Bostock* which held sex, which is subject to intermediate scrutiny, necessarily includes sexual orientation and gender identity.²¹ In *Price Waterhouse v. Hopkins*,²² an employer denied a woman a promotion because she did not act "feminine" enough.²³ The woman sued for sex discrimination under Title VII and won because the Supreme Court ruled that employers cannot discriminate against employees based on sex stereotypes.²⁴ Applying *Price Waterhouse*, many courts have found that discrimination against transgender individuals is unlawful under the Equal Protection clause.²⁵ For example, in *Glenn v. Brumby*,²⁶ the Eleventh Circuit held that discrimination against someone on the basis of gender nonconformity constitutes sex-based discrimination in violation of the Equal Protection Clause.²⁷ Thus, a transgender state employee who was fired because her supervisor

(11th Cir. 2011); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018); *Fabian v. Hospital of Central Connecticut*, 172 F.Supp.3d 509, 427 (D.Conn. 2016).

17. *See Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Pa. Mar. 31, 2015); *Kaao-Tomaselli v. Butts*, No. 11-00670 LEK/BMK, 2013 WL 399184, at *5 (D. Haw. Jan. 31, 2013); *Ravenwood v. Daines*, No. 06-CV-6355-CJS, 2009 WL 2163105, at *11-12 (W.D.N.Y. July 17, 2009); *Casillas v. Daines*, 580 F. Supp. 2d 235, 246 (S.D.N.Y. 2008); *Doe v. U.S.P.S.*, Civ. A. No. 84-3296, 1985 WL 9446 at *4 (D.D.C. 1985).

18. *See Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Marlett v. Harrington*, No. 1:15-cv-01382-MJS (PC), 2015 WL 6123613, at *4 (E.D. Cal. Oct. 16, 2015).

19. *See generally* *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U.S. 150 (1897); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

20. *See Grimm v. Gloucester City Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004). *But see* *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir. 2007).

21. *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1741 (2020); Sharita Gruberg, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CENTER FOR AMERICAN PROGRESS (August 26, 2020, 9:01 AM), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/>.

22. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

23. *Id.*

24. *Id.* at 250.

25. *See* *Lockhart*, *supra* note 16, at § 4. For a similar application of *Price Waterhouse v. Hopkins* in a Title VII case, *see generally* *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016).

26. 663 F.3d at 1317.

27. *Id.*

considered it “inappropriate” for her to appear at work dressed as a woman could bring an action for relief pursuant to 42 U.S.C. § 1983.²⁸

iii. Equal Protection Liability. Both individual school employees and school districts may be held accountable for sex-based discrimination under the Equal Protection Clause.²⁹ However, neither may be held liable under a theory of *respondeat superior*.³⁰

(1) School District Equal Protection Liability. To prove that a school is liable, a plaintiff must demonstrate that the school discriminated based on a district policy or long-standing custom.³¹ The custom can either derogate from a policy or rise to the level of a policy.³²

Plaintiffs have been particularly successful at proving school district liability where the district failed to respond to complaints of discrimination based on sexual orientation or gender identity with the same vigor with which it responded to complaints of other sorts of discrimination.³³ For example, in *Montgomery v. Independent School Dist. No. 709*,³⁴ the plaintiff adduced evidence that the school responded to all allegations of boy-against-girl sexual harassment by notifying the alleged harasser’s parents and threatening police involvement if the behavior continued.³⁵ When the plaintiff alleged sexual orientation-based harassment, the school did not notify the alleged harasser’s parents and did not threaten police involvement if the harassment continued.³⁶

Conversely, in *Brown v. Ogletree*,³⁷ a case initiated by the estate of a student who committed suicide due to harassment regarding his sexual orientation, a school district’s motion for summary judgment was granted, even though the school ignored incidents of LGBTQ bullying for over two years.³⁸ The court was

28. *Id.*; see also 42 U.S.C. § 1983 (2012) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

29. See *Doe ex rel. Conner v. United School Dist.* 233, No. 12-2285-JTM, 2013 WL 3984336, at *8–9 (D. Kan. Aug. 1, 2013).

30. See *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1116 (E.D. Cal. 2011) (respondeat superior allows a plaintiff to hold an employer or principal legally responsible for the wrongful acts of an employee or agent if such acts occur within the scope of employment or agency).

31. See *Conner*, 2013 WL 3984336, at *8.

32. *Id.*

33. See *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1097 (D. Minn. 2000).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Estate of Brown v. Ogletree*, No. 11-CV-1491, 2012 WL 591190, at *1–3 (S.D. Tex. Feb. 21, 2012).

38. *Id.* at *1–3.

unable to distinguish between the school's responses to this bullying and its responses to bullying and harassment of other students.³⁹

Plaintiffs have also been successful at proving district liability where the district has failed to follow its written anti-discrimination policies in response to discrimination based on sexual orientation.⁴⁰ The departure from district policies, in this context, is sufficient to establish discriminatory intent.⁴¹

(2) Individual Equal Protection Liability. In order to hold an individual school employee liable under the Equal Protection Clause, a plaintiff must prove that the employee was deliberately indifferent to known discrimination.⁴² Mere negligence is insufficient.⁴³

As with district liability, the failure to respond with the same vigor to complaints of LGBTQ-based discrimination can be evidence of deliberate indifference.⁴⁴ The same is true for failure to follow district policies.⁴⁵ Moreover, a school district employee's discriminatory statements may provide additional evidence of deliberate indifference.⁴⁶ For example, in *Nabozny v. Podlesny*,⁴⁷ when Nabozny reported an assault based on his sexual orientation, the school official in charge of discipline "laughed and told [him that he] deserved such treatment because he is gay."⁴⁸

Finally, in order to hold an individual school employee liable in an Equal Protection claim under § 1983, a plaintiff must overcome the employee's claim of qualified immunity.⁴⁹ Qualified immunity only adheres if a defendant would not have known that "discrimination . . . based on . . . sexual orientation, viewed in the light of the law at the time, was unlawful."⁵⁰ In 1996, the Seventh Circuit wrote:

[T]he Constitution prohibits intentional invidious discrimination between otherwise similarly situated persons based on one's membership in a definable minority, absent at least a rational basis for the discrimination. There can be little doubt that homosexuals are an identifiable minority subjected to discrimination in our society. Given the legislation across the country both positing and prohibiting homosexual rights, that proposition was as self-evident in 1988 as it is today.⁵¹

39. *Id.* at *12.

40. *See, e.g.,* *Seiwert v. Spencer-Own Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 952 (S.D. Ind. 2007).

41. *See id.*

42. *See* Conner, 2013 WL 3984336, at *9.

43. *Id.*

44. *See* *Nabozny v. Podlesny*, 92 F.3d 446, 455 (7th Cir. 1996).

45. *See id.*

46. *See id.*

47. *Id.*

48. *Id.* at 452.

49. *See id.* at 457.

50. *Id.*

51. *Id.*

This proposition has only become clearer in the wake of the 2015 marriage equality Supreme Court decision,⁵² the introduction of the Equality Act, which highlights the many areas where federal law still permits overt discrimination based on sexual orientation and/or gender identity,⁵³ and the Student Non-Discrimination Act, which notes the extensive discrimination and harassment experienced by LGBTQ youth.⁵⁴

b. The First Amendment - Retaliation. Students have brought successful First Amendment retaliation claims when school personnel have discriminated against them based on their sexual orientation.⁵⁵ In order to prevail on such a claim, the student must prove that the speech in question was (a) constitutionally protected and (b) “a substantial or motivating factor” for “the adverse action.”⁵⁶ The school then has the opportunity to demonstrate that it would have taken the same action had the student not engaged in protected speech.⁵⁷

For example, in *Wolfe v. Fayetteville, Arkansas School District*,⁵⁸ school personnel responded to allegations of harassment and discrimination based on sexual orientation by: (1) telling the complainant, in front of his harasser, not to cry “like a little baby”; (2) making false accusations against the complainant to Fayetteville Police; (3) participating in a Facebook smear campaign against the complainant; and (4) publicly releasing the complainant’s student records.⁵⁹ Based on this evidence, the district court denied the school’s motion to dismiss the First Amendment retaliation claim.⁶⁰ The Eighth Circuit affirmed this denial of motion to dismiss. The plaintiff had shown affirmative acts of retaliation amounting to adverse actions that could be construed as retaliatory.⁶¹ Moreover, to prove a Title IX deliberate indifference claim against a school district, there needs to be proof of sex-based motivation.⁶²

2. Federal Statutory Law⁶³

a. Title IX. Title IX of the Education Amendments Act of 1972 reads in relevant part, “No person . . . shall, on the basis of sex, be excluded from participation

52. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

53. EQUAL. ACT, S. 1858, H.R. 3185, 114th Cong. (2015).

54. THE STUDENT NON-DISCRIMINATION ACT, S. 439, H.R. 846, 114th Cong. (2015).

55. See, e.g., *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1075 (D. Nev. 2001).

56. *Id.*

57. *Id.*

58. *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 600 F. Supp. 2d 1011, 1021 (W.D. Ark. 2009).

59. *Id.*

60. *Id.*

61. *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011).

62. *Id.* at 865.

63. Some advocates have sought to establish Gender Identity Disorder (GID) as a disability, see *infra* note 423; however, GID has been explicitly excluded from the Americans with Disabilities Act, 42 U.S.C. § 12211 (2015) and the Rehabilitation Act of 1973, 29 U.S.C. § 705 (2014).

in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁶⁴

Although Title IX refers to sex and not to sexual orientation or gender identity, in January 2001, the U.S. Department of Education’s Office for Civil Rights (OCR) released guidance suggesting that discrimination based on gender identity or failure to conform to gender stereotypes should be considered sex discrimination.⁶⁵ The majority of courts have adopted this interpretation.⁶⁶

i. Lesbian, Gay, and Bisexual Students and Title IX. As a threshold matter, plaintiffs must prove that they were, in fact, discriminated against based on a failure to conform to gender stereotypes.⁶⁷ Where plaintiffs were called gay slurs but testified to reasons for the bullying other than perceived homosexuality, courts have been reluctant to find that Title IX applies.⁶⁸ For example, in *A.E. ex rel. Evans v. Harrisburg School District No. 7*,⁶⁹ the plaintiff speculated that he was teased for his height and “because he had a ‘pretty boy face, like Prince Charming,’” or because his harasser wanted to fit in with the cool kids.⁷⁰ The district court found that he could not avail himself of Title IX’s protections.⁷¹ Some courts have suggested that “homophobic slur[s]” are among “a variety of generic middle school insults.”⁷² Without evidence that the plaintiff was effeminate or otherwise behaved in a way that failed to conform to gender stereotypes, these courts have refused to allow Title IX claims to proceed.⁷³

At the same time, at least one court that has considered bullying and harassment claims has recognized that homophobic terms were deliberately chosen and have allowed Title IX suits to proceed even in the absence of evidence that the

64. 20 U.S.C. § 1681(a) (1972).

65. See generally U.S. DEP’T OF EDUC., OFF. FOR C.R., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCH. EMPS., OTHER STUDENTS, OR THIRD PARTIES (2001).

66. See *Doe ex rel. Conner v. United School Dist. 233*, No. 12-2285-JTM, 2013 WL 3984336, at *5 (D. Kan. Aug. 1, 2013); *A.E. ex rel. Evans v. Harrisburg Sch. Dist. No. 7*, No. 6:11-CV-6255-TC, 2012 WL 4794314, at *3 (D. Or. Oct. 9, 2012); *Hoffman v. Saginaw Pub. Sch.*, No. 12-10354, 2012 WL 2450805, at *8–9 (E.D. Mich. June 27, 2012); *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1115 (E.D. Cal. 2011); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 152 (E.D.N.Y. 2011); *Seiwert v. Spencer-Own Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1307 (D. Kan. 2005). But see *Patenaude v. Salmon River Cent. Sch. Dist.*, No. 3:03-CV-1016, 2005 WL 6152380, at *6–7 (N.D.N.Y. Feb. 16, 2005); *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 132 F. Supp. 3d 736, 745 (E.D. Va. 2015) (holding the Department of Education’s interpretation of its regulation as encompassing gender identity should be given deference).

67. See *Theno*, 394 F. Supp. 2d at 1302.

68. *A.E. ex rel. Evans*, 2012 WL 4794314, at *3.

69. *Id.*

70. *Id.*

71. *Id.*

72. See *Doe ex rel. Conner v. United Sch. Dist. 233*, No. 12-2285-JTM, 2013 WL 3984336, at *5 (D. Kan. Aug. 1, 2013).

73. See, e.g., *Hoffman v. Saginaw Pub. Sch.*, No. 12-10354, 2012 WL 2450805, at *8–9, (E.D. Mich. June 27, 2012).

plaintiff's behavior or presentation failed to conform to gender stereotypes.⁷⁴ In *Theno v. Tonganoxie Unified School District No. 464*,⁷⁵ even though the plaintiff testified that he was teased for his unique haircuts and for participating in taekwondo,⁷⁶ the district court found that "instead of simply picking on him by using non-sexual terms such as 'geek,' 'weirdo,' or 'spaz,' [the bullies] resorted to crude gestures, teasing, and name calling with sexual innuendos in an effort to debase and derogate his masculinity."⁷⁷ Where a plaintiff's "expressive gestures and manner of speaking [are] of a nature stereotypically associated" with the opposite sex, courts are even more likely to allow a Title IX suit to proceed than when bullies have used only homophobic epithets.⁷⁸

However, not every court has considered this issue, and one court has declined to follow OCR's guidance. Specifically, the Western District of New York only recognizes Title IX claims where discrimination is based on a plaintiff's male or female sex.⁷⁹ For example, in *Preston v. Hilton Cent. Sch. Dist.*,⁸⁰ the court dismissed the plaintiff's Title IX claims because the plaintiff's evidence that bullies called the male plaintiff homophobic slurs and asked the plaintiff questions using terms with sexual connotations was not sufficient proof that the plaintiff was targeted because of his gender.⁸¹

ii. Transgender Students and Title IX. Title IX poses challenges for transgender students, but it may also offer opportunities for protection from discrimination. Title IX regulations allow schools to provide separate locker rooms, toilets, and shower facilities to each sex so long as the facilities are comparable in terms of quality and are provided in proportionate quantity.⁸² Schools may also offer certain sex-segregated classes, such as human sexuality, physical education and chorus.⁸³ Under these regulations, schools have excluded transgender children from gender-corresponding sports and facilities by citing a need to segregate based on students' sex assigned at birth.⁸⁴

In a recent resolution agreement entered into by Arcadia School District, the OCR reasoned that, under Title IX, schools should separate students based on

74. See *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1304–05 (D. Kan. 2005).

75. *Id.*

76. *Id.* at 1306.

77. *Id.* at 1307.

78. *E.g.*, *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 152 (E.D.N.Y. 2011).

79. See *Preston v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 243–44 (W.D.N.Y. 2012).

80. *Id.*

81. *Id.*

82. 34 C.F.R. § 106.33 (2000).

83. *Id.* § 106.34.

84. See, e.g., *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 132 F. Supp. 3d 736, 740 (E.D. Va. 2015) ("It shall be the practice of the [Gloucester County Public Schools] to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.").

gender rather than natal sex.⁸⁵ The transgender student's complaint alleged that his middle school had both denied him access to sex-specific school facilities designated for boys' use during school and extracurricular programs and had prohibited him from residing in the male dorms during a school-sponsored academic overnight trip.⁸⁶ Without admitting unlawful conduct, the school district agreed to allow the student access to male-designated facilities for the remainder of his educational career and to implement new district-wide policies to ensure that transgender students and students who do not conform to sex stereotypes retain an equal opportunity to participate in school programs.⁸⁷ The Department of Education has taken this position in subsequent policy guidance.⁸⁸

Not all federal courts have accepted the Department of Education's interpretation of Title IX.⁸⁹ In a recent decision, the U.S. District Court for the Eastern District of Virginia did not defer to the Department of Education's interpretation of its Title IX regulation, instead holding that the regulation was unambiguous and plainly allowed schools to limit bathroom access on the basis of sex.⁹⁰ The court reasoned that the term "sex" in the regulation could refer to both gender and biological sex, but not exclusively to gender. Therefore, while the regulation potentially allowed segregation of bathroom facilities on the basis of gender, it did not require such segregation.⁹¹ The court critiqued the Department's interpretation of the regulation through a "Dear Colleagues" letter, arguing that the Department was attempting to create a new regulation without using required notice and comment rule-making procedures under the Administrative Procedures Act.⁹²

Title IX provides an exemption for religious institutions whose religious practices are inconsistent with the requirements of the statute,⁹³ and 277 higher education institutions have been issued exemptions by the Department of Education.⁹⁴ These institutions are exempt from Title IX requirements in admissions, housing,

85. See Resolution Agreement Between the Arcadia Unified Sch. Dist., U.S. Dep't of Educ. Office for Civil Rights, and U.S. Dep't of Justice, No. 09-12-1020 (OCR), No. 169-12C-70 (DOJ) (2013), (NPR, 169-12C-70 (DOJ) (2013) http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia_Resolution_agreement_07.24.2013.pdf [hereinafter Arcadia Settlement]; For an academic discussion of this theory, see Erin E. Buzuvis, "On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education, 28 WIS. J.L. GENDER & SOC'Y 219, 242 (2013).

86. Arcadia Settlement, *supra* note 85, at 1.

87. Arcadia Settlement, *supra* note 85, at 3.

88. ENF'T OF TITLE IX OF THE EDUC. AMENDMENTS OF 1972 WITH RESPECT TO DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN LIGHT OF BOSTOCK V. CLAYTON CNTY. (Interpretation), 81 Fed. Reg. 32637 (June 22, 2021).

89. See *Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674-78 (W.D. Pa. 2015); *Grimm*, 132 F.Supp.3d 736, 746 (E.D. Va. 2015).

90. *Grimm*, 132 F.Supp.3d at 744-46.

91. *Id.*

92. *Id.* at 746.

93. 20 U.S.C. § 1681(a)(3) (2015); 34 C.F.R. § 106.12(a) (2013).

94. U.S. DEP'T OF EDUC., *Insti. Currently Holding Religious Exemption*, <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/rel-exempt-approved-and-pending.xlsx> (last updated Dec. 31, 2016).

access to bathrooms, and/or athletics opportunities as they pertain to transgender students.⁹⁵

iii. Liability Under Title IX⁹⁶. Once a plaintiff has established that Title IX applies, he or she must still overcome several hurdles to prevail on a Title IX claim. A plaintiff must prove that (a) the school had actual knowledge of discrimination based on sex; (b) the discrimination was so “severe, pervasive, and objectively offensive that it [could] be said to deprive the [plaintiff] of access to” educational opportunities; and (c) the school was deliberately indifferent to the discrimination.⁹⁷ Only institutions receiving federal funding can be liable under Title IX and there is no individual liability.⁹⁸

(1) Actual Knowledge. Federal law has not specified what level or type of official must have been informed of the discrimination or harassment to prove that the school district itself has been put on notice.⁹⁹ Courts have found that the school board itself does not necessarily need to be informed; it is sufficient for someone with the authority to address the discrimination on behalf of the school district to have been notified.¹⁰⁰ Where a plaintiff did not previously complain about discrimination to school officials, a court is unlikely to find that the school district had actual knowledge of the discrimination.¹⁰¹

(2) Severe, Pervasive, and Objectively Offensive. Courts are divided on what it means for discrimination to be so “severe, pervasive, and objectively offensive that . . . [it] deprives the [plaintiff] of access to” educational opportunities.¹⁰² Some courts have insisted that a plaintiff’s grades must suffer in order to prove that he or she was deprived of educational opportunities.¹⁰³ Other courts have suggested that a disrupted school environment¹⁰⁴ or deprivation of non-academic

95. For more information regarding religious exemptions, see Liam Stack, *Colleges Obtain Waivers to Law that Protects Transgender Students*, N.Y. TIMES (Dec. 10, 2015), <http://www.nytimes.com/2015/12/11/us/religious-colleges-obtain-waivers-to-anti-discrimination-law.html>.

96. There is a circuit split as to whether § 1983 can be used to enforce Title IX or whether Title IX’s only remedies lie in the text of the statute: the Second, Third, and Seventh Circuits hold that Title IX preempts § 1983 while the Sixth, Eighth, and Tenth circuits allow § 1983 actions to enforce Title IX. See Henkle v. Gregory, 150 F. Supp. 2d 1067, 1073 (D. Nev. 2001).

97. See Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 631 (1999); Hoffman v. Saginaw Pub. Sch., No. 12-10354, 2012 WL 2450805, at *7 (E.D. Mich. June 27, 2012).

98. Schroeder *ex rel.*; see also Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869, 879 (N.D. Ohio 2003).

99. See Doe *ex rel.*; see also Conner v. United Sch. Dist. 233, No. 12-2285-JTM, 2013 WL 3984336, at *4 (D. Kan. Aug. 1, 2013).

100. See, e.g., Schroeder, 296 F. Supp. 2d at 880.

101. A.E. *ex rel.* Evans v. Harrisburg Sch. Dist. No. 7, No. 6:11-CV-6255-TC, 2012 WL 4794314, at *3 (D. Or. filed Oct. 9, 2012).

102. See Hoffman, 2012 WL 2450805, at *7.

103. See Shaposhnikov v. Pacifica Sch. Dist., No. C 04-01288 SI, 2006 WL 931731, at *8, (N.D. Calif. Apr. 11, 2006) (finding that because plaintiff graduated with a 4.0, he was not deprived of educational opportunities, and failing to consider other metrics of educational opportunities).

104. See Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 228 (D. Conn. 2006) (discussing that Plaintiff’s grades did not drop, but students taunted her and threw objects at her during class time; she was also denied access to school counseling sessions.).

school resources, such as access to the school cafeteria or school bus, is sufficient.¹⁰⁵

(3) Deliberate Indifference. Finally, in order to satisfy the deliberate indifference requirement, the school's reaction to the discrimination must have been "clearly unreasonable."¹⁰⁶ Courts emphasize that schools are not required to "'remedy' peer harassment," but merely to respond to it appropriately.¹⁰⁷ However, what constitutes an appropriate response is largely left to the court's discretion. For example, courts in several cases have found for schools that responded to every—or almost every—allegation of harassment.¹⁰⁸ Conversely, courts have imposed liability in other cases where the school responded to allegations of harassment in a manner insufficient to stop the harassment.¹⁰⁹ The court was more likely to find for the plaintiff where the school essentially ignored a plaintiff's pleas for help or punished the plaintiff instead of their harasser.¹¹⁰

3. State Law

States have adopted varying levels of protection for students based on their sexual orientation—these protections are embedded in education laws,¹¹¹ public accommodations laws,¹¹² tort laws,¹¹³ and disability laws.¹¹⁴

a. Education Laws. Twelve states and Washington, D.C. have state-level non-discrimination laws that protect students from discrimination based on their sexual orientation,¹¹⁵ and seventeen states and Washington, D.C. prohibit discrimination or

105. *Cf.* *Montgomery v. Ind. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1094 (D. Minn. 2000).

106. *Doe ex rel. Conner v. United Sch. Dist. 233*, No. 12-2285-JTM, 2013 WL 3984336, at *7 (D. Kan. Aug. 1, 2013).

107. *Id.*

108. *See, e.g., Shaposhnikov*, 2006 WL 931731, at *7; *N.K. v. St. Mary's Springs Acad. of Fond du Lac Wis., Inc.*, 965 F. Supp. 2d 1025, 1035 (E.D. Wis. 2013).

109. *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1311 (D. Kan. 2005).

110. *Seiwert v. Spencer-Own Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007).

111. *See infra* section II.A.iii.1.

112. *See infra* section II.A.iii.2.

113. *See infra* section II.A.iii.3.

114. *See infra* section II.A.iii.4.

115. CAL. EDUC. CODE § 220 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.); COLO. REV. STAT. § 24-34-301 (West, Westlaw through Laws effective Mar. 8, 2017 of the 1st Reg. Sess. of the 71st Gen. Assembly (2017)); CONN. GEN. STAT. ANN. § 46a-75 (West, Westlaw through Gen. Statutes of Conn., Rev. of 1958, Revised to Jan. 1, 2017); D.C. CODE ANN. § 2-1402.41 (West, Westlaw through Apr. 3, 2017); 775 ILL. COMP. STAT. ANN. 5/1-102 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.); IOWA CODE ANN. § 216.9 (West, Westlaw through immediately effective legislation signed as of Apr. 7, 2017 from the 2017 Reg. Sess.); ME. REV. STAT. ANN. tit. 5 § 4601-02 (West, Westlaw through Ch. 3 of the 2017 1st Reg. Sess. of the 128th Leg.); MASS. GEN. LAWS ANN. CH. 76, § 5 (West, Westlaw through Ch. 5 of the 2017 1st Annual Sess.); MINN. STAT. ANN. § 363A.13 (West, Westlaw through ch. 14 of the 2017 Reg. Sess.); N.J. STAT. ANN. §10:5-12 (West, Westlaw through L.2017, c. 39 and J.R. No. 1); OR. REV. STAT. ANN. § 659.850 (West, Westlaw through Ch. 9 of the 2017 Reg. Sess., pending classification of undesignated material and text revision by the Or. Reviser); WASH. REV. CODE ANN. § 49.60.030 (West, Westlaw through all laws from the 2016 Reg. and Spec. Sess's. and Laws 2017, chs. 1

harassment based on gender identity in schools.¹¹⁶ While school districts may opt to forgo state funding rather than comply with anti-discrimination laws designed to protect transgender students, no school district has yet elected to do so.¹¹⁷ As in the federal context, six states exempt educational institutions controlled by religious organizations from the application of anti-discrimination laws that would not be consistent with the religious tenets of that organization.¹¹⁸

Legal challenges to anti-discrimination statutes that protect transgender students have been largely unsuccessful.¹¹⁹ In California, two plaintiffs challenged

to 4 of the Wash. leg.); WIS. STAT. ANN. § 106.58 (West, Westlaw through 2017 Act 2, published Mar. 10, 2017).

116. CAL. EDUC. CODE § 220 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.); COLO. REV. STAT. § 24-34-301 (West, Westlaw through Laws effective Mar. 8, 2017 of the 1st Reg. Sess. of the 71st Gen. Assembly (2017)); CONN. GEN. STAT. § 10-15c (West, Westlaw through Gen. Statutes of Conn., Rev. of 1958, Revised to Jan. 1, 2017); D.C. CODE § 2-1402.41 (West, Westlaw through Apr. 3, 2017); 6 DEL. CODE ANN. § 4503 (West, Westlaw through 81 Laws 2017, ch. 2. Revisions to 2017 Acts by the Del. Code Revisors were unavailable at the time of publication); IOWA CODE ANN. § 216.9 (West, Westlaw through immediately effective legislation signed as of Apr. 7, 2017 from the 2017 Reg. Sess.); MASS. GEN. LAWS Ch. 76, § 5 (West, Westlaw through Ch. 5 of the 2017 1st Annual Sess.); MINN. STAT. § 121A.031 (West, Westlaw through ch. 14 of the 2017 Reg. Sess.); N.J. STAT. ANN. 18A:37-14 (West, Westlaw through L.2017, c. 39 and J.R. No. 1); N.M. STAT. ANN. § 28-1-2 (West, Westlaw through Ch. 137 of the 1st Reg. Sess., 53rd Leg.); N.Y. EDUC. LAW §§ 11, 16 (West, Westlaw through L.2017, chs. 1 to 23); N.C.G.S.A. § 115C-407.15 (West, Westlaw through the end of the 2016 Reg. Sess., with the addition of S.L. 2016-126 from the 2016 4th Extra Sess. and through 2017-2 of the 2017 Reg. Sess. of the Gen. Assembly); OR. REV. STAT. ANN. §§ 174.100, 659.850 (West, Westlaw through Ch. 9 of the 2017 Reg. Sess., pending classification of undesignated material and text revision by the Or. Reviser); R. I. Gen. Laws 1956, § 11-24-2.1 (West, Westlaw through Ch. 542 of the Jan. 2016 Sess.); VT. STAT. ANN. tit. 16, § 11 (West, Westlaw through Law No. 6 of the 1st Sess. of the 2017–18 Vt. Gen. Assembly (2017)); WASH. REV. CODE §§ 49.60.040(2), 49.60.215 (West, Westlaw through all laws from the 2016 Reg. and Spec. Sess.'s. and Laws 2017, chs. 1 to 4 of the Wash. leg.); Doe v. Reg'l Sch. Unit 26, 86 A.3d 600, 605 (Me. 2014) (interpreting ME. REV. STAT. ANN. tit. 5, §§ 4552, 4553, subd. § 9-C, 4602) (interpreting laws that prohibit discrimination on the basis of sex as protecting one's gender identity as well as one's biological sex).

117. Cf. *Calif. Sch. System Fights Transgender Law: Orange Cnty District Risks Millions in State Funds*, NBC NEWS (Mar. 31, 2004), http://www.nbcnews.com/id/4639907/ns/us_news/t/calif-school-system-fights-transgender-law/. The California Education Superintendent eventually approved a definition of “sex discrimination” passed by the Westminster School District to avoid defunding the school, although he emphasized that “gender identity” does not include “perceived identity” and that the school district had a duty to address complaints of discrimination. See Mason Stockstill, *Education Official Says Westminster School's Gender Policy is OK*, SAN DIEGO UNION-TRIBUNE (Apr. 19, 2004), <http://legacy.utsandiego.com/news/state/20040419-1812-ca-transgenderrights.html>.

118. CAL. EDUC. CODE § 221 (West, Westlaw current with emergency legislation through Ch. 4 of 2017 Reg.Sess.); CONN. GEN. STAT. § 46a-81aa (West, Westlaw through Gen. Statutes of Conn., Rev. of 1958, Revised to Jan. 1, 2017); 775 ILL. COMP. STAT. 5/5-101(A)(11) (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.); IOWA CODE ANN. § 216.9 (West, Westlaw through immediately effective legislation signed as of Apr. 7, 2017 from the 2017 Reg. Sess.); N.M. STAT. ANN. § 28-1-9 (West, Westlaw through Ch. 137 of the 1st Reg. Sess., 53rd Leg.); N.Y. EDUC. LAW § 17 (West, Westlaw through L.2016, chs. 1 to 23).

119. See Tyler Brown, Note, *The Dangers of Overbroad Transgender Legis., Case Law, and Policy in Educ.: California's AB 1266 Dismisses Concerns About Student Safety and Privacy*, 2014 BYU EDUC. & L.J. 287, 297–311 (2014).

sections 220 and 210.7 of the California Education Code.¹²⁰ The plaintiffs argued that the California Legislature had “recklessly abandon[ed] the traditional understanding of biological sex in favor of an elusive definition that is unconstitutionally vague,” and alleged that the laws violated non-transgender students’ privacy and safety rights under the California Constitution by permitting transgender students to use gender-corresponding restrooms.¹²¹ The court dismissed the plaintiffs’ suit, finding that the complaint failed “to allege any invasion of privacy” and that the alleged safety concerns were “conclusory and . . . unsupported.”¹²²

b. State Public Accommodations Laws. Six states and Washington, D.C. have enacted public accommodations laws that prohibit discrimination based on sexual orientation and apply explicitly to schools.¹²³ Another twelve states’ public accommodations laws prohibit discrimination based on sexual orientation and could be interpreted to apply to schools.¹²⁴ The public accommodations laws of California,¹²⁵ Maine,¹²⁶ Minnesota,¹²⁷ and

120. *See* Cal. Educ. Comm. v. O’Connell, No. 34-2008-00026507-CU-CR-GDS (Cal. Super Ct. 2009), http://www.lambdalegal.org/in-court/legal-docs/ca-education-committee_ca_20090601_final-ruling-demurrer-granted.

121. Jennifer Johnson, *Transgender Youth in Public Schools: Why Identity Matters in the Restroom*, 40 WM. MITCHELL L. REV. 63, 79 n.82 (2014) (citing First Amended Complaint for Declaratory & Injunctive Relief at 2, 10, Cal. Educ. Comm. v. O’Connell, No. 37-2008-00077546-CU-CRCTL).

122. *Id.* at 80 n.85 (citing Minute Order at 3, Cal. Educ. Comm. L.L.C. v. O’Connell, No. 34-2008-00026507-CU-CR-GDS).

123. COLO. REV. STAT. ANN. § 24-34-601 (West, Westlaw through Laws effective Mar. 8, 2017 of the 1st Reg. Sess. of the 71st Gen. Assembly (2017)); D.C. CODE ANN. §§ 2-1402.01, 2-1402.31 (West, Westlaw through Apr. 3, 2017); 775 ILL. COMP. STAT. ANN. 5/1-102 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.); IOWA CODE ANN. §§ 216.7, 216.2 (West, Westlaw through immediately effective legislation signed as of Apr. 7, 2017 from the 2017 Reg. Sess.); N.J. STAT. ANN. §§ 10:5-5, 10:5-12 (West, Westlaw through L.2017, c. 39 and J.R. No. 1); VT. STAT. ANN. tit. 9, §§ 4501-02 (West, Westlaw through Law No. 6 of the 1st Sess. of the 2017–18 Vt. Gen. Assembly (2017)); WASH. REV. CODE ANN. §§ 49.60.215, 49.60.40 (West, Westlaw through all laws from the 2016 Reg. and Spec. Sess.’s. and Laws 2017, chs. 1 to 4 of the Wash. leg.).

124. CAL. CIV. CODE § 51 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.); 6 DEL. CODE ANN. § 4504 (West, Westlaw through 81 Laws 2017, ch. 2); HAW. REV. STAT. ANN. § 489-3 (West, Westlaw through Act 1 (End) of the 2016 2d Spec. Sess.); ME. REV. STAT. ANN. tit. 4 § 4591-92 (West, Westlaw through Ch. 3 of the 2017 1st Reg. Sess. of the 128th Leg.); MD. CODE ANN., STATE GOV’T § 20-301 (West, Westlaw through Chs. 1 to 3, 10, 11, 76, 77, 81, 87, 127, 134, 135, 137, 141 & 142 from the 2017 Reg. Sess. of the Gen. Assembly); MASS. GEN. LAWS ANN. Ch. 272, §§ 92A, 98 (West, Westlaw through Ch. 5 of the 2017 1st Annual Sess.); MINN. STAT. ANN. § 363A.11 (West, Westlaw through ch. 14 of the 2017 Reg. Sess.); N.H. REV. STAT. ANN. §§ 354-A:2, A:17 (West, Westlaw through Ch. 7 of the 2017 Reg. Sess., not including changes and corrections made by the State of N.H., Office of Legislative Servs.); N.M. STAT. ANN. § 28-1-7 (West, Westlaw Ch. 137 of the 1st Reg. Sess., 53rd Leg.); OR. REV. STAT. ANN. §§ 659A.400, 03 (West, Westlaw through Ch. 9 of the 2017 Reg. Sess., pending classification of undesignated material and text revision by the Or. Reviser); 11 R.I. GEN. LAWS ANN. §§ 11-24-2.3 (West, Westlaw through Ch. 542 of the Jan. 2016 Sess.); VT. STAT. ANN. tit. 9, §§ 4501-02 (West, Westlaw through Law No. 6 of the 1st Sess. of the 2017–18 Vt. Gen. Assembly (2017)); WIS. STAT. ANN. § 106.52 (West, Westlaw through 2017 Act 2, published Mar. 10, 2017).

125. *See* Walsh v. Tehachapi Unified Sch. Dist., 827 F. Supp. 2d 1107, 1123 (E.D. Cal. 2011).

126. *See* Doe v. Reg’l Sch. Unit 26, 86 A.3d 600, 605 (Me. 2014).

127. *See* Montgomery v. Ind. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1087–88 (D. Minn. 2000).

Washington¹²⁸ have already been interpreted to protect LGBTQ youth in schools; the remaining states' public accommodations laws remain untested.

State laws may afford greater protections or preferred remedies to plaintiffs; for example, rather than adhere to the stringent liability requirements for Title IX, the New Jersey Superior Court's Appellate Division decided that its Law Against Discrimination should follow the same rubric as their more plaintiff-friendly requirements for a hostile work environment claim.¹²⁹

c. State Tort Law. Finally, plaintiffs seeking redress for gender identity or sexual orientation-based discrimination in schools have alleged a number of tort law violations with varying levels of success; for example, plaintiffs have been able to state claims in various forums for negligence,¹³⁰ bystander emotional distress,¹³¹ and negligent infliction of emotional distress,¹³² although these claims are not universally successful.¹³³ Plaintiffs have been less successful when alleging intentional infliction of emotional distress.¹³⁴

d. State Disability Law. Like the federal disability laws, most state disability rights laws either explicitly exclude gender identity disorder or exclude it through judicial interpretation.¹³⁵ However, state courts in Massachusetts, New Jersey, and New York have extended state disability protections to transgender people.¹³⁶

B. TRANSITIONING IN SCHOOLS

While occupying a relatively small place in the published opinions of federal and state courts, transgender students face major challenges to accessing public education.¹³⁷

128. See *Davis v. Fred's Appliance, Inc.*, 287 P.3d 51, 57 (Wash. Ct. App. 2012) (noting that the Washington Law Against Discrimination prohibits discrimination based on sexual orientation but holding that "perceived sexual orientation" is not a protected class under the statute).

129. *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 886 A.2d 1090, 1102–04 (N.J. Super. Ct. App. Div. 2005).

130. See, e.g., *A.E. ex rel. Evans v. Harrisburg Sch. Dist. No. 7*, No. 6:11-CV-6255-TC, 2012 WL 4794314, at *4 (D. Or. Oct. 9, 2012); *Seiwert v. Spencer-Own Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 956 (S.D. Ind. 2007).

131. See *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1126 (E.D. Cal. 2011).

132. See *Seiwert*, 497 F. Supp. 2d at 957.

133. See *Walsh*, 827 F. Supp. 2d at 1124–25.

134. See, e.g., *Evans*, 2012 WL 4794314, at *4; *Seiwert*, 497 F. Supp. 2d at 956–57.

135. DEREK BLACK, EDUC. LAW: EQUALITY, FAIRNESS AND REFORM 465 (2013).

136. See *Lie v. Sky Publ'g Corp.*, No. 013117J, 2002 WL 31492397, at *7, 2002 Mass. Super LEXIS 402 (Mass. Super. Ct. Oct. 7, 2002); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 376 (N.J. Super. Ct. App. Div. 2001); *Doe v. Bell*, 754 N.Y.S.2d 846, 851 (N.Y. Sup. Ct. 2003); see also *Smith v. City of Jacksonville Corr. Inst.*, No. 88-5451, 1991 WL 833882, at *14, 2012 U.S. Dist. LEXIS 33461 (Fla. Div. Admin. Hrgs. Oct. 2, 1991) (holding that GID is within the disability coverage of the Florida Human Rights Act, as well as the portions of the Act prohibiting discrimination based on perceived disability).

137. Reports from advocates who work directly with transgender youth provide helpful insight into the experiences of transgender youth. See *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys, Gender Identity in U.S.*

Many schools are unprepared to address the privacy and affirmation needs of transgender students, and some school policies may be outright hostile to transgender students.¹³⁸ The section below describes common challenges transgender students face in gaining recognition and acceptance from their schools.¹³⁹

1. Required Documentation of Transition

One of the first hurdles transgender students often face when transitioning in school is providing their school with the required documentation of their gender identity. However, in May of 2016, the civil rights divisions of the Department of Justice and Department of Education jointly issued a Dear Colleague Letter (DCL) which provides helpful guidance on schools' Title IX legal obligations regarding transgender students.¹⁴⁰ The DCL states that Title IX requires a school to treat a student consistently with the student's gender identity once the student or the student's parent or guardian "notifies the school administration that the student will assert a gender identity that differs from previous representations or records."¹⁴¹ The DCL specifies that "there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity."¹⁴² A policy requiring full sexual reassignment surgery or genital surgery as a prerequisite for recognition of transition would in many cases act as a *de facto* ban on recognition because some transgender students are unable to obtain sex reassignment surgery due to a lack of funds, age, contraindicating health

Surveillance Group, UCLA SCH. OF L. WILLIAMS INST. 2 (Sept. 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/geniuss-report-sep-2014.pdf>. As highlighted in a recent report, there is a lack of population-based data about transgender people, including transgender youth.

138. See Joseph G. Kosciw et al., *Educational Exclusion: Drop Out, Push Out, and the School-to-Prison Pipeline Among LGBTQ Youth*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK 13 (2016), http://www.glsen.org/sites/default/files/Educational%20Exclusion_Report_6-28-16_v4_WEB_READY_PDF.pdf.

139. Transgender youth typically cannot pursue a gender transition without coming out as transgender. See STUART BIEGEL, *THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS* 178–79 (Univ. of Minn. Press, 1st ed. 2010) [hereinafter *RIGHT TO BE OUT*]. Once they begin presenting differently, they are immediately out to those who knew them previously. *Id.* Transgender youth may not wish to come out; rather, some may choose to transfer schools to pursue gender transition, or to leave home. *Id.*; see also Asaf Ort et al., *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools*, GENDER SPECTRUM 15 (2015), <https://www.hrc.org/resources/schools-in-transition-a-guide-for-supporting-transgender-students-in-k-12-s>.

140. U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., *DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS* 1 (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [hereinafter U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST.]. (But note that the Trump Administration later decided to rescind the DCL, resulting in backlash from groups like the Consortium of Higher Education LGBT Resource Professionals. See *Statement on White House Rescinding Dear Colleague Letter on Trans Inclusion*, CONSORTIUM OF HIGHER EDUCATION LGBT RESOURCE PROFESSIONALS, https://www.lgbtcampus.org/index.php?option=com_content&view=article&id=122:statement-on-white-house-rescinding-dear-colleague-letter-on-trans-inclusion&catid=21:press-releases&Itemid=124.)

141. U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., *supra* note 140, at 2.

142. *Id.*

conditions,¹⁴³ or personal choice.¹⁴⁴ With respect to sex-segregated activities, the DCL explains that Title IX prohibits schools from adopting requirements that “rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students.”¹⁴⁵ Federal funding is conditional on compliance with Title IX.¹⁴⁶

After its publication, federal courts were left to grapple with whether the DCL guidelines should be given deference, and they came to different conclusions.¹⁴⁷ On October 28, 2016, the Supreme Court granted certiorari on this issue in *G.G. ex rel. Grimm v. Gloucester County School Board*.¹⁴⁸ Grimm, a transgender high school student, alleged that his school’s policy requiring students to use the bathroom corresponding to the sex assigned to them at birth constituted discrimination based on sex, which is a violation of Title IX.¹⁴⁹ On March 6, 2017, the Supreme Court vacated the judgment and remanded the case to the United States Court of Appeals for the Fourth Circuit for reconsideration in light of the new DCL guidelines.¹⁵⁰ The Fourth Circuit concluded that, as to the question of whether Title IX protections extend to bathroom policies that prohibit transgender students from using the bathroom corresponding to their gender identification, “the answer is resoundingly yes.”¹⁵¹ The school board appealed and the Supreme Court denied certiorari on June 28, 2021, allowing the Fourth Circuit’s decision to stand.¹⁵²

2. Schools’ Duties

a. Names and Pronouns. Experts emphasize that it is very important for transgender youth to have their gender recognized and validated.¹⁵³ For example,

143. See RIGHT TO BE OUT, *supra* note 139, at 179.

144. See, e.g., *id.* at 175.

145. U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUST., *supra* note 140, at 3.

146. *Id.* at 1.

147. In August 2016, the United States District Court for the Middle District of Texas granted a preliminary injunction, enjoining the United States from enforcing the DCL guidelines against Texas schools. *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. Aug. 2016). The court held that the DCL guidelines were not a reasonable interpretation of “the plain meaning of the term sex as used in [34 C.F.R.] § 106.33.” *Id.* at 832–33. However, the Fourth Circuit overturned a similar ruling, finding that the DCL guidelines are entitled to deference. *Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016).

148. *Grimm*, 822 F.3d 709, *cert. granted* 136 S. Ct. 2442 (2016); see also *G.G. v. Gloucester Cnty. Sch. Board*, ACLU, <https://www.aclu.org/cases/gg-v-gloucester-county-school-board> (last updated Oct. 28, 2016); see Kristian Foden-Vencil, *In Oregon, Medicaid Now Covers Transgender Medical Care*, NPR (Jan. 12, 2015), <http://www.npr.org/sections/health-shots/2015/01/10/376154299/in-oregon-medicaid-now-covers-transgender-medical-care>.

149. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 593 (Aug. 2020).

150. *Gloucester Cty. Sch. Bd. v. Grimm*, 137 S. Ct. 1239, 1239 (2017).

151. *Grimm*, 972 F.3d at 593.

152. *Gloucester Cty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878, 2878 (2021) (Justices Alito and Thomas dissenting).

153. See, e.g., *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, AM. PSYCHOLOGICAL ASS’N 840 (2015), <https://www.apa.org/practice/guidelines/transgender.pdf>.

chosen name use is associated with decreased depressive symptoms and suicidal ideation among transgender youth.¹⁵⁴ However, forty-two percent of transgender students surveyed by the Gay, Lesbian & Straight Education Network (GLSEN) reported that they were prevented from using their preferred name in school.¹⁵⁵ Advocacy groups argue that if transgender persons are to be protected from discrimination, they should have the right to be addressed by the name and pronouns that correspond with their identity.¹⁵⁶ The Department of Justice and Department of Education previously asserted under the now-rescinded DCL that under Title IX, “a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex.”¹⁵⁷ The three largest school districts in the United States—New York City, Los Angeles, and Chicago—have already acknowledged the right of transgender students to be addressed by the name and pronouns that correspond with their identity.¹⁵⁸

b. Access to Sex-Segregated Spaces. Transgender students face serious safety concerns when attempting to use gender-corresponding, sex-segregated spaces.¹⁵⁹ In particular, transgender activists have noted increased risks in bathroom facilities where other bathroom users aggressively police sex segregation.¹⁶⁰ GLSEN reported that fifty-nine percent of the transgender students they surveyed were required to use the bathroom or locker room of their legal sex while in school.¹⁶¹ However, an increasing number of schools and districts have adopted policies

154. Stephen Russell et al., *Chosen Name Use is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior Among Transgender Youth*, J. ASOLESC. HEALTH (Oct. 2018).

155. Kosciw, *supra* note 138, at 14.

156. See *Best Practices for Serving Transgender and Gender Nonconforming Students in Schools*, MASS. TRANSGENDER POLITICAL COAL. POL’Y COMM. (Nov. 2012), <https://www.masstpc.org/wp-content/uploads/MTPC-2013-K-12-Best-Practices.pdf>; *Fact Sheet: Transgender & Gender Nonconforming Youth in Schools*, SYLVIA RIVERA L. PROJECT (2015), <http://srp.org/resources/fact-sheet-transgender-gender-nonconforming-youth-school/>; see, e.g., *Model District Policy on Transgender and Gender Nonconforming Students: Model Language, Commentary & Resources*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK & NAT’L CTR. FOR TRANSGENDER EQUALITY 6 (2014), https://www.glsen.org/sites/default/files/2020-04/Trans_ModelPolicy_2014.pdf.

157. U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, *supra* note 140, at 3.

158. See *Guidelines to Support Transgender and Gender Expansive Students*, N.Y.C. DEP’T OF EDUC., <https://www.schools.nyc.gov/school-life/school-environment/guidelines-on-gender/guidelines-to-support-transgender-and-gender-expansive-students> (last visited Oct. 31, 2021); *Transgender Students—Ensuring Equity and Nondiscrimination*, L. A. UNIFIED SCH. DIST., 5 (Aug. 20, 2014), <https://achieve.lausd.net/cms/lib08/CA01000043/Centricity/Domain/381/Transgender%20Students%20-%20Ensuring%20Equity%20and%20Nondiscrimination.pdf>; *CPS Guidelines Regarding the Support of Transgender and Gender Nonconforming Students*, CHI. PUB. SCH., 4-5, https://www.cps.edu/globalassets/cps-pages/services-and-supports/health-and-wellness/healthy-cps/healthy-environment/lgbtq-supportive-environments/guidelines_regarding_supportoftransgenderand-gender_nonconforming_students_july_2019.pdf (last visited Feb. 11, 2022).

159. See Tara Mateik, *Toilet Training: Law and Order in the Bathroom*, <https://vimeo.com/85470055> (last visited Feb. 11, 2022); *Equal Access to Public Restrooms*, LAMBDA LEGAL 1 (2011), http://www.lambdalegal.org/sites/default/files/2015_equal-access-to-public-restrooms-fs-v4-singlepages.pdf.

160. *Equal Access to Public Restrooms*, *supra* note 159, at 1.

161. Kosciw, *supra* note 138, at 14.

that allow transgender students to use sex-segregated facilities in accordance with their gender identity.¹⁶²

The Department of Justice argued in *Grimm* that transgender high school students should be able to use school restrooms that match their gender identity and should not be forced by the school to use the restroom that matches their physical characteristics.¹⁶³ The Fourth Circuit held that the Department of Education's interpretation of its Title IX regulation, which instructed schools to treat transgender students consistent with their gender identity in the case of a transgender individual using a sex-segregated facility, was entitled to deference.¹⁶⁴ The Supreme Court stayed the Fourth Circuit's decision to reverse the District Court's dismissal of the plaintiff's Title IX claim; the Supreme Court granted certiorari to hear the case during the 2016-2017 Term, at which time the decision was vacated and remanded to the Fourth Circuit.¹⁶⁵ The Fourth Circuit concluded that Title IX does protect transgender students from school policies preventing them from using the bathroom that corresponds to their gender identification.¹⁶⁶ The school board appealed, but the Supreme Court denied certiorari.¹⁶⁷

Additionally, in a settlement with Arcadia Unified School District, the federal government requested that schools consider transgender students' occasional increased desire for privacy, by making single-use restrooms and changing facilities available for transgender students when such a preference is expressed.¹⁶⁸ Further, in a now-rescinded joint guidance letter, the Department of Justice and Department of Education stated that the correct interpretation of Title IX requires that schools allow transgender students access to restrooms and locker rooms consistent with their gender identity.¹⁶⁹

Transgender students have brought lawsuits against states that have tried to impede their right to use the bathroom that corresponds with their gender identity through legislation.¹⁷⁰ North Carolina received significant public attention following former Governor Patrick McCrory's signing House Bill 2 into law on March 23, 2016.¹⁷¹ As a result of House Bill 2, North Carolina boards of

162. See Alia Wong, *The K-12 Binary*, THE ATLANTIC (July 9, 2015), <http://www.theatlantic.com/education/archive/2015/07/the-k-12-binary/398060/>.

163. Statement of Interest of the United States, *Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 717 (4th Cir. 2016).

164. *Id.* at 721.

165. Statement of Interest of the United States, *Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 717 (4th Cir. 2016), *cert. granted* 136 S. Ct. 2442 (2016).

166. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 593 (Aug. 2020).

167. Orion Rummeler, *Supreme Court Won't Rule on Transgender Bathroom Access in Schools*, THE 19TH (July 3, 2021), <https://ctmirror.org/2021/07/03/supreme-court-wont-rule-on-transgender-bathroom-access-in-schools/>.

168. Arcadia Settlement, *supra* note 85, at 3.

169. U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, *supra* note 133, at 3.

170. See *e.g.*, *Mathis v. Fountain-Fort Carson Sch. Dist.* No. 8, Charge No. P20130034X, (Colo. C. R. Div. 2013).

171. Tal Kopan & Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN, Mar. 24, 2016, <http://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/>.

education had to require every multiple occupancy bathroom to be used only by students whose biological sex, as stated on their birth certificate, corresponded with the gender designation for the bathroom.¹⁷² The Department of Justice sued, alleging that the bill violated the Violence Against Women Act, Title IX, and Title VII of the Civil Rights Act.¹⁷³ The District Court for the Middle District of North Carolina enjoined the United States from cutting off federal funding to North Carolina for violating these acts, pending an outcome on the merits of the case.¹⁷⁴ In *Carcaño v. McCrory*, individuals and civil liberties organizations, including the American Civil Liberties Union (ACLU), brought an action against Governor McCrory, alleging that House Bill 2 discriminated against LGBTQ people in violation of Title IX.¹⁷⁵ This suit was filed on behalf of Joaquin Carcaño, a transgender man who worked at the University of North Carolina at Chapel Hill and was denied use of the male bathroom.¹⁷⁶ The court issued a preliminary injunction, enjoining the University of North Carolina from enforcing House Bill 2 on the grounds that DOE's guidance regarding "sex" should be given deference.¹⁷⁷ Eventually, following widespread criticism, North Carolina's HB2 was repealed.¹⁷⁸

Additional lawsuits have been filed in other states in which schools have enacted similar biological sex restrictions for bathroom use; for example, Coy Mathis, a first-grader attending a public school who was assigned male at birth but identified as female, filed a complaint with the Colorado Civil Rights Division after her school principal informed her parents that she would no longer be permitted to use the girls' restroom.¹⁷⁹ During kindergarten, Coy had been allowed to use the girls' restroom, line up with the girls at recess, wear girls' clothing, and was referred to by staff and faculty as a girl.¹⁸⁰ The Colorado Civil Rights Division found that the school's refusal to allow Coy continued use of the girls' restroom created "an environment rife with harassment and inapposite to a nurturing school atmosphere."¹⁸¹ It held "telling [Coy] that she must disregard her identity while performing one of the most essential human functions

172. N.C. GEN. STAT. § 115C-521.2(b) (West, Westlaw through the end of the 2016 Reg. Sess., with the addition of S.L. 2016-126 from the 2016 4th Extra Sess. and through 2017-2 of the 2017 Reg. Sess. of the Gen. Assembly).

173. *United States v. North Carolina*, 192 F.Supp.3d 620, 622 (M.D.N.C. 2016).

174. *Id.*

175. *Carcaño v. McCrory*, 315 F.R.D 176, 177 (M.D.N.C. 2016).

176. Complaint at 4, 12, 55, *Carcaño v. McCrory*, 315 F.R.D 176, 177 (M.D.N.C. 2016) (No. 1:16-cv-236).

177. *Carcaño*, 315 F.R.D. at 179.

178. Jason Hanna et al., *North Carolina Repeals 'Bathroom Bill,'* CNN POLITICS (Mar. 30, 2017), <https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html>.

179. Sunnive Brydum, *Not So Elementary: A Trans Student's Fight With Her School*, THE ADVOCATE, Apr. 5, 2013, <https://www.advocate.com/print-issue/current-issue/2013/04/05/not-so-elementary-trans-students-fight-her-school>.

180. *Id.*

181. Mathis, *supra* note 170, at 12–13.

constitutes severe and pervasive treatment, and creates an environment that is objectively and subjectively hostile, intimidating or offensive.”¹⁸²

States continue to pass legislation of this type; for example, in May 2021, Tennessee Governor Bill Lee signed legislation into law that allows students, parents, and employees to sue public school districts for “psychological, emotional, and physical harm suffered” if transgender students or staff are permitted to use multi-person bathrooms or locker rooms that do not reflect the sex they were assigned at birth.¹⁸³ Soon after, Governor Lee signed a second bill into law requiring businesses and government facilities open to the public to put up a sign informing customers if transgender people are permitted to use multi-person restrooms.¹⁸⁴ The Human Rights Campaign has filed a federal lawsuit against Tennessee over the school bathroom measure on behalf of two transgender students, alleging that the statute violates Title IX.¹⁸⁵ Similarly, the American Civil Liberties Union has challenged the law requiring signs to be posted in businesses that allow transgender customers to utilize multi-person restrooms.¹⁸⁶

c. Participation in Sports. Title IX regulations allow schools to provide separate athletic opportunities to students of each sex, so long as the programs offer equivalent numbers of opportunities to members of each sex and the programs are of equal quality.¹⁸⁷ Schools often exclude transgender students from gender-corresponding physical education classes and participation in sports.¹⁸⁸ For example, Mississippi enacted Senate Bill 2536, more commonly known as the “Mississippi Fairness Act” in March of 2021.¹⁸⁹ This bill *requires* public schools to have separate sports teams based on biological sex, due to what the Mississippi legislature called the “inherent differences between men and women.” Policies like this can have significant negative impacts on transgender students’ academic performance because physical education is a graduation requirement in many

182. *Id.* at 12.

183. *Tennessee Governor Signs Transgender ‘Bathroom Bill’ For Schools*, NBC NEWS (May 18, 2021, 11:53 AM), <https://www.nbcnews.com/nbc-out/out-news/tennessee-gov-signs-transgender-bathroom-bill-schools-rcna953>.

184. Kimberlee Kruesi & Jonathan Mattise, *Tennessee Bill Mandating Bathroom Signs Called ‘Humiliating’ for Transgender People*, THE TENNESSEAN, May 20, 2021, <https://www.tennessean.com/story/news/politics/2021/05/19/tennessee-law-requires-signs-transgender-bathroom-use-allowed/5161761001/>.

185. Kimberlee Kruesi, *Tennessee Sued Over Transgender ‘Bathroom Bill’ For Public Schools*, PBS NEWS HOUR, Aug. 3, 2021, <https://www.pbs.org/newshour/education/tennessee-sued-over-transgender-bathroom-bill-for-public-schools>.

186. *Id.*; Ashley Sharp, *Tennessee Transgender Bathroom Bill Put on Pause Due to Ongoing Lawsuit*, WJHL, July 12, 2021, <https://www.wjhl.com/news/local/tennessee-transgender-bathroom-bill-put-on-pause-due-to-ongoing-lawsuit/>.

187. 34 C.F.R. § 106.41 (West, Westlaw through Oct. 22, 2021; 86 FR 58596).

188. See Erin E. Buzovis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L.1, 2–3 (2011).

189. Miss. S.B. 2536 (NS) (2021).

states.¹⁹⁰ Additionally, exclusion from school athletic teams diminishes transgender students' ability to obtain athletic scholarships for higher education.¹⁹¹

However, some states do have more progressive policies; fifteen states as well as the District of Columbia have statewide athletic association guidance that is specifically inclusive of transgender students.¹⁹² Connecticut and Massachusetts, for example, have both analyzed how their states' statutory bans on gender identity based discrimination apply to sex-segregated athletics.¹⁹³ The Massachusetts Department of Elementary and Secondary Education promulgated regulations that give students the right to play on a male or female team, consistent with the students' gender identity.¹⁹⁴ Similarly, the Connecticut Commission on Human Rights and Opportunities has interpreted its anti-discrimination statute to allow students to pursue athletic opportunities in a manner consistent with their gender identity.¹⁹⁵ Likewise, the Florida High School Athletic Association's Administrative Policies state that "all eligible students should have the opportunity to participate in interscholastic athletics in a manner that is consistent with their gender identity and expression, irrespective of the gender listed on a student's birth certificate and/or records."¹⁹⁶ Other states, including California, Connecticut, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Oregon, Vermont, and Washington have similar policies allowing students to participate in sports teams consistent with their gender identity, without regard to what their birth certificate might say.¹⁹⁷

190. See *State School Health Policy Database: Physical Education and Activity*, NAT'L ASS'N OF ST. BD. OF EDUC., <https://statepolicies.nasbe.org/> (last visited Feb. 10, 2022).

191. Approximately fifty-seven percent of Division I athletes and sixty-three percent of Division II athletes receive some level of athletics-related financial aid. NCAA Recruiting Facts, NAT'L COLLEGIATE ATHLETIC ASSOC., Aug. 2020, https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf.

192. Shoshana K. Goldberg & Thee Santos, *Fact Sheet: The Importance of Sports Participation for Transgender Youth*, CTR. FOR AM. PROGRESS (Mar. 18, 2021, 1:14 PM), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/03/18/497336/fact-sheet-importance-sports-participation-transgender-youth/>.

193. See 603 MASS. CODE REGS. 26.05(3) (2021); *Guidelines for Conn. Schools to Comply with Gender Identity & Expression Non-Discrimination Laws*, CONN. SAFE SCH. COALITION, Feb. 2017, 8–9, https://www.ctschoollaw.com/files/2017/02/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf (last visited Feb. 10, 2022).

194. 603 MASS. CODE REGS. 26.06 (2021); see also Memorandum from Mitchell Chester, Comm'r, Mass. Dep't of Elementary and Secondary Educ., to Educ. Members of the Bd. of Elementary and Secondary Educ. (June 19, 2012) ("Excluding a transgender student from a team that does not match the gender listed on the student's birth records would constitute unlawful discrimination on the basis of gender identity.").

195. *Guidelines for Conn. Schools to Comply with Gender Identity & Expression Non-Discrimination Laws*, *supra* note 193, at 32.

196. *Bylaws of the Florida High School Athletic Association, Inc. 2019-2020 Edition*, FHSAA, https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_17131865a24d4817b9b1ebbbc7eec045.pdf.

197. *Policies By State*, TRANSATHLETE, <https://www.transathlete.com/k-12> (last Accessed Nov. 1, 2021).

Four state athletic associations, which are authorized by state governments to organize athletics programs in public elementary and secondary schools,¹⁹⁸ have policies that require transgender students to participate on the sports team that aligns with the sex listed on their birth certificate.¹⁹⁹ In these states, sex reassignment surgery is required to alter one's birth certificate, making their policy a *de facto* ban on gender-corresponding sports participation for transgender youth.²⁰⁰ For example, the Kentucky High School Athletic Association requires transgender athletes to have sex-reassignment surgery before they are eligible to compete on a gender-corresponding team.²⁰¹ Additionally, the Idaho High School Activities Association policy requires hormone treatment for more than a year before a male-to-female student athlete is allowed to compete on a girls' team.²⁰²

Critics of transgender students' participation in school athletics programs argue that cisgender female athletes will be robbed of fair opportunities to compete.²⁰³ The National Collegiate Athletics Association (NCAA) has responded to these concerns, stating:

[These concerns] are based on three assumptions: one, that transgender women are not "real" women and therefore not deserving of an equal

198. State athletic associations are nonprofit organizations that promulgate rules for inter-school athletic competitions. Federal courts have widely held these organizations to be state actors. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298–99 (2001); *see also* Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n, 483 F.3d 1025, 1030–31 (10th Cir. 2007); *Dennin v. Conn. Interscholastic Athletic Conf., Inc.*, 913 F. Supp. 663, 670 (D. Conn. 1996), *vacated on other grounds*, 94 F.3d 96 (2d Cir. 1996); *Johnson v. Fla. High Sch. Activities Ass'n, Inc.*, 899 F. Supp. 579, 583 (M.D. Fla. 1995), *vacated on other grounds*, 102 F.3d 1172 (11th Cir. 1997); *Sandison v. Mich. High Sch. Athletic Ass'n*, 863 F. Supp. 483, 487 (E.D. Mich. 1994), *rev'd in part, appeal dismissed in part, on other grounds*, 64 F.3d 1026 (6th Cir. 1995); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 857 F. Supp. 654, 661–62 (E.D. Mo. 1994), *rev'd on other grounds*, 40 F.3d 926 (8th Cir. 1994). *But see* *Yanero v. Davis*, 65 S.W.3d 510, 530 (Ky. 2002).

199. *See Case Studies 2012–13*, ALA. HIGH SCH. ATHLETIC ASSOC., http://media.wix.com/ugd/2bc3fc_87536da66cad4d6195ae056a573e67da.pdf (last visited Feb. 10, 2022); *GHSAA Constitution and By-Laws for 2021–2022*, GEORGIA HIGH SCH. ASS'N. 16, <https://www.ghsa.net/sites/default/files/documents/Constitution/Constitution21-22completecx26.pdf> (last visited Feb. 10, 2022); *NCHSAA Handbook 2021–2022*, https://www.nchsaa.org/sites/default/files/attachments/2020-2021_NCHSAA_Handbook_Section1_0.pdf (last accessed Feb. 10, 2022); *New Mexico Activities Association Handbook: Section 6 (Eligibility)*, N.M. ACTIVITIES ASS'N., https://www.nmact.org/file/Section_6.pdf (July 18, 2019) (last visited Feb. 10, 2022).

200. *See* ALA. CODE § 22-9A-19(d) (West, Westlaw through 2021 Reg. Sess.); GA. CODE ANN. § 31-10-23(e) (West, Westlaw through 2021 Reg. Sess.); N.M. STAT. ANN. § 24-14-25(D) (West, Westlaw through 1st Reg. Sess., 55th Leg.); N.C. GEN. STAT. § 130A-118(b) (West, Westlaw through S.L. 2021-105, 2021-113, and 2021-140 from the 2021 Reg. Sess. of the Gen. Assembly). For further discussion of the major challenges transgender youth face seeking sex reassignment surgery, *see supra* Section II.B.1.

201. 2019–2020 *Kentucky High School Athletic Ass'n Handbook: Policies and Procedures: Transgender Participation*, KY. HIGH SCH. ATHLETIC ASS'N, https://khsaa.org/common_documents/handbook/policies/policies-transgenderpolicy.pdf (last visited Feb. 11, 2022).

202. *Rules and Regulations 2019-2020*, IDAHO HIGH SCH. ACTIVITIES ASS'N, https://idhsaa.org/asset/19-20Manual_Complete.pdf, 103 (last visited Feb. 11, 2022).

203. Tyler Brown, *The Dangers of Overbroad Transgender Legislation, Case Law, and Policy in Education: California's AB 1266 Dismisses Concerns About Student Safety and Privacy*, *BYU EDUC. & L.J.* 287, 297 (2014).

competitive opportunity; two, that being born with a male body automatically gives a transgender woman an unfair advantage when competing against non-transgender women; and three, that men might be tempted to pretend to be transgender in order to compete in competition with women.²⁰⁴

In April 2021, the NCAA Board of Governors clarified its position in a Statement on Transgender Participation, which stated that “the NCAA Board of Governors firmly and unequivocally supports the opportunity for transgender student-athletes to compete in college sports. This commitment is grounded in our values of inclusion and fair competition.”²⁰⁵ The Statement goes on to state that per NCAA policy, championships should only be hosted at locations that can commit to providing an environment that is “safe, healthy and free of discrimination.”²⁰⁶

In January 2022, however, the NCAA announced a new policy regarding transgender participation in sports.²⁰⁷ The policy was announced following widespread public debate regarding transgender student Lia Thomas’s participation as a swimmer on the women’s swim team at the University of Pennsylvania.²⁰⁸ The NCAA’s new approach is modeled after the United States Olympic and Paralympic Committee and International Olympic Committee Guidelines.²⁰⁹ The new policy will require transgender participation to be determined on a sport-by-sport basis, with the specific policy for each sport to be determined by that sport’s governing body.²¹⁰ Additionally, transgender student athletes will be required to document testosterone levels starting four weeks before their sport’s championship selections.²¹¹ Starting with the 2022-2023 academic year, transgender athletes will also be required to document their testosterone levels at the beginning of the season and then again six months later, in addition to four weeks before championship selections.²¹² Speaking about the policy, John DeGioia, chair of the NCAA Board of Governors, stated that the NCAA is “steadfast in [its] support

204. Pat Griffin & Helen Carroll, *NCAA Inclusion of Transgender Student-Athletes* 7 (Aug. 2011), https://ncaa.org.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf.

205. *NCAA Board of Governors Statement on Transgender Participation*, NCAA (Apr. 12, 2021, 2:20 PM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-board-of-governors-statement-on-transgender-participation>.

206. *Id.*

207. Katie Barnes, *NCAA Updates Policy on Transgender Participation, to Let Each Sport Set Eligibility Requirements*, ESPN (Jan. 20, 2022), https://www.espn.com/college-sports/story/_/id/33105305/ncaa-updates-policy-transgender-participation-let-sport-set-requirements.

208. Jenna Lemoncelli, *NCAA Adopts New Transgender Policy as Lia Thomas Controversy Brews*, NY POST, <https://nypost.com/2022/01/19/ncaas-new-transgender-athlete-policy-to-be-sport-by-sport/> (Jan. 19, 2022).

209. *Board of Governors Updates Transgender Participation Policy*, NCAA (Jan. 19, 2022, 8:41 PM), <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx>.

210. *Id.*

211. *Id.*

212. *Id.*

of transgender student-athletes and the fostering of fairness across college sports,” and that “it is important that NCAA member schools, conferences and college athletes compete in an inclusive, fair, safe and respectful environment and can move forward with a clear understanding of the new policy.”²¹³ The policy has already been criticized for “lack[ing] clarity” and for being difficult to enforce.²¹⁴

There has also been legislation proposed on the federal level.²¹⁵ For example, Florida Representative Greg Steube introduced the “Protection of Women and Girls in Sports Act of 2021,” which would define *sex* to be “based solely on a person’s reproductive biology and genetics at birth,” and would prohibit sports programs that receive federal funding from “permit[ing] a person whose sex is male to participate in an athletic program or activity that is designated for women or girls.”²¹⁶ Further, Utah’s Mike Lee, along with thirteen other senators, has introduced an identical bill in the Senate.²¹⁷ The bill’s stated purpose is to “protect athletic opportunities for female athletes.”²¹⁸

In contrast, President Biden took action after taking office in January 2021 by signing an executive order prohibiting discrimination based on gender identity or sexual orientation.²¹⁹ The order speaks directly to the inclusivity of transgender students in schools, stating “children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports.”²²⁰

C. SEX EDUCATION AND LGBTQ YOUTH

As of October 2020, thirty states and the District of Columbia have laws requiring some form of sex education: comprehensive, abstinence-only, and/or sexually transmitted infection (STI)/HIV/AIDS-prevention.²²¹ Several federal

213. *Id.*

214. Jo Yurcaba, *NCAA’s New Trans Athlete Guidelines Sow Confusion Amid Lia Thomas Debate*, NBC NEWS (Jan. 21, 2022), <https://www.nbcnews.com/nbc-out/out-news/ncaas-new-trans-athlete-guidelines-sow-confusion-lia-thomas-debate-rcna13073>.

215. Gillian R. Brassil, *How Some States Are Moving to Restrict Transgender Women in Sports*, N.Y. TIMES (JUNE 22, 2021), <https://www.nytimes.com/2021/03/11/sports/transgender-athletes-bills.html>.

216. *Id.*; H.R. 426, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/426/text>.

217. Brassil, *supra* note 215; S. 251, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/251/text?r=98&s=1>.

218. Addy Bink, *Utah Senator Lee Introduces Legislation to ‘Protect Athletic Opportunities or Female Athletes’*, ABC4 (Feb. 5, 2021, 10:53 AM), <https://www.abc4.com/news/politics/utah-senator-lee-introduces-legislation-to-protect-athletic-opportunities-for-female-athletes/>.

219. Brassil, *supra* note 215; Exec. Order No. 13988, Fed. Reg. 2021-01761 (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

220. Exec. Order No. 13988, *supra* note 219.

221. *State Policies on Sex Education in Schools*, NAT’L CONF. STATE LEGISLATURES (Oct. 1, 2020), <https://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx>.

funding streams provide resources for various forms of sex education.²²² Title V of the Welfare Reform Act provides more than fifty million dollars per year for grants to states for abstinence-only education.²²³ Two funding streams created by Congress in 2010, the Teen Pregnancy Prevention Initiative and the Personal Responsibility Education Program, fund grants to states for comprehensive sex education.²²⁴ Still, the federal funding streams and some of the state laws entrust local school boards with significant discretion.²²⁵ Consequently, sex education varies tremendously from state to state and even between school districts within a particular state.²²⁶

Only nine states currently require that discussion of LGBTQ identities and relationships be affirming and inclusive.²²⁷ While three states have struck laws that proscribe how LGBTQ issues are addressed in school sex education classes,²²⁸ similar laws remain on the books in seven states.²²⁹ For example, Texas requires educators to teach that homosexuality is an unacceptable lifestyle,²³⁰ and, along with Mississippi, requires teachers to explain that homosexuality or homosexual acts are illegal, referencing their anti-sodomy laws—even though those laws have been unenforceable since *Lawrence v. Texas* was decided in 2003.²³¹ Students in Oklahoma are taught that “homosexual activity . . . is now known to be primarily responsible for contact with the AIDS virus,”²³² which is factually misleading.²³³ Meanwhile, South Carolina’s sex education teachers are only permitted to mention same-sex relationships in the context of STI transmission,²³⁴ and in Florida, if a school district chooses to provide instruction regarding

222. See Matthew Lashof-Sullivan, *Sex Education in Schools*, 16 GEO. J. GENDER & L. 263 (2015); *How Sex Education Gets Funding*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/sex-education/how-sex-education-funded> (last visited Mar. 6, 2022); *Federally Funded Sex Education: Strengthening and Expanding Evidence-Based Programs*, GUTTMACHER INST. (June 2021), <https://www.guttmacher.org/fact-sheet/sex-education>.

223. Lashof-Sullivan, *supra* note 222, at 275.

224. *Id.* at 276–77.

225. *Id.* at 264, 277.

226. *Id.* at 264–74; *Florida State Profile*, SIECUS, https://siecus.org/state_profile/florida-fy21-state-profile/ (last visited Mar. 6, 2022).

227. *Sex Education Laws and State Attacks*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/sex-education/sex-education-laws-and-state-attacks> (last visited Mar. 6, 2022).

228. 2021 AL. ALS 293 (striking the Alabama provision on homosexuality); 2019 ARIZ. ALS 86 (striking the Arizona provision on homosexuality); UTAH CODE ANN. § 53A-13-101 (striking the Utah provision on homosexuality).

229. LA. REV. STAT. ANN. § 17:281.

230. TEX. HEALTH & SAFETY CODE ANN. § 163.002.

231. TEX. HEALTH & SAFETY CODE ANN. § 163.002; MISS. CODE ANN. § 37-13-171; see also *Lawrence v. Texas*, 539 U.S. 558, 576–78 (2003).

232. OKLA. STAT. ANN. tit. 70, § 11-103.3.

233. See *How Do You Get HIV or AIDS?*, U.S. DEP’T HEALTH & HUMAN SERVS. (Aug. 27, 2015), <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/how-you-get-hiv-aids/index.html> (stating that people most commonly get or transmit HIV through needle or syringe use or through sexual behavior, including heterosexual vaginal sex).

234. S.C. CODE ANN. § 59-32-30.

AIDS, it must also teach “the benefits of monogamous homosexual marriage.”²³⁵ Louisiana prohibits “sexuality explicit materials depicting male or female homosexual activity” and otherwise focuses on abstinence,²³⁶ while Illinois mandates that course material and instruction “teach honor and respect for monogamous heterosexual marriage.”²³⁷

At least one school has used its abstinence-only policy to exclude a gay-straight alliance from meeting or advertising on campus.²³⁸ Because the gay-straight alliance had indicated that it would discuss safe sex, the court allowed the school to exclude the group based on the school’s “educational mission,” which included “restricting any discussion of sexual activity and birth control other than abstinence.”²³⁹

Meanwhile, six states—California, Colorado, New Jersey, Oregon, Rhode Island, and Washington—and the District of Columbia have laws or regulatory guidance as of May 2021 requiring that sex education be LGBTQ-inclusive.²⁴⁰ California explicitly prohibits sex education programs in the state from reflecting or promoting bias against LGBTQ people, among other groups.²⁴¹ After the Fresno County Superior Court found that the Clovis Unified School District’s abstinence-only program violated California students’ right to complete, medically-accurate, and bias-free sex education,²⁴² the district adopted a sex education curriculum that includes unbiased information about sexual orientation.²⁴³ Five additional states—Delaware, Iowa, Massachusetts, South Carolina, and Wisconsin—require that such instruction neither affirm nor discriminate against LGBTQ youth.²⁴⁴

D. FREEDOM OF EXPRESSION AND ASSOCIATION

Plaintiffs have brought First Amendment claims to vindicate their right to express pro-LGBTQ opinions at school²⁴⁵ and to start gay-straight alliances

235. FLA. STAT. ANN. § 1003.46 (through the 2021 Reg. and First and Second Extraordinary Sess.).

236. LA. REV. STAT. ANN. § 17:281.

237. 105 ILL. COMP. STAT. ANN. § 5/27-9.1 (through P.A. 102-557 and P.A. 102-662 of the 2021 Sess. of the 102nd Legis.).

238. *Caudillo ex rel. Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 556–57, 563 (N.D. Tex. 2004).

239. *Id.* at 563–64 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

240. UNITE FOR REPROD. & GENDER EQUITY (URGE), A CALL TO ACTION: LGBTQ+ YOUTH NEED INCLUSIVE SEX EDUCATION 5 (MAY 2021), https://urge.org/lgbtq-inclusive_sexed_report/ [hereinafter URGE REPORT].

241. CAL. HEALTH & SAFETY CODE § 151002(a)(6).

242. *Am. Acad. of Pediatrics v. Clovis Unified Sch. Dist.*, No. 12CECG02608 DSB (Cal. Sup. Ct. May 4, 2015).

243. *Press Release, Historic Ruling in ACLU Lawsuit: Abstinence-Only Sex Ed Violated State Law*, ACLU of N. Cal. (May 11, 2015), <https://www.aclunc.org/news/historic-ruling-aclu-lawsuit-abstinence-only-sex-ed-violated-state-law>.

244. URGE REPORT, *supra* note 240, at 5.

245. *See, e.g., Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1074 (D. Nev. 2001) (distinguished by *McCarthy v. Underhill*, No. 03:05-CV-0177-LRH-RJJ, 2006 U.S. Dist. (D. Nev. Feb. 16, 2006)).

(GSAs).²⁴⁶ However, students' free speech rights at school are not absolute because schools are often considered "limited public forums."²⁴⁷ This means that schools are able to prohibit some speech that could not be limited outside the schoolhouse gates.²⁴⁸ Specifically, schools may prohibit speech that is "vulgar, lewd, obscene, [or] plainly offensive," school-sponsored speech, and speech that causes a "substantial disruption of or material interference with school activities."²⁴⁹ In addition to the First Amendment, schools are governed by the federal Equal Access Act, which concerns student organizational expression on campus.²⁵⁰

This section addresses the legal landscape pertaining to student organizations (particularly GSAs), students' apparel and appearance, and students' access to LGBTQ information on the Internet at school. It also covers faculty and staff's freedom of expression in the context of state and local "No Promo Homo" policies, which are policies that stigmatize the discussion of LGBTQ people and issues in the classroom.²⁵¹

1. Student Organizations

Today, there are more than 4,000 GSAs throughout the nation.²⁵² Most of the LGBTQ students whom the Gay, Lesbian & Straight Education Network (GLSEN) surveyed in 2019 reported having a GSA or similar club at their school.²⁵³ This section will discuss the legal landscape in which these clubs operate.

The federal Equal Access Act prohibits secondary schools that maintain "limited open forums" from discriminating against any student meeting based on "the religious, political, philosophical, or other content of the speech at such meetings."²⁵⁴ Originally, the Equal Access Act was enacted to grant student-led religious groups access to school facilities on the same basis as other student groups.²⁵⁵ However, it has since been used to allow GSAs to meet on school

246. See, e.g., *Caudillo ex rel. Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 556–58 (N.D. Tex. 2004).

247. *Id.* at 560.

248. See *id.* at 571 (quoting *Vernonia Sch. Dist. 47J*, 515 U.S. 646, 656 (1995)).

249. *Henkle*, 150 F. Supp. 2d at 1074–75 (quoting *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992) and *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

250. 20 U.S.C.S. § 4071 (through Pub. Law 117-52, approved Dec. 27, 2021).

251. 'No Promo Homo' Laws, GAY, LESBIAN & STRAIGHT EDUC. NETWORK (LAST VISITED MAR. 6, 2022), <http://www.glsen.org/learn/policy/issues/nopromohomo>.

252. WALTER FRANK, *LAW AND THE GAY RIGHTS STORY: THE LONG SEARCH FOR EQUAL JUSTICE IN A DIVIDED DEMOCRACY* 137 (2014).

253. Joseph G. Kosciw et al., *THE 2019 NATIONAL SCHOOL CLIMATE SURVEY, THE GAY, LESBIAN & STRAIGHT EDUC. NETWORK* xxi (2020) https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf (finding 61.6% of LGBTQ students said their school had a GSA or similar club).

254. 20 U.S.C.S. § 4071 (through Pub. Law 117-52, approved Dec. 27, 2021).

255. See Michael P. Aaron, *The Equal Access Act: A Haven for High School "Hate Groups"?*, 13 *HOFSTRA L. REV.* 589, 589–90 (1985).

property.²⁵⁶ Nonetheless, the Equal Access Act is not absolute. State law determines what constitutes a “secondary school,” and states have circumscribed the Equal Access Act’s reach by narrowly defining “secondary school” or refusing to define the term at all.²⁵⁷

Additionally, schools have circumvented the Equal Access Act by becoming “closed forums”—that is, by allowing only curricular student groups to meet on campus.²⁵⁸ A Northern District of Texas court has read a students’ well-being exception into the Equal Access Act and banned a GSA, suggesting that a website listed on the club’s poster would threaten students’ well-being.²⁵⁹ The court also objected to the club’s plans to discuss safe sex, disregarding the school’s abstinence-only policy.²⁶⁰ However, this case continues to be seen as an exception to the trend in Equal Access Act cases.²⁶¹

2. Students’ Apparel and Appearance

Generally, schools adopt dress codes in order to maintain educational environments that facilitate instruction and orderliness.²⁶² While the rules vary widely, they are in place to convey standards of modesty, cleanliness, and decorum.²⁶³ However, school dress codes can sometimes run afoul of students’ First Amendment rights. In *Tinker v. Des Moines School District*,²⁶⁴ the Supreme Court held that students had a First Amendment right to wear black armbands protesting the Vietnam War to class as long as their protest did not cause “substantial disruption” or “material interference with school activities.”²⁶⁵ The district court in *Gillman v. School Board for Holmes County*²⁶⁶ applied the *Tinker* test and held that the school board’s prohibition on students’ clothing, buttons, or

256. See, e.g., *Boyd Cnty. High Sch. Gay Straight All. v. Bd. of Educ.*, 258 F. Supp. 2d 667, 693 (E. D. Ky. 2003).

257. See *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cty.*, 124 F. Supp. 3d 1254, 681 (M.D. Fla. 2015), *rev’d*, 842 F.3d 1324 (11th Cir. 2016) (“We conclude that ‘secondary education,’ under Florida law, means at least ‘courses through which a person receives high school credit that leads to the award of a high school diploma.’”).

258. See, e.g., *E. High Gay/Straight All. v. Bd. of Educ.*, 81 F. Supp. 2d 1166, 1197–98 (D. Utah 1999).

259. *Caudillo ex rel. Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 571 (N.D. Tex. 2004).

260. *Id.* at 563.

261. For courts finding for GSAs under the Equal Access Act, see *Boyd Cnty.*, 258 F. Supp. at 692–93 (granting preliminary injunction enjoining school from denying the formation of a GSA club because such denial would most likely violate the EAA); *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000) (finding that denying the formation of a GSA club would most likely violate the EAA); *E. High*, 81 F. Supp. 2d at 1184 (D. Utah 1999) (finding EAA granted GSA club the right to meet on school campus because the school allowed a non-curricular student club to meet during that time).

262. RICHARD FOSSEY & TODD A. DEMITCHELL, *STUDENT DRESS CODES AND THE FIRST AMENDMENT* ix (Rowman & Littlefield eds., 2014).

263. *Id.*

264. 393 U.S. 503 (1969).

265. *Id.* at 514.

266. 567 F. Supp. 2d 1359 (N.D. Fla. 2008).

apparel that advocated acceptance and fair treatment of LGBTQ people violated the students' First Amendment rights.²⁶⁷

Public high schools and elementary schools may restrict speech that injures or encroaches on the rights of other students.²⁶⁸ The Ninth Circuit has permitted schools to ban student speech when it targets a classmate's race, sexual orientation, or religion, reasoning that such speech may damage the classmate's self-esteem.²⁶⁹ In *Harper v. Poway Unified School District*,²⁷⁰ the court held that a school did not violate the First Amendment when it kept a student out of class for wearing a T-shirt bearing an anti-gay message.²⁷¹ However, other courts have held that students have a First Amendment right to wear T-shirts printed with anti-gay slogans.²⁷²

Transgender students often rely on clothing and other appearance-related indicators to express their gender identity.²⁷³ Students have challenged the overall application of gender-specific dress codes,²⁷⁴ as well as the enforcement of gender-specific dress rules for special events, like senior portraits²⁷⁵ or prom.²⁷⁶

3. Access to LGBTQ Information on the Internet

Many LGBTQ youth rely on the Internet to find information on same-sex attraction and sexual health.²⁷⁷ In 1996, Congress began a federal funding

267. *Id.* at 1375–79, 1362 (citing *Tinker*, 393 U.S. 503).

268. *See Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1183 (9th Cir. 2006) (dicta; vacated as moot).

269. FOSSEY & DEMITCHELL, *supra* note 262, at 92.

270. *Harper*, 445 F.3d 1166 (9th Cir. 2006).

271. *See id.* at 1191–92.

272. FOSSEY & DEMITCHELL, *supra* note 262, at 92 (citing *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001)).

273. *See, e.g.*, Paisley Currah, TRANSGENDER RIGHTS 6–7 (Paisley Currah et al. eds., 2006).

274. *See, e.g.*, *Order Granting Preliminary Injunction, A.C. v. Magnolia Indep. Sch. Dist.*, No. H-21-3466 (S.D. Tex. Nov. 4, 2021); *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569 (7th Cir. 2014); *Doe v. Yunits*, 15 Mass. L. Rep. 278 (2001); *see also* Jan Hoffman, *Can a Boy Wear a Skirt to School?*, N.Y. TIMES (Nov. 6, 2009), <http://www.nytimes.com/2009/11/08/fashion/08cross.html>.

275. *See, e.g.*, Charles Joughin, *Justice for Jeydon: Senior Yearbook Will Not Bar Transgender Student*, HRC BLOG (Nov. 15, 2013), <https://www.hrc.org/press-releases/justice-for-jeydon-transgender-student-wont-be-barred-from-senior-yearbook>; Henry K. Lee, *S.F. Girl Booted from Yearbook for Wearing Tux*, S.F. GATE (May 17, 2014, 8:07 AM), <https://www.sfgate.com/lgbt/article/Students-rally-around-tux-wearing-teen-left-out-5484943.php#photo-6315347>; Galen Sherwin, *5 Things Public Schools Can and Can't Do When It Comes to Dress Codes*, ACLU BLOG (May 30, 2017, 4:00 PM), <https://www.aclu.org/blog/womens-rights/womens-rights-education/5-things-public-schools-can-and-cant-do-when-it-comes>.

276. *See, e.g.*, *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010); *Logan v. Gary Cmty. Sch. Corp.*, Civil Action No. 2:07-CV-431 JVB, 2008 WL 5062802 (N.D. Ind. Sept. 25, 2008); *Know Your Rights: Same-Sex Dates and School Dances*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/youth-dances> (last visited Mar. 12, 2022).

277. *See* Jacob Colling, *Approaching LGBTQ Students' Ability to Access LGBTQ Websites in Public Schools from a First Amendment and Public Policy Perspective*, 28 WISC. J.L. GENDER & SOC'Y 347, 349 (2013) (citing Lynne Hillier et al., *The Internet as a Safety Net: Findings From a Series of Online Focus Groups with LGB and Non-LGB Young People in the United States*, 9 J. LGBT YOUTH 225, 241 (2012)).

program called E-Rate to offset telecommunication and Internet costs for schools and libraries.²⁷⁸ As a result, since 2005, nearly all public schools have had access to the Internet.²⁷⁹ However, Congress also passed the Children’s Internet Protection Act (CIPA) in 2000.²⁸⁰ Under CIPA, every school that receives certain federal funds or discounts must install a technology protection measure to block student access to obscenity, child pornography, and content that is “harmful to minors.”²⁸¹ Acting in over-compliance with CIPA, many schools initially blocked well-known LGBTQ-positive websites, depriving LGBTQ students of vital online resources.²⁸²

In February 2011, the ACLU launched a campaign titled “Don’t Filter Me” aimed at unblocking LGBTQ-friendly websites at public schools.²⁸³ In response to the ACLU’s demand letters, the majority of schools the ACLU approached voluntarily adjusted their filtering software.²⁸⁴ However, the ACLU did sue one recalcitrant school; in that case, *Parents, Families, and Friends of Lesbians and Gays, Inc. v. Camdenton R-III. School District*,²⁸⁵ the court held that the school district’s filtering policy violated the First Amendment and ordered the school district to stop filtering LGBTQ-friendly websites.²⁸⁶ The court also made clear that even though students could request that websites be unblocked, there was still a constitutional violation.²⁸⁷

The ACLU also approached software-filtering companies, and several companies in response agreed to remove their LGBTQ-specific category and to categorize nonsexual LGBTQ websites as “social science, history, or other appropriate areas.”²⁸⁸ Other software companies declined to change their categories but did issue public statements and improved their customer guidance, explaining their categories and emphasizing that schools should not block nonsexual LGBTQ content.²⁸⁹

278. *Id.* at 350.

279. Colling, *supra* note 277, at 350 (citing John Wells et al., U.S. DEP’T EDUC. NAT’L CTR. EDUC. STAT., INTERNET ACCESS IN U.S. PUBLIC SCHOOLS AND CLASSROOMS: 1994–2005 4 (Nov. 2006), <http://nces.ed.gov/pubs2007/2007020.pdf>).

280. Colling, *supra* note 277, at 350.

281. *Id.* at 350–51.

282. *Parents, Families, & Friends of Lesbians and Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888 (W.D. Mo. 2012); *see also* ACLU, “DON’T FILTER ME” FINAL REPORT 3–8 (2012), <https://www.aclu.org/other/dont-filter-me-final-report> [hereinafter “DON’T FILTER ME” REPORT] (stating the school’s internet filter blocked the following: PFLAG; DignityUSA; Matthew Shepard Foundation; Campus Pride; Day of Silence; Evangelicals Concerned; The Gay & Lesbian Alliance Against Defamation; Gay, Lesbian, & Straight Education Network; Human Rights Campaign; and Lambda Legal, all of which are positive LGBTQ websites that do not contain pornography and are fully appropriate under CIPA).

283. *Id.* at 3.

284. *Id.* at 5.

285. 853 F. Supp. 2d 888.

286. *Id.* at 899–901.

287. *Id.* at 900–01.

288. “DON’T FILTER ME” REPORT, *supra* note 282, at 7.

289. *Id.* at 7–9 (explaining how each software company responded to ACLU’s requests).

4. Faculty and Staff's Freedom of Expression About LGBTQ Issues

While Alabama deleted the provisions of its sexual education statute requiring teachers to “emphasize . . . that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state,”²⁹⁰ five states remain with “No Promo Homo” laws described in Section C, *supra*.²⁹¹ Some school districts have also voluntarily adopted “No Promo Homo” policies in the absence of state law.²⁹² Moreover, in 2021 alone three states introduced similar legislation targeting trans students.²⁹³ An Arkansas bill would protect educators wishing to refer to students by their “biological sex.”²⁹⁴ In Iowa, one pending bill would require parents’ written consent for their children to participate in curricular activities regarding gender identity,²⁹⁵ while another would mandate that such lessons include “the potential harm and adverse outcomes of social and medical gender interventions.”²⁹⁶ And in Tennessee, a bill has been passed to permit parents to withdraw students from LGBTQ curricula,²⁹⁷ a second bill would prohibit educators from using materials that “promote, normalize, support, or address . . . LGBTQ issues or lifestyles.”²⁹⁸

Three states have recently repealed these types of laws and policies: Arizona in 2019, North Carolina in 2017, and Utah in 2018.²⁹⁹ Similarly, in 2013, the Anoka-Hennepin school district in Minnesota revised its policy after several students sued the school claiming that the policy inhibited the school from addressing rampant bullying and harassment based on sexual orientation, gender identity, and gender expression.³⁰⁰

290. ALA. CODE § 16-40A-2 (through the 2021 2nd Sp. Sess. (Acts 2021, No. 21-564), but not including corrections and changes made to the 2021 session laws by the Code Commissioner) (deleting former (c)(8) and revising (a)(1)).

291. “No Promo Homo” laws prohibit teachers and staff from discussing LGBTQ issues in a positive light, if at all. *See* LA. REV. STAT. ANN. § 17:281; MISS. CODE ANN. § 37-13-171; OKLA. STAT. ANN. tit. 70, § 11-103.3; S.C. CODE ANN. § 59-32-30; TEX. HEALTH & SAFETY CODE ANN. § 163.002.

292. *See* Hannah Bolt, Note, *The Anoka-Hennepin Lawsuit: How Anti-Gay Bullying Was Sex-Based and “Neutrality” Created a Hostile Environment*, 26 HARV. HUM. RTS. J. 265, 278–79 (2013).

293. Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation would Affect Minors the Most*, CNN (Apr. 15, 2021, 9:46 AM) <https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html>.

294. H.B. 1749, 93rd Gen. Assemb. Reg. Sess. (Ark. 2021).

295. S.F. 167, 89th Gen. Assemb. Reg. Sess. (Iowa 2021).

296. H.F. 326, 89th Gen. Assemb. Reg. Sess. (Iowa 2021).

297. H.B. 529, 112th Gen. Assemb. Reg. Sess. (Tenn. 2021).

298. H.B. 800, 112th Gen. Assemb. Reg. Sess. (Tenn. 2021).

299. ARIZ. REV. STAT. § 15-716; N.C. GEN. STAT. § 115C-81; UTAH CODE ANN. § 53A-13-101.

300. Consent Decree, *Doe v. Anoka-Hennepin Sch. Dist.* No. 11, No. 11-cv-01999-JNE-SER (D. Minn. Mar. 6, 2012), ECF No. 82, <http://www.clearinghouse.net/chDocs/public/ED-MN-0001-0003.pdf>; *see also* Bolt, *supra* note 292, at 278–80 (describing the “no promo homo” and “neutrality” laws in place in the Anoka-Hennepin school district).

E. BULLYING, HARASSMENT, AND VIOLENCE

1. Bullying and Harassment

According to GLSEN's most recent 2019 National School Climate Survey, 68.7% of LGBTQ students in grades six through twelve reported verbal harassment based on their sexual orientation in 2018,³⁰¹ 56.9% described verbal harassment based on gender expression,³⁰² 25.7% testified to physical harassment based on sexual orientation, and 21.8% reported physical harassment based on gender expression.³⁰³ Lastly, 11% of LGBTQ students surveyed were physically assaulted for their sexual orientation and 9.5% for their gender expression.³⁰⁴

Bullying and harassment have a tangible effect on these students' lives—39.6% of the students GLSEN surveyed had missed at least one day of school in the month preceding the survey because they feared for their safety or felt uncomfortable in the classroom.³⁰⁵ Bullying and harassment also affect students' academic outcomes—students who experienced higher levels of bullying had, on average, lower GPAs than those who experienced less harassment.³⁰⁶ Students who were severely bullied were twice as likely as other students to report to GLSEN that they did not intend to attend college, technical school, or trade school.³⁰⁷ The suicide rate for LGBTQ youth is also significantly higher than it is for their straight and cisgender peers—nearly half of all transgender and nonbinary youth have seriously contemplated suicide,³⁰⁸ and over 40% of LGBTQ respondents to the 2020 National Survey on LGBTQ Youth Mental Health seriously considered attempting suicide in the past twelve months.³⁰⁹

a. LGBTQ Students' Legal Recourse for Bullying and Harassment. LGBTQ students and their families use each of the laws discussed in Section II, with varying levels of success, to try to hold schools and school officials accountable for bullying and for allowing peer-to-peer bullying to persist unimpeded. In addition, eighteen states have pending legislation or laws explicitly requiring schools to implement anti-bullying policies that prohibit bullying on the basis of a number of protected classes, including sexual orientation and gender identity.³¹⁰

301. Kosciw, *supra* note 138, at 28.

302. *Id.*

303. *Id.* at 29.

304. *Id.*

305. *Id.* at 71.

306. *Id.* at 49 (students who experienced greater levels of harassment based on sexual orientation had an average GPA of 3.03 compared to 3.34 for those who did not experience much bullying; students who were severely bullied based on gender identity had an average GPA of 2.98).

307. *Id.* at 48.

308. National Survey on LGBTQ Youth Mental Health 2020, TREVOR PROJECT 2 (2020), <https://www.thetrevorproject.org/wp-content/uploads/2020/07/The-Trevor-Project-National-Survey-Results-2020.pdf>.

309. *Id.*

310. ARK. CODE ANN. § 6-18-514 (West, Westlaw through the end of the 2016 3rd Extraordinary Sess. of the 90th Ark. Gen. Assembly, the Nov. 8, 2016, election, and Acts effective through Apr. 3, 2017, from the 2017 Reg. Sess. of the 91st Ark. Gen. Assembly, and include changes made by the Ark.

Enumerated anti-bullying policies have become the goal for organizations like GLSEN because these policies appear to be more effective at preventing anti-LGBTQ bullying and harassment than generic anti-bullying policies.³¹¹ These policies “specifically protect students based on their actual or perceived race, color, national origin, sex, disability status, sexual orientation, gender identity, and religion.”³¹² Students in schools with enumerated policies reported to GLSEN 14.9% fewer homophobic remarks than students in schools with no anti-bullying policies reported.³¹³ By comparison, students in schools with generic anti-bullying policies only reported 3.1% fewer homophobic remarks than students in schools with no bullying policies at all.³¹⁴ Additionally, teachers in schools with enumerated anti-bullying policies are more likely to intervene to stop bullying and harassment.³¹⁵

Enumerated anti-bullying policies must be carefully crafted to survive judicial scrutiny.³¹⁶ For example, the Third Circuit invalidated State College Area School District’s anti-bullying policy because it prohibited discrimination based not only on identity-based characteristics, like those protected by Title IX and Title VI, but also “other personal characteristics,” like wardrobe, appearance, hobbies,

Code Revision Comm’n received through Apr. 1, 2017); CAL. EDUC. CODE § 234.1 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.); COLO. REV. STAT. ANN. § 22-32-109.1 (West, Westlaw through Laws effective Mar. 8, 2017 of the 1st Reg. Sess. of the 71st Gen. Assembly (2017)); CONN. GEN. STAT. ANN. § 10-222d (West, Westlaw through Gen. Statutes of Conn., Revision of 1958, Revised to Jan. 1, 2017); 105 ILL. COMP. STAT. ANN. 5/27-23.7 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.); IOWA CODE ANN. § 280.28 (West, Westlaw through immediately effective legislation signed as of Apr. 7, 2017 from the 2017 Reg. Sess.); ME. REV. STAT. ANN. tit. 20-A, § 6554 (West, Westlaw through Ch. 3 of the 2017 1st Reg. Sess. of the 128th Leg.); MD. CODE ANN., EDUC. § 7-424.1 (West, Westlaw through Chs. 1 to 3, 10, 11, 76, 77, 81, 87, 127, 134, 135, 137, 141 & 142 from the 2017 Reg. Sess. of the Gen. Assembly); MASS. GEN. LAWS ANN. Ch. 71, § 370 (West, Westlaw through Ch. 5 of the 2017 1st Annual Sess.); MINN. STAT. ANN. § 121A.031 (West, Westlaw through ch. 14 of the 2017 Reg. Sess.); NEV. REV. STAT. ANN. § 388.122 (West, Westlaw through the 79th Reg. Sess. (2017) of the Nev. Leg. with all legislation operative or effective up to and including Mar. 15, 2017 subject to change from the reviser of the Legislative Bureau); N.J. STAT. ANN. § 18A:37-15 (West, Westlaw through L.2017, c. 39 and J.R. No. 1.); N.Y. EDUC. LAW § 13 (McKinney, Westlaw through L.2017, chs. 1 to 23); N.C. GEN. STAT. ANN. §§ 115C-407.15 to .16 (West, Westlaw through the end of the 2016 Reg. Sess., with the addition of S.L. 2016-126 from the 2016 4th Extra Sess. and through 2017-2 of the 2017 Reg. Sess. of the Gen. Assembly); OR. REV. STAT. ANN. § 339.356 (West, Westlaw through Ch. 9 of the 2017 Reg. Sess., pending classification of undesignated material and text revision by the Or. Reviser); R.I. GEN. LAWS ANN. §§ 16-21-33 to -34 (West, Westlaw through Ch. 542 of the Jan. 2016 sess.); VT. STAT. ANN. tit. 16, § 11 (West, Westlaw through Law No. 6 of the 1st Sess. of the 2017–18 Vt. Gen. Assembly (2017)); WASH. REV. CODE ANN. § 28A.300.285 (West, Westlaw through all laws from the 2016 Reg. and Special Sess.’s. and Laws 2017, chs. 1 to 4 of the Wash. leg.); *see also*, *State Maps*, GLSEN, <http://www.glsen.org/article/state-maps> (last visited Mar. 12, 2022).

311. *Enumeration of Statewide Anti-Bullying Laws and Local Policies*, GLSEN, https://www.glsen.org/sites/default/files/2019-11/GLSEN_Enumeration_Bill_2019.pdf (last visited Oct. 23, 2021).

312. *Id.*

313. Kosciw, *supra* note 138, at 79.

314. *Id.*

315. *Enumeration of Statewide Anti-Bullying Laws and Local Policies*, *supra* note 311.

316. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209–10 (3d Cir. 2001).

values, and social skills.³¹⁷ The court was particularly fixated on expression of values as a core First Amendment activity.³¹⁸ It held that insofar as the definition of values-based harassment included activities that did not actually disrupt the school, but were merely expected to cause disruption, the school's policy ran afoul of the First Amendment.³¹⁹ However, the court also noted that some anti-harassment policies can withstand First Amendment scrutiny,³²⁰ including potential prohibition on anti-LGBTQ bullying.³²¹

2. Suicides and Murders

LGBTQ youth experience a great deal of violence in the form of verbal bullying and harassment during middle school and high school from their peers.³²² Transgender youth, especially young people of color, experience even more dramatic rates of violence.³²³ This subsection discusses the statistical disparities in violence suffered by LGBTQ youth and legal protections against excessive violence.

a. Suicide Among LGBTQ Youth. Primarily as a result of school bullying and family rejection,³²⁴ LGBTQ youth suffer from low self-esteem, feelings of isolation, and depression.³²⁵ Because the abuse suffered by LGBTQ youth generally corresponds with the discovery of a teenager's sexual identity, many stay closeted out of fear of rejection and violence.³²⁶ As a result of these combined pressures, LGBTQ youth commit suicide at shockingly high rates.³²⁷

It is estimated that gay youth are two to three times more likely to attempt suicide than non-LGBTQ youth.³²⁸ Approximately thirty percent of annual completed suicides among youth are committed by members of the LGBTQ community.³²⁹ A 2011 Oregon study of over 30,000 eleventh grade students found that 21.5% of LGBTQ youth attempted suicide in the previous twelve

317. *Id.* at 210.

318. *Id.*

319. *Id.* at 216.

320. *Id.* at 209.

321. *See id.* at 210.

322. *See* Kosciw, *supra* note 138, at 98–99.

323. NAT'L COAL. ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE IN 2013 103–04 (2014), https://avp.org/wp-content/uploads/2017/04/2013_ncavp_hvreport_final.pdf.

324. Sonia Renee Martin, *A Child's Right to be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 HASTINGS L.J. 167, 168–69 (1996) (“[Q]ueer youth are under enormous stress from the outside world, making it imperative that they receive support from their families . . . [who] often fail to provide the necessary comfort to queer children.”).

325. *Id.* at 169, 181.

326. *See id.* at 169–70.

327. Rea Carey & Suman Chakraborty, *Class President or 'Just Another Suicide Statistic': The Effects of Homophobia Harassment on Youth*, 1 GEO. J. GENDER & L. 125, 132 (1999).

328. *Id.*

329. *Id.*

months, compared with 4.2% of non-LGBTQ youth.³³⁰ The study also found that the risk of suicide attempts was 20% higher in unsupportive environments than in supportive environments.³³¹ A 2016 study found that almost half of all transgender individuals surveyed had a history of attempting suicide.³³² Moreover, transgender students who were denied access to a school bathroom that corresponded with their gender identity were reportedly 1.32 times more likely to attempt suicide than transgender individuals who were provided access to restrooms that match their gender identity.³³³ The subject of bathrooms as they relate to transgender rights is discussed in a later section of this article.³³⁴ National initiatives like the “It Gets Better” campaign have been developed to provide hope to LGBTQ youth contemplating suicide.³³⁵

b. Murder of LGBTQ Youth. Young people continue to face threats of murder and hate crimes by their peers because of their sexual orientation and gender expression.³³⁶ In response to two horrific murders of gay youths, President Obama signed the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act in 2009, which expands the prior federal hate crime definition to include crimes motivated by gender, sexual orientation, gender identity, and disability.³³⁷ In addition to providing funds to investigate and prosecute hate crimes, the Act grants the FBI the authority to pursue cases that are neglected by local

330. Mark L. Hatzenbuehler, *The Social Environment and Suicide Attempts in Lesbian, Gay, and Bisexual Youth*, 127 PEDIATRICS 896, 899 (2011).

331. *Id.*

332. Kristie L. Seelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, 68 GA. STATE J. HOMOSEXUALITY 1378, 1380 (2016).

333. *Id.* at 1389.

334. See discussion *infra*, section IV.E.

335. The “It Gets Better” project was founded in 2010 to send the message to LGBT youth that life does get better as those around them mature. See *What is the It Gets Better Project?*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/pages/about-it-gets-better-project/> (last visited Oct. 23, 2021). The program was launched in response to the high degree of suicide due to bullying of LGBTQ youth in schools. *Id.* The project received submissions in support of LGBTQ youth from public figures and organizations such as President Barack Obama, Colin Farrell, Ellen DeGeneres, and Google, Facebook, and Pixar. *Id.* To view that statement issued by the White House Office of Communications lending its support to the campaign, see Brian Bond, “It Gets Better”, WHITE HOUSE OFFICE COMM’NS, 2010 WL 3946661 (Oct. 9, 2010).

336. See Rob Wile, *It’s Still Dangerous to be Gay in America. Here are the Atstatistics that Prove It*, SPLINTER (June 12, 2016, 8:49 PM), <https://splinternews.com/it-s-still-dangerous-to-be-gay-in-america-here-are-the-1793857468> (stating that 20–25% of LG people report experiencing hate crimes in their lifetime, that killings of LGBTQ individuals have surged since 2007, and that transgender women of color are particularly vulnerable); Sylvia Cunningham, *James Dixon Pleads Guilty to Manslaughter of Transgender Woman Islan Nettles*, NBC NEWS (Apr. 4, 2016, 3:20 PM), <http://www.nbcnews.com/news/nbcblk/james-dixon-pleads-guilty-manslaughter-transgender-woman-islan-nettles-n550426> (describing the beating of a trans woman of color in Harlem that resulted in her death); Ramin Setoodeh, *Young, Gay and Murdered*, NEWSWEEK (July 18, 2008, 8:00 PM), <http://www.newsweek.com/young-gay-and-murdered-junior-high-92787> (describing the anti-gay-motivated murder of 15-year-old Lawrence “Larry” King by a teenage classmate).

337. Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (West, Westlaw through P.L. 115-22).

authorities,³³⁸ as well as to track data on crimes based on gender identity and sexual orientation.³³⁹

According to the most recent data released by the FBI, 16.7% of hate crimes committed in 2019 were motivated by bias against the victim's sexual orientation.³⁴⁰ An analysis of the data reveals that gay and lesbian individuals report hate crimes at a higher rate per capita than any other group.³⁴¹ LGBTQ youth of color experience the increased violence of intersectional discrimination.³⁴² A 2016 report by the National Coalition of Anti-Violence Programs found that, of all anti-LGBTQ homicides, 61% were committed against people of color and 68% against transgender individuals.³⁴³ The murder rate among transgender individuals is troubling,³⁴⁴ prompting recent campaigns such as "Trans Lives Matter."³⁴⁵ Thirty states and the District of Columbia have passed hate crime laws that protect LGB individuals, but only seventeen states and the District of Columbia protect transgender individuals as well.³⁴⁶

338. See Anti-Defamation League, Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (HCPA): What You Need to Know, <https://www.adl.org/education/educator-resources/lesson-plans/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention> (last visited Oct. 24, 2021).

339. See Matthew Shepard James Byrd Jr. Hate Crimes Prevention Act Data Collection Provisions Takes Effect at the Beginning of the New Year, NAT'L CTR. FOR TRANSGENDER EQUAL. (Jan. 8, 2013), <http://www.transequality.org/blog/matthew-shepard-james-byrd-jr-hate-crimes-prevention-act-data-collection-provisions-takes>.

340. Hate Crime Statistics, FBI (Nov. 16, 2020), <https://ucr.fbi.gov/hate-crime/2019/resource-pages/hate-crime-summary>.

341. Joseph R. Williams, "I Don't Like Gays, Okay?" Use of the "Gay Panic" Murder Defense in Modern American Courtrooms: The Ultimate Miscarriage of Justice, 78 ALB. L. REV. 1129, 1132-35 (2014-2015).

342. See Wile, *supra* note 336.

343. Nat'l Coal. Anti-Violence Programs, Nat'l Rep. on Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities (2017), http://avp.org/wp-content/uploads/2017/06/NCACP_2016HateViolence_REPORT.pdf.

344. Hum. Rts Campaign, Addressing Anti-Transgender Violence, Exploring Realities, Challenges and Solutions for Policymakers and Community Advocates 2 (Nov. 2015), https://assets2.hrc.org/files/assets/resources/HRC-AntiTransgenderViolence-0519.pdf?_ga=2.209286226.1951465327.1647117082-533552523.1647117082 (finding that at least 21 transgender people were killed in the U.S. in the first ten months of 2015, a higher rate than any year on record). For a world-wide mapping of transphobic murders, see Trans Murder Monitoring Project, TRANSGENDER EUROPE (May 19, 2009) <http://tgeu.org/tmm/>.

345. Jen Richards, *It's Time for Trans Lives to Truly Matter to Us All*, ADVOCATE (Feb. 18, 2015, 8:15 AM), <http://www.advocate.com/commentary/2015/02/18/op-ed-its-time-trans-lives-truly-matter-us-all>.

346. Hate Crime Laws, MOVEMENT ADVANCEMENT PROJECT (Mar. 3, 2022) http://www.lgbtmap.org/equality-maps/hate_crime_laws; see CAL. PENAL CODE § 422.56 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.) (protecting against gender discrimination, explicitly inclusive of gender identity and gender expression). *But see* N.Y. PENAL LAW § 485.05 (McKinney, Westlaw through L.2017, chs. 1 to 23) (protecting against gender discrimination, but not defining gender as inclusive of gender identity or gender expression).

F. STUDENTS' PRIVACY AND LEGAL RECOURSE FOR "OUTINGS" BY SCHOOL OFFICIALS

Coming out is often an intensely personal decision, involving self-discovery and acceptance.³⁴⁷ "Outing," in the context of this section, occurs when a third party reveals another individual's sexual orientation or gender identity against the individual's wishes.³⁴⁸ Outings can be devastating experiences for the individuals involved, provoking feelings of anxiety and fear of the consequences of exposure and "slic[ing] into human dignity by stealing individual control [of] one's life"³⁴⁹ While students do have a privacy interest in their sexual orientation,³⁵⁰ that interest is not absolute.³⁵¹ Rather, it is subject to a balancing of the school's interest in disclosure and the student's interest in secrecy.³⁵² An estimated 43.5% of LGBT students do not report incidents of harassment or assault to school staff for fear of being outed.³⁵³

III. CHALLENGES FACING FAMILIES OF LGBTQ YOUTH

A. CONVERSION THERAPY

Approximately 350,000 adults in the U.S. received conversion therapy as adolescents.³⁵⁴ Conversion therapy³⁵⁵ is "any attempt to change a person's sexual orientation, gender identity, or gender expression."³⁵⁶ Conversion therapy stems from a belief that being in the LGBTQ+ community is unnatural or immoral. Although conversion therapy has been practiced for over fifty years,³⁵⁷ recent

347. Evan Ettinghoff, *Outed At School: Student Privacy Rights And Preventing Unwanted Disclosures Of Sexual Orientation*, 47 LOY. L.A. L. REV. 579, 581–82 (2014).

348. *Outing*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/outing> (last visited Mar. 12, 2022).

349. Katheleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L. REV. 1531, 1548 (1995).

350. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1191 (C.D. Cal. 2007).

351. *Id.* at 1193.

352. *Id.* at 1195.

353. Kosciw, *supra* note 138, at 33 (Table 1.1 Reasons LGBT Students Did Not Report Incidents of Harassment or Assault to School Staff).

354. Christy Mallory et al., *Conversion Therapy and LGBT Youth*, UCLA SCH. L. WILLIAMS INST. (June 2019), <https://williamsinstitute.law.ucla.edu/publications/conversion-therapy-and-lgbt-youth/> (defining adolescent as anyone under age 18).

355. "Conversion therapy" is also referred to as "sexual orientation change efforts," (SOCE) "reparative therapy," or "ex-gay therapy." See *Therapeutic Fraud Prevention Act*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/therapeutic-fraud-prevention-act> (last visited Oct. 13, 2021); "However, because the practice has come under increasing scrutiny, providers frequently change their terminology to avoid detection," including, "reparative therapy," "sexual orientation change efforts (SOCE)," and "ex-gay ministry." *Conversion Therapy*, GLAAD, <https://www.glaad.org/conversiontherapy> (last visited Oct. 13, 2021); see also *#BornPerfect: The Facts About Conversion Therapy*, NAT'L. CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.org/bornperfect-the-facts-about-conversion-therapy/> (last visited Oct. 13, 2021) (detailing the purpose of and evidence for laws banning conversion therapy).

356. *Conversion Therapy*, *supra* note 355.

357. Stephen Vider & David S. Byers, *A Half-Century of Conflict Over Attempts to 'Cure' Gay People*, TIME (Feb. 12, 2015, 12:00 PM), <http://time.com/3705745/history-therapy-hadden/>; see also Jamie Scot, *Shock the Gay Away: Secrets of Early Gay Aversion Therapy Revealed*, HUFFINGTON POST

judicial rulings and legislative developments highlight a significant shift in socio-cultural attitudes away from its acceptability.³⁵⁸ Although the American Psychiatric Association has not listed homosexuality as a mental disorder in its Diagnostic Statistical Manual of Mental Disorders (DSM) since 1973, those who engage members of the LGBTQ community in gay conversion therapy continue to treat it as one.³⁵⁹ Gender dysphoria³⁶⁰ and transvestic disorder³⁶¹ are still included in the most recent DSM, however the former may be useful in order to obtain insurance coverage for gender-affirming medical treatment.³⁶² Continuing to view these identities as mental illnesses has devastating effects on LGBTQ youth.³⁶³ However, courts and legislatures are beginning to treat conversion therapy as either consumer fraud, or as psychologically harmful to minors.³⁶⁴ Twenty-one states ban conversion therapy and six states partially ban it.³⁶⁵ Three states have prevented enforcement of conversion therapy bans.³⁶⁶

1. Conversion Therapy as Consumer Fraud

On August 20, 2015, Illinois enacted Public Act 099-0411, also known as the Youth Mental Health Protection Act, which bans sexual orientation change efforts and amends the State's Consumer Fraud and Deceptive Practices Act.³⁶⁷ It provides in relevant part that:

(Dec. 6, 2017), http://www.huffingtonpost.com/jamie-scot/shock-the-gay-away-secrets-of-early-gay-aversion-therapy-revealed_b_3497435.html.

358. See *infra* III.A.i-ii.

359. Meaghan Kane, *The Persecution of Minors: Gay to Straight Conversion Therapy*, 15 RUTGERS J. L. & RELIGION 384, 392 (2014) (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013); Rick Mayes & Allan V. Horwitz, *DSM III and the Revolution in the Classification of Mental Illness*, 41 J. HIST. BEHAV. SCI. 249 (2005)).

360. Gender dysphoria is "psychological distress that results from an incongruence between one's sex assigned at birth and one's gender identity." *WHAT IS GENDER DYSPHORIA?*, AM. PSYCH. ASS'N (Nov. 2020), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>.

361. Transvestic disorder "identifies people who are sexually aroused by dressing as the opposite sex but who experience significant distress or impairment in their lives—socially or occupationally—because of their behavior." AMERICAN PSYCHIATRIC ASSOCIATION, *PARAPHILIC DISORDERS* (2013), <https://www.psychiatry.org/psychiatrists/practice/dsm/educational-resources/dsm-5-fact-sheets>.

362. Kayley Whalen, *(In)validating Transgender Identities: Progress and Trouble in the DSM-5*, NAT'L LGBTQ TASK FORCE, <https://www.thetaskforce.org/invalidating-transgender-identities-progress-and-trouble-in-the-dsm-5/> (last visited Mar. 12, 2022).

363. See Martin, *supra* note 324, at 174 (noting that belief in conversion therapy leads to parental rejection of queer youth); see also *Doev. Governor of N.J.*, 783 F.3d 150, 152–53 (3d Cir. 2015).

364. See *Conversion Therapy Laws*, MOVEMENT ADVANCEMENT PROJECT (Aug. 31, 2016), http://www.lgbtmap.org/equality-maps/conversion_therapy. See e.g. 405 ILL. COMP. STAT. ANN. 48/25 (West 2016); CAL. BUS. & PROF. CODE § 865 (West 2017); N.J. STAT. ANN. §§ 45:1–54, 55 (West 2017); OR. REV. STAT. ANN. § 675.850 (West 2017); 18 V.S.A. § 8353 (West 2017); D.C. OFFICIAL CODE § 7-1231.14a (West 2017); see *infra* pp. 58–61.

365. *Conversion Therapy Laws*, *supra* note 364.

366. *Id.*

367. Youth Mental Health Protection Act, 405 ILL. COMP. STAT. ANN. 48/25 (West 2016).

No person or entity may . . . employ any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact in advertising or otherwise offering conversion therapy services in a manner that represents homosexuality as a mental disease, disorder, or illness . . . A violation of [Section 25] constitutes an unlawful practice under the Consumer Fraud and Deceptive Business Practices Act.³⁶⁸

In setting forth its legislative findings, the Illinois General Assembly discussed at length³⁶⁹ its conclusion that gay conversion therapy is both ineffective and has incredibly detrimental effects.³⁷⁰ Illinois is the fourth state to ban gay conversion therapy for people under the age of eighteen, but it is the first state to enact a ban on the practice on the basis that it is consumer fraud.³⁷¹

In a recent New Jersey case, plaintiffs engaged in “conversion therapy and counseling services” provided by defendants Jews Offering New Alternatives for Healing (JONAH), “a nonprofit corporation dedicated to educating [individuals] about the social, cultural, and emotional factors that lead to same-sex attractions.”³⁷² The therapy provided by JONAH purported to “change plaintiffs’

368. *Id.*; see also 815 ILL. COMP. STAT. ANN. 505/1 (Consumer Fraud And Deceptive Practices Act) (West 2016); cf. Walter Frank, *supra* note 215 at 147–48 (discussing the beginning of this kind of legislation and the first law of this kind in California).

369. H.B. 217, 2015 Ill. Legis. Serv. P.A. 99-411 (H.B. 217).

370. These findings are supported by: the American Psychological Association, the American Psychiatric Association, the American Academy of Pediatrics, the American Medical Association Council on Scientific Affairs, the National Association of Social Workers, the American Counseling Association Governing Council, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization. *Id.* The Illinois General Assembly cited the “Task Force on Appropriate Therapeutic Responses to Sexual Orientation,” which was convened by the American Psychological Association. *Id.* Gay conversion therapy poses:

[C]ritical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame towards parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.

2015 Ill. Legis. Serv. P.A. 99-411 (H.B. 217) (citing AM. PSYCHOL. ASS’N, APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION (2009), <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>); see also SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN, ENDING CONVERSION THERAPY: SUPPORTING AND AFFIRMING LGBTQ YOUTH (2015), <https://store.samhsa.gov/sites/default/files/d7/priv/sma15-4928.pdf>).

371. Casey Leins, *States that Have Banned Conversion Therapy*, U.S. NEWS (Apr. 11, 2019, 12:01 AM), <https://www.usnews.com/news/best-states/articles/2019-04-11/these-states-have-banned-conversion-therapy>; *Illinois Law Banning Conversion Therapy Against LGBT Youth First to Contain ‘Consumer Fraud’ Provision*, ERIE GAY NEWS (Aug. 21, 2015), <https://www.eriegaynews.com/news/article.php?recordid=201509splcilconversiontherapy>.

372. *Ferguson v. JONAH*, 2015 WL 609436, at *1, 2015 LEXIS 236 at *1–2 (N.J. Super. Ct. Law Div. Feb. 5, 2015). One plaintiff alleged that during a private session with a particular counselor, he was required “to say one negative thing about himself, remove an article of clothing, then repeat the

sexual orientation from homosexual to heterosexual.”³⁷³ Plaintiffs brought suit against JONAH, claiming that the organization’s “business practices violate[d] the New Jersey Consumer Fraud Act . . . by misrepresenting that homosexuality is a mental illness or disorder and that JONAH’s therapy program is effective in changing the sexual orientation of clients.”³⁷⁴ The Third Circuit found that each of JONAH’s “experts based their conclusions on the initial false premise that homosexuality is either abnormal or a mental disorder,” and that the “overwhelming weight of scientific authority concluded that homosexuality is not a disorder or abnormal . . . [and therefore] any expert opinion based on the initial premise that homosexuality is a mental disorder or abnormal is unreliable and likewise barred.”³⁷⁵

2. Gay Conversion Therapy Bans Based on Psychological Harm to Minors

The Third³⁷⁶ and Ninth³⁷⁷ Circuits have each upheld the constitutionality of state laws that ban the provision of gay conversion therapy to LGBTQ youth.³⁷⁸

process.’ [He] submitted to [the] instructions until he was naked, when [the counselor] directed [him] ‘to touch his penis and then his buttocks.’” *Id.* Clients were also told “to spend more time at the gym and to be naked with their fathers at bathhouses.” *Id.* at *2. One plaintiff was told “to wear a rubber band on his wrist and snap it each time he felt attracted to another man.” *Id.* JONAH also “told plaintiffs that homosexuality is loathsome and that homosexuals are more susceptible to loneliness, suicidal thoughts, and contracting HIV/AIDS.” *Id.*

373. *Id.* at *1. The defendant organization “believes that homosexuality is a ‘learned behavior’ that can be reduced or eliminated through psychological and spiritual help.” *Id.* at *2.

374. *Ferguson v. JONAH*, 2015 WL 609436, at *1 (N.J. Super. Ct. Law Div. Feb. 5, 2015) (citing N. J. STAT. ANN. 56:8-1 to 56:8-20 (West, Westlaw current with laws effective through L.2017, c. 39 and J. R. No.1)). The legal claim was that JONAH:

[E]ngaged in ‘unconscionable commercial practice, deception, fraud, false pretense, false promise, and misrepresentation[.]’ by claiming that homosexuality is a mental disorder and, in the face of empirical evidence to the contrary, that same-sex attractions can be reduced or eliminated through therapy Additionally, they contend that JONAH advised them that if conversion therapy did not produce the promised results, the blame rested solely with the clients.

Id. (citation omitted).

375. *Id.* at *1.

376. See *Doe*, 783 F.3d 150, 151 (3d Cir. 2015), *cert. denied sub nom.*; *Doe v. Christie*, 136 S. Ct. 1155 (2016). This case was brought as a challenge to the validity of the New Jersey ban on gay conversion therapy, “codified at N.J. STAT. ANN. §§ 45:1-54, 55.” *Doe*, 783 F.3d at 151–52, n.2 (citing N.J. STAT. ANN. §§ 45:1-54, 55 (West, Westlaw through L.2017, c. 39 and J.R. No. 1)).

377. See *Pickup v. Brown*, 740 F.3d 1208, 1223 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2871, 189 L. Ed. 2d 833 (2014), and *cert. denied sub nom.*; *Welch v. Brown*, 134 S. Ct. 2881, 189 L. Ed. 2d 833 (2014). This case was brought as a challenge to the constitutional validity of the California ban on gay conversion therapy, as codified in CAL. BUS. & PROF. CODE § 865.1-865.2 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.). See *Pickup v. Brown*, 740 F.3d 150.

378. Oregon and the District of Columbia have also enacted bans of gay conversion therapy for minors; effective May 18, 2015, Oregon’s ban provided that a “mental health care or social health professional may not practice conversion therapy if the recipient of the conversion therapy is under 18 years of age.” OR. REV. STAT. ANN. § 675.850 (West, Westlaw through Ch. 9 of the 2017 Reg. Sess., pending classification of undesignated material and text revision by the Or. Reviser). Effective March 11, 2015, the District of Columbia ban provided that a:

In 2013, both California³⁷⁹ and New Jersey³⁸⁰ enacted legislation that prohibits mental health providers from engaging in any sexual orientation change efforts with persons under the age of eighteen. Each of these state legislatures found that being “lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming,”³⁸¹ and in declaring the intent of the acts, cited to the American Psychological Association’s conclusion that “sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people.”³⁸² The New Jersey ban also established that the state “has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts.”³⁸³

In *Doe ex. rel. Doe v. Governor of New Jersey*,³⁸⁴ a minor who sought to undergo sexual orientation change efforts and his parents challenged the constitutional validity of the New Jersey ban on gay conversion therapy.³⁸⁵ When deciding this case, the Third Circuit discussed a similar case, *King v. Governor of New Jersey*,³⁸⁶ in which licensed counselors challenged the constitutionality of the gay conversion therapy ban.³⁸⁷ The court upheld *King’s* reasoning.³⁸⁸

[P]rovider shall not engage in sexual orientation change efforts with a consumer who is a minor,” and that violation of this law “shall be considered a failure to conform to acceptable conduct within the mental health profession under § 3-1205.14(a)(26), and shall subject a provider to discipline and penalties under § 3-1205.14(c).

D.C. CODE § 7-1231.14a (West, Westlaw through Apr. 3, 2017).

379. See CAL. BUS. & PROF. CODE §§ 865.1-865.2 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.). The California act provides that “[u]nder no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.” *Id.* § 865.1 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.). The act also provides that “[a]ny sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider.” *Id.* § 865.2 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.).

380. See N.J. STAT. ANN. § 45:1-54 (West, Westlaw through West, Westlaw through L.2017, c. 39 and J.R. No. 1).

381. N.J. STAT. ANN. § 45:1-54 (West, Westlaw through West, Westlaw through L.2017, c. 39 and J.R. No. 1). See also *Therapy And Therapists—Sexual Orientation—Children And Minors*, 2012 Cal. Legis. Serv. Ch. 835 (S.B. 1172); CAL. BUS. & PROF. CODE § 865.1-865.2 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.).

382. See S.B. 1172, 2012 Leg. Reg. Sess. (Cal. 2012) (codified at CAL. BUS. PROF. CODE § 865.1 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.)); N.J. STAT. ANN. § 45:1-54 (West, Westlaw through L.2017, c. 39 and J.R. No. 1).

383. N.J. STAT. ANN. § 45:1-54 (West, Westlaw through West, Westlaw through L.2017, c. 39 and J.R. No. 1).

384. *Doe ex. rel. Doe v. Governor of New Jersey*, 783 F.3d 150 (3d Cir. 2015).

385. *Id.* at 151.

386. *Id.* at 151–56 (citing *King v. New Jersey* 767 F.3d 216 (3d Cir. 2014)).

387. *Id.* at 151.

388. The court in *King* also stated that the ban could be “permissible only if it directly advances the State’s substantial interest in protecting clients from ineffective or harmful professional services, and is not more extensive than necessary to serve that interest.” *Doe*, 783 F.3d at 153 (3d Cir. 2015) (citing *King*, 767 F.3d at 240).

[The Act] survived intermediate scrutiny and was a “permissible prohibition of professional speech” since the state of New Jersey had “an ‘unquestionably substantial’ interest in protecting citizens from harmful professional practices, and that this interest is even stronger where the citizens protected are minors, “a population that is especially vulnerable to such practices.”³⁸⁹

The Third Circuit also agreed with the Ninth Circuit’s reasoning in *Pickup v. Brown*,³⁹⁰ a case involving a challenge to California’s statute prohibiting sexual orientation change efforts counseling to minors.³⁹¹ In *Pickup*, the Ninth Circuit held that the California ban, S.B. 1172, was “rationally related to the legitimate government interest of protecting the well-being of minors.”³⁹²

B. CHILD CUSTODY ISSUES FOR LGBTQ-AFFIRMING PARENTS

As LGBTQ youth come out at younger ages, “courts will increasingly face custody disputes where divorcing parents disagree about the desirability of their child’s emerging sexual orientation or gender identity and expression.”³⁹³ However, courts have yet to determine the proper way to take a child’s sexual identity into account in ways that will serve the best interests of LGBTQ youth.

The “best interests of the child” standard is the primary guiding principle for courts in determining the outcomes of custody hearings.³⁹⁴ The “best interests” standard is inherently subjective and provides judges with broad discretion to determine which living arrangement is most desirable for the child long-term.³⁹⁵ Thus, a fact-finder may misinterpret or misunderstand LGBTQ youths’ gender identity and sexual orientation in custody determinations, or may assign custody to the parent whose view regarding gender identity and sexual orientation most closely aligns with the fact-finder’s own.³⁹⁶

389. *Doe*, 783 F.3d 150, 153 (3d Cir. 2015) (citations omitted). For a scholarly discussion of the intermediate scrutiny standard, see also Patrick Bannon, *Intermediate Scrutiny vs. the “Labeling Game” Approach: King v. Governor of New Jersey and the Benefits of Applying Heightened Scrutiny to Professional Speech*, 23 J.L. & POL’Y 649, 677 (2015); David Friedman, *The Right to Stay Gay: SB 1172 and SOCE*, 25 STAN. L. & POL’Y REV. 193, 196 (2014). But see Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex and Sex Discrimination—The Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 144 (2011) (arguing for strict scrutiny for sex discrimination because sex, like race, is an imprecise category).

390. *Pickup*, 740 F.3d 1208, 1223 (9th Cir.), cert. denied, 134 S. Ct. 2871, (2014) and cert. denied sub nom. *Welch v. Brown*, 134 S. Ct. 2881 (2014).

391. *Doe*, 783 F.3d at 156.

392. *Pickup*, 740 F.3d at 1232; see also *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016).

393. Matthew J. Hulstein, *Recognizing and Respecting the Rights of LGBT Youth in Child Custody Proceedings*, 27 BERKELEY J. GENDER L. & JUST. 171, 174 (2012).

394. Linda D. Eldrod, *CHILD CUSTODY PRAC. & PROC.* § 4:1 (2016 Ed.).

395. Hulstein, *supra* note 393, at 173.

396. *Id.*; see also *Smith v. Smith*, No. 05 JE 42, 2007 WL 901599, at *1, 2007 Ohio App. LEXIS 1282 (Ohio Ct. App. Mar. 23, 2007) (upholding a lower court’s finding, without medical diagnosis, that the child did not suffer from Gender Identity Disorder and was rather influenced by the mother to believe that he was transgender).

Judges are not permitted to consider society's possible negative reaction to race, ethnicity, religion, or gender in determining the best interests of a child.³⁹⁷ In addition, scholars argue that *Lawrence v. Texas*³⁹⁸ requires equal treatment of youth in custody proceedings.³⁹⁹ However, there is a need for greater understanding of gender identity, sexual orientation, and the interests of LGBTQ youth in custody proceedings.⁴⁰⁰

For example, in *Smith v. Smith*,⁴⁰¹ an Ohio court awarded custody to the estranged father of Christine, a child who was born male but sought treatment for Gender Identity Disorder with the support of her mother.⁴⁰² Although Christine's mother had previously been given residential custody, her father was awarded sole custody when he protested Christine's transition and claimed that being treated as if she were a boy was in Christine's best interests.⁴⁰³ In addition to granting custody to the father, the court issued an order requiring Christine be treated as if she were a boy.⁴⁰⁴ The Ohio Court of Appeals affirmed the trial court's decision, but noted that the case revealed "some of the severe limitations in using the judicial system to resolve complex and possibly controversial child-rearing and childhood mental health issues."⁴⁰⁵

Additionally, attorneys representing LGBTQ youth are not immune to personal biases, homophobia, and transphobia, and the lack of a "zealous advocate" may negatively affect custody determinations.⁴⁰⁶ Scholars and advocates insist that both judges and attorneys approach custody proceedings with an understanding of the needs of minors who identify with the LGBTQ community.⁴⁰⁷

397. See *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984).

398. 539 U.S. 558 (2003).

399. As one scholar stated:

Although the facts in *Lawrence* concerned a criminal statute that prohibited same sex couples from engaging in consensual sex acts in private, the right articulated in the case goes well beyond such facts Ultimately, the *Lawrence* opinion protects "the right of gay people to equal respect for their life choices."

Hulstein, *supra* note 393, at 185–86 (citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)) (quoting Pamela Karlan, *The Boundaries of Liberty after Lawrence v. Texas*, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1450 (2004)); U.S. CONST. amend. XIV; *Limon v. Kansas*, 539 U.S. 955 (2003).

400. Shannon Safron Perez, *Is it a Boy or Girl? Not the Baby, the Parent: Transgender Parties in Custody Battles and the Benefit of Promoting a Truer Understanding of Gender*, 9 WHITTIER J. CHILD & FAMILY ADVOC. 367, 367–93 (2010).

401. No. 05 JE 42, 2007 WL 901599 (Ohio Ct. App., 2007).

402. *Id.* at *2–6.

403. *Id.* at *1–2.

404. *Id.* at *5.

405. *Id.* at *12.

406. See Sarah Valentine, *When Your Attorney is Your Enemy: Preliminary Thoughts on Ensuring Effective Representation For Queer Youth*, 19 COLUM. J. GENDER & L. 773, 775–76 (2010).

407. *Id.*

C. HOMELESSNESS AMONG LGBTQ YOUTH AND RELATED ISSUES

Children and teenagers who identify as LGBTQ are 120% more likely to experience homelessness than heterosexual, cisgender youth.⁴⁰⁸ Studies estimate that more than 1.6 million youths in the United States are currently experiencing some form of homelessness,⁴⁰⁹ with up to forty percent identifying as LGBT.⁴¹⁰ Within this population, African-American LGBTQ youth are overrepresented; thirty-one percent of homeless LGBTQ youth are African-American.⁴¹¹ Studies have also shown that transgender and gender nonconforming youth are at especially high risk of homelessness.⁴¹² LGBTQ youth also have more barriers to exiting homelessness and experience greater trauma while living on the streets or in shelters.⁴¹³

This section examines the primary reasons why LGBTQ youth become homeless and the specific barriers to exiting homelessness that they experience. It also summarizes the initiatives and legal remedies that have been proposed.

1. Primary Causes of Homelessness

Familial rejection is cited as the primary cause of homelessness among LGBTQ youth.⁴¹⁴ Fifty-five percent of homeless gay, lesbian, and bisexual youth and sixty-seven percent of homeless transgender youth reported that either being

408. See M.H. Morton, A. Dworsky, & G.M. Samuels, *Missed Opportunities: Youth Homelessness in America*, VOICES OF YOUTH COUNT (2017) <https://voicesofyouthcount.org/wp-content/uploads/2017/11/VoYC-National-Estimates-Brief-Chapin-Hall-2017.pdf>; See also Adam P. Romero, Shoshana K. Goldberg, & Luis A. Vasquez, *LGBT People and Housing Affordability, Discrimination, and Homelessness*, UCLA SCHOOL OF LAW WILLIAMS INSTITUTE (Apr. 2020) <https://williamsinstitute.law.ucla.edu/publications/lgbt-housing-instability/>; Nusrat Ventimiglia, *LGBT Selective Victimization: Unprotected Youth on the Streets*, 13 J. L. SOC'Y 439, 440 (2012).

409. Deborah Lolai, "You're Going to be Straight or You're Not Going to Live Here": *Child Support for LGBT Homeless Youth*, 24 TUL. J.L. & SEXUALITY 35, 41 (2015) (quoting Nicholas Ray, Nat'l Gay & Lesbian Task Force Policy Inst., *Lesbian, Gay, Bisexual, and Transgender Youth: An Epidemic of Homelessness*, Nat'l Coalition for the Homeless 14 (2006)).

410. See Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 375 (2007) (citing studies in New York, Los Angeles, and Seattle); *LGBT Homelessness*, NAT'L COALITION FOR THE HOMELESS, <http://nationalhomeless.org/issues/lgbt> (last visited Feb. 11, 2022).

411. Soon Kyu Choi et. al., *The Needs and Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness*, SERVING OUR YOUTH 2015, 4 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Serving-Our-Youth-June-2015.pdf> [hereinafter SERVING OUR YOUTH] (finding, in a study of 183 youths experiencing homelessness in New York City, that twenty percent identified as gay or lesbian, seven percent identified as bisexual, and two percent identified as questioning).

412. Jody Marksamer, *A Place of Respect: A Guide for Group Care Facilities Serving Transgender and Gender Non-Conforming Youth*, 20 NAT'L CTR. FOR LESBIAN RIGHTS (2011), http://www.nclrights.org/wp-content/uploads/2013/07/A_Place_Of_Respect.pdf (quoting Heather Berbert, *Living in the Shadows: An Assessment of Housing Needs Among San Diego's LGBTQ Youth Living Outside the Home*, presentation at the American Psychological Association annual meeting, Honolulu, HI. (2004) (finding that four percent of youth experiencing homeless in San Diego identified as transgender girls)).

413. SERVING OUR YOUTH, *supra* note 411.

414. *Id.* at 5.

“forced out by parents or [running] away because of Sexual Orientation, Gender Identity and Gender Expression” was the reason they were homeless.⁴¹⁵

Additionally, LGBTQ youth are also more likely to experience emotional, physical, and sexual abuse while in foster care, a potential alternative to homelessness for youth.⁴¹⁶ State custody facilities, such as juvenile correctional facilities, have been found liable for allowing harassment and abuse of LGBTQ youth to persist despite their duty to protect the welfare of the minors in their charge.⁴¹⁷

2. Specific Struggles of LGBTQ Youth Experiencing or Attempting to Exit Homelessness

LGBTQ youth, on average, experience homelessness and housing insecurity for longer periods of time than heterosexual youth.⁴¹⁸ This is likely due to the many barriers that LGBTQ youth face when exiting homelessness, like lack of family acceptance, lack of a support system, and lack of funding for LGBTQ-specific programs for housing providers.⁴¹⁹ Transgender youth often experience difficulty in securing placement in gender-segregated accommodations or are placed in these accommodations at odds with their gender identity.⁴²⁰ Further, the transgender community faces difficulties in securing housing; one in five transgender people have been refused a home, and one in ten have been evicted because of their gender identity.⁴²¹

LGBTQ youth are especially vulnerable to violence and harassment while experiencing homelessness.⁴²² Among homeless LGB youth, seventy percent reported harassment and bullying, while sixty percent also reported physical, emotional, or sexual abuse.⁴²³ Transgender youth experienced even higher rates of violence while homeless; ninety percent reported harassment and bullying, and

415. *Id.*; see also Maureen Carroll, *Transgender Youth, Adolescent Decisionmaking, and Roper v. Simmons*, 56 U.C.L.A. L. REV. 725, 734 (2009) (“Transgender adolescents must navigate a hostile world with little familial or institutional support.”).

416. See James W. Gilliam, Jr., *Toward Providing a Welcoming Home For All: Enacting a New Approach to Address the Longstanding Problems Lesbian, Gay, Bisexual, and Transgender Youth Face in the Foster Care System*, 37 LOY. L.A. L. REV. 1037, 1038 (2004); J. Lauren Turner, *From the Inside Out: Calling on States to Provide Medically Necessary Care to Transgender Youth in Foster Care*, 47 FAM. CT. REV. 552, 556 (2009) (detailing the struggles of transgender youth in the foster system).

417. See *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1157 (D. Haw. 2006) (holding that a facility that allowed pervasive abuse to transgender plaintiff violated her due process rights).

418. SERVING OUR YOUTH, *supra* note 411, at 4 (sixty-one percent of LGB and eighty percent of transgender youth were homeless for longer periods of time than non-LGBT youth according to providers interviewed).

419. *Id.* at 5.

420. See, e.g., Shannon Minter & Christopher Daley, *Trans Realities: A Legal Needs Assessment of San Francisco’s Transgender Communities*, Nat’l Ctr. For Lesbian Rights & Transgender Law Ctr., 9 (2003), <http://www.nclrights.org/wp-content/uploads/2013/07/transrealities0803.pdf>.

421. GLAAD, *Understanding Issues Facing Transgender Americans*, 4 (Feb. 23, 2015), www.glaad.org/sites/default/files/understanding-issues-facing-transgender-americans.pdf [hereinafter GLAAD Report].

422. See SERVING OUR YOUTH, *supra* note 411, at 5.

423. See *id.*

seventy-five percent experienced physical, emotional, or sexual abuse.⁴²⁴ Homeless LGBTQ youth are also likely to be involved in the sex trade.⁴²⁵ Ten percent of homeless LGB youth and twenty percent of homeless transgender youth reported having been sexually exploited or trafficked.⁴²⁶

In addition to physical traumas associated with housing insecurity, LGBTQ youth experience a great deal of emotional and mental harm.⁴²⁷ Sixty-five percent of homeless LGB youth and seventy-five percent of homeless transgender and gender nonconforming youth identified as having mental health issues.⁴²⁸ Thirty-five percent of homeless LGB youth reported abusing alcohol or other substances; forty percent of their transgender counterparts reported substance abuse.⁴²⁹

The increased likelihood that LGBTQ youth will experiment with drugs, alcohol, and sex work likely contributes to higher rates of incarceration, which further exacerbates barriers to housing security.⁴³⁰ Fifteen percent of LGB and twenty percent of transgender youth surveyed in 2014 reported having some interaction in the juvenile or criminal justice system.⁴³¹ Some of this interaction, however, may have been the result of discriminatory enforcement of laws: LGBTQ youth experiencing homelessness are easily targeted for minor “quality of life” crimes such as loitering, public drunkenness, and littering.⁴³² Moreover, similarly to all people experiencing homelessness, LGBTQ youth are often forced to resort to “survival crimes,” such as prostitution or minor theft, in order to survive on the streets and meet basic needs.⁴³³

3. Proposed Legal Solutions Addressing the Issue of LGBTQ Youth Homelessness

A number of legal solutions have been proposed to address the epidemic of homelessness among LGBTQ youth, focusing on increasing monetary support and care for youth who too often fall between the cracks.⁴³⁴

424. *See id.*

425. *See id.* at 14; *see also* Tamar R. Birckhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1093 (2011) [hereinafter *Youngest Profession*].

426. *See* SERVING OUR YOUTH, *supra* note 411, at 5; *see also Youngest Profession, supra* note 426, at 1093.

427. *See* SERVING OUR YOUTH, *supra* note 411, at 5.

428. *See id.*

429. *See id.*

430. *See id.*

431. *See id.*

432. *See* Marksamer, *supra* note 412, at 22; AMNESTY INT’L, USA: STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE U.S. 33 (Sept. 2005), <https://www.amnesty.org/en/documents/AMR51/122/2005/en/>.

433. Carrie L. Buist, *LGBTQ Rights in the Fields of Criminal Law and Law Enforcement*, 54 U. RICH. L. REV. 877, 881–82 (2020).

434. Deborah Lolai, *supra* note 409, at 78; Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe For All Youth Through Litigation, Advocacy, and Education*, 79 TEMP. L. REV. 415, 422–23 (2006); Talia Yasmeen Stossel, *Addressing the Harm of Silence and Assumptions of*

a. Emancipation and Child Support. Deborah Lolai, author of *'You're Going to be Straight or You're Not Going to Live Here': Child Support for LGBT Homeless Youth*, argues for constructive or actual emancipation of LGBT youth who are experiencing homelessness. This would allow them to petition their parents for child support.⁴³⁵ Lolai discusses the possible positive effects of reducing homelessness, enabling youth employment, and minimizing interactions with the child welfare and juvenile justice system.⁴³⁶ She admits, however, that the potentially harmful effects of such orders may include deterioration of the parent-child relationship, infringement of parents' rights, and possible contribution to the prison-industrial complex.⁴³⁷

b. Foster Care Reform. Due to the high frequency of unsafe and abusive conditions for LGBTQ youth, legal claims have been brought against foster care providers under multiple theories: the right of safety in the child welfare system,⁴³⁸ the right of equal protection,⁴³⁹ freedom of speech, and freedom of religion.⁴⁴⁰ Additionally, many organizations and scholars advocate for the implementation of model standards and best practices in foster care,⁴⁴¹ focusing on effective non-discrimination policies that are clear to all caseworkers, staff members, and caregivers.⁴⁴² The Supreme Court's decision in *Fulton v. City of Philadelphia* – which held that religious social services groups could refuse to certify same-sex parents as foster parents on the grounds of the Free Exercise Clause of the First Amendment – will ostensibly only exacerbate these systemic issues by eliminating opportunities for families willing to foster LGBTQ youth.⁴⁴³

Mutability: Implementing Effective Non-Discrimination Policies for Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Foster Care, 17 U.C. DAVIS J. JUV. L. & POL'Y 79, 115 (2013); Shannon Wilbur et al., *CWLA Best Practices Guidelines: Serving LGBT Youth in Out of Home Care*, CHILD WELFARE LEAGUE OF AMERICA, 50 (2006) <http://www.nclrights.org/wp-content/uploads/2013/07/bestpracticeslgbtyouth.pdf>; Rob Woronoff, Rudy Estrada, & Susan Sommer, CWLA, LAMBDA LEGAL, *OUT OF THE MARGINS: A REPORT ON REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH IN CARE* (2006), <https://www.lambdalegal.org/sites/default/files/publications/downloads/out-of-the-margins.pdf>.

435. Lolai, *supra* note 409, at 78.

436. *Id.* at 81–83.

437. *Id.* at 85–88.

438. See Estrada & Marksamer, *supra* note 434, at 422–23; see also *Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Reg. Servs.*, 380 F.3d 872, 880 (5th Cir. 2004) (discussing liability of the state when parents sued for the death of their child in the foster system).

439. See Estrada & Marksamer, *supra* note 434, at 431.

440. *Id.* at 432.

441. Talia Yasmeen Stossel, *supra* note 434, at 115 (quoting Shannon Wilbur et al., *CHILD WELFARE LEAGUE OF AM., CWLA BEST PRACTICES GUIDELINES: SERVING LGBT YOUTH IN OUT OF HOME CARE* (2006)), <http://www.nclrights.org/wp-content/uploads/2013/07/bestpracticeslgbtyouth.pdf>). Other agencies involved in standardized best practices for foster housing include: National Center for Lesbian Rights (NCLR), Lambda Legal Education and Defense Fund, and Child Welfare League of America. *Id.*

442. *Id.*; see also Woronoff, *supra* note 434, for full recommendations and toolkit for implementation.

443. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1871–73 (2021).

c. Prevention of Discrimination in Emergency Shelters & Permanent Housing. The Child Welfare League of America published a list of “Best Practices” for administrators of emergency and long-term shelters aimed at changing the culture of discrimination and promoting equal acceptance of the gay, lesbian, and transgender communities.⁴⁴⁴

The history of LGBTQ discrimination in emergency housing illustrates the need for more adequate funding of LGBTQ-specific services in homeless and domestic violence shelters, as well as an expanded understanding of gender identity.⁴⁴⁵ The Administration for Children and Families (ACF)⁴⁴⁶ has modified its Office of Refugee Resettlement Matching Grant Program Guidelines to allow members of the LGBTQ population to transfer from one resettlement agency to another if there are “special needs that are not being met.”⁴⁴⁷

While federal protection against housing discrimination for LGBTQ Americans has been historically scarce, in February 2021, the Department of Housing and Urban Development (“HUD”) announced that it would enforce the Fair Housing Act to prohibit discrimination on the basis of sexual orientation and gender identity.⁴⁴⁸ The agency’s new interpretation of the Fair Housing Act stems from the Supreme Court’s decision in *Bostock v. Clayton County*, which held that an employer who fires an individual for being gay or transgender violates the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964.⁴⁴⁹

Currently, only twenty two states and the District of Columbia have laws explicitly prohibiting housing and lending discrimination based on both sexual orientation and gender identity.⁴⁵⁰ Nine more states interpret existing prohibitions on sex discrimination to include sexual orientation and/or gender identity, but do not explicitly enumerate sexual orientation or gender identity in their

444. See Wilbur et al., *supra* note 434, at 50.

445. *Id.*

446. The Administration for Children and Families is a division of the U.S. Department of Health and Human Services that promotes the economic and social well-being of families through funding, guidance, trainings, and technical assistance. See ADMIN. CHILDREN & FAMILIES, <https://www.acf.hhs.gov/> (last visited Nov. 8, 2016).

447. U.S. DEP’T. HEALTH & HUMAN SVS., ADVANCING LGBT HEALTH AND WELL BEING 7 (2014), <http://www.hhs.gov/sites/default/files/lgbt/resources/reports/dhhs-lgbt2014annualreport.pdf> [hereinafter *HHS Report*]. The Department of Health & Human Services is also facilitating linkages between the LGBT Youth Homelessness Prevention Project and the grant-recipients of the Runaway and Homeless Youth Program, which will assist treatment providers in improving their cultural competency in dealing with LGBT youth. *Id.* at 8.

448. U.S. DEP’T OF HOUSING AND URBAN DEVELOPMENT, HUD TO ENFORCE FAIR HOUSING ACT TO PROHIBIT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY (Feb. 11, 2021), https://www.hud.gov/press/press_releases_media_advisories/hud_no_21_021.

449. 140 S. Ct. 1731, 1737 (2020).

450. See *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Nov. 1, 2021) (noting that Maine, New Hampshire, Vermont, New York, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, Virginia, Illinois, Iowa, Minnesota, New Mexico, Colorado, Utah, Nevada, California, Oregon, Washington, Hawaii, and the District of Columbia explicitly prohibit discrimination based on sexual orientation and gender identity).

nondiscrimination laws.⁴⁵¹ One other state prohibits housing discrimination based on sexual orientation, but offers no protections for gender identity.⁴⁵²

D. ACCESS TO MEDICAL TREATMENT FOR TRANSGENDER YOUTH

Transgender people face substantial barriers to accessing health care⁴⁵³ and are “among the most stigmatized and medically underserved groups.”⁴⁵⁴ Transgender people have a particularly acute interest in safe and accessible health care because they are “uniquely dependent on medical treatments to realize their identities and to live healthy, authentic lives.”⁴⁵⁵ For transgender youth, this need to access medical care is exacerbated by the fact that the U.S. has not “developed jurisprudence or legislation that explicitly protects adolescents’ capacity to consent to gender reassignment treatment.”⁴⁵⁶ However, the lack of established case law may be mitigated by regulatory developments, discussed below.

451. *Id.* (noting that Florida, Kansas, Kentucky, Michigan, North Dakota, Nebraska, and Pennsylvania do not explicitly enumerate sexual orientation or gender identity in their nondiscrimination laws).

452. *Id.* (noting that Wisconsin state law explicitly prohibits discrimination based on sexual orientation only).

453. These obstacles include professionals’ bias and lack of general knowledge about best practices, as well as the failure of many health insurance plans to cover the cost of hormone therapy and supplies, mental health services, or gender affirmation surgery, and restrictions on care imposed by prohibitive health care systems. “One in four respondents to the Transgender Discrimination Survey had experienced insurance coverage obstacles, such as coverage denials for care related to gender transition or routine care. More than half (55%) had been denied coverage for transition-related surgery, and 25% were denied coverage for hormone therapy. These barriers exist despite evidence that such interventions are safe, effective, and medically necessary.” Committee Opinion No. 823, Health Care for Transgender and Gender Diverse Individuals, *Am. Coll. Obstetricians & Gynecologists* 78 (Mar. 2021), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals> (citation omitted). Furthermore, these treatments are very expensive: puberty blockers, for example, cost “approximately \$1,200 for injections and anywhere between \$4,500–\$18,000 for an implant.” Priyanka Boghani, *When Transgender Kids Transition, Medical Risks are Both Known and Unknown*, PBS (June 30, 2015), <http://www.pbs.org/wgbh/pages/frontline/health-science-technology/growing-up-trans/when-transgender-kids-transition-medical-risks-are-both-known-and-unknown/>.

454. Sarah Gage, *The Transgender Eligibility Gap: How the ACA Fails to Cover Medically Necessary Treatment for Transgender Individuals and How HHS Can Fix It*, 49 *New Eng. L. Rev.* 499, 500 n.2 (2015) (citing Emilia Lombardi, *Enhancing Transgender Health Care*, 91 *AM. J. PUB. HEALTH* 869, 870 (2001)).

455. Kellan Baker & Andrew Cray, *Ctr. For Am. Progress, Why Gender-Identity Nondiscrimination in Insurance Makes Sense* 6 (May 2, 2013), <http://cdn.americanprogress.org/wp-content/uploads/2013/05/BakerNondiscriminationInsurance-6.pdf>.

456. “According to [Professor] Kimberly Mutcherson, in one study, American health care providers reported that adolescent patients ‘understand information about medical treatment and conditions, engage in rational deliberation during the decisional process, and communicate choices and concerns clearly.’” Katherine Romero & Rebecca Reingold, *Advancing Adolescent Capacity to Consent to Transgender-Related Health Care in Colombia and the USA*, 21 *Reprod. Health Matters*, 186, 193 (2013) (citing Kimberly M. Mutcherson, *Whose Body Is It Anyway? An Updated Model of Healthcare Decision-making Rights for Adolescents*, 14 *Cornell J.L. & Pub. Pol’y* 251, 257–85 (2005)); see also Maureen Carroll, *Transgender Youth, Adolescent Decisionmaking, and Roper v. Simmons*, 56 *UCLA L. Rev.* 725, 732 (2009) (stating that because “the parents of transgender youth are often hostile or absent, the parental consent requirement imposed by informed consent laws adds to these barriers.”).

1. Access to Hormone Replacement Therapy and Gender Confirmation Surgeries

a. Access to Hormone Replacement Therapy. Doctors have found hormone therapy to be medically necessary for many people.⁴⁵⁷ Transgender adolescents often have difficulty obtaining hormones due to “barriers imposed by the medical establishment and the legal system.”⁴⁵⁸ Additionally, “individuals concerned about the way they may be treated by a health care professional are more likely to obtain hormones from friends or unlicensed sources, putting them at risk of inappropriate dosing and the subsequent [after effects]”⁴⁵⁹ threatening the adolescent transgender community’s safety and well-being.

The Medicaid rules in eighteen states and the District of Columbia have chosen to specifically include coverage for gender affirming care.⁴⁶⁰ Recent developments, including a rule finalized by the Department of Health and Human Services Office for Civil Rights regarding anti-discrimination, seem promising for the future of transgender youth.⁴⁶¹ However, certain medical uncertainties, such as the timing of gender-affirming hormone treatment to transgender minors, still need to be addressed.⁴⁶² The issue of timing will only gain importance because as “transgender issues have gained visibility in recent years,

457. *FAQ on Access to Health Care*, Lambda Legal, <http://www.lambdalegal.org/know-your-rights/transgender/transition-related-care-faq> (last visited Nov. 1, 2021).

458. Carroll, *supra* note 456, at 735. These barriers result in astonishing consequences of inadequate treatment:

Fifty-four percent of transgender youth have attempted suicide and 21% resort to self-mutilation. More than 50% of persons identified as transgender have used injected hormones that were obtained illegally or used outside of conventional medical settings. Additionally, such individuals frequently resort to the illegal and dangerous use of self-administered silicone injections to spur masculine or feminine physiologic changes. The American College of Obstetricians and Gynecologists, therefore, urges public and private health insurance plans to cover the treatment of gender identity disorder.

Committee Opinion No. 512, *supra* note 402, at 2 (citing Nicolas Ray, Nat’l Gay and Lesbian Task Force, *Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness* (2006)), <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>).

459. Committee Opinion No. 823, *Health Care for Transgender and Gender Diverse Individuals*, *Am. Coll. Obstetricians & Gynecologists* 79 (Mar. 2021).

460. Christy Mallory & William Tentindo, *Medicaid Coverage for Gender Affirming Care 2* (William Institute 2019).

461. See 45 C.F.R. § 92.1 (West, Westlaw through Apr. 13, 2017; 82 FR 17767).

462. “Doctors grapple with when to start cross-sex hormones While the Endocrine Society’s guidelines suggest 16, more and more children are starting hormones at 13 or 14 once their doctors, therapists and families have agreed that they are mentally and emotionally prepared.” *When Transgender Kids Transition, Medical Risks are Both Known and Unknown*, PBS (June 30, 2015), <http://www.pbs.org/wgbh/pages/frontline/health-science-technology/growing-up-trans/when-transgender-kids-transition-medical-risks-are-both-known-and-unknown/>. The decision to try to start hormone treatment earlier in life is due to “concerns over the impact that delaying puberty for too long can have on development, physically, emotionally and socially. The physical changes that hormones bring about are irreversible, making the decision more weighty than taking puberty blockers.” *Id.*

many transgender people are beginning their journey toward living openly much earlier.”⁴⁶³

b. Access to Gender Confirmation Surgeries. For transgender youth, access to gender affirming care is incredibly costly.⁴⁶⁴ A person wishing to access gender-affirming surgery (also known as “sex reassignment surgery” or SRS) must first be diagnosed with gender identity disorder (“GID”), which carries “the attendant stigma of a mental disorder.”⁴⁶⁵ After receiving a GID diagnosis, state law may still prohibit health insurance coverage of SRS even if deemed “medically necessary.”⁴⁶⁶

In May 2014, the Department of Health and Human Services Departmental Appeals Board determined that the National Coverage Determination (“NCD”) denial of Medicare coverage of gender confirmation as a treatment for “transsexualism is not valid under the Board’s ‘reasonableness standard.’”⁴⁶⁷ As a result, the previous NCD denial is “no longer a valid basis for denying claims for Medicare coverage of transsexual surgery.”⁴⁶⁸ However, the Board also established that “the decision does not bar [the Centers for Medicare & Medicaid Services] or its contractors from denying individual claims for payment for transsexual surgery for other reasons permitted by law.”⁴⁶⁹

2. Legal Advances in Response to the Medicaid Coverage Ban

The United States Department of Health and Human Services (HHS) oversees Medicaid at the federal level, but each state “establishes its own eligibility standards[;] determines the type, amount, duration, and scope of services[;] sets the

463. Beth Sherhouse, *New Study Supports Puberty Blockers for Transgender Youth*, Human Rights Campaign (Sept. 11, 2014), <http://www.hrc.org/blog/entry/new-study-supports-puberty-blockers-for-transgender-youth>.

464. To undergo SRS:

[O]ne must typically undergo at least two years of preparation and extreme time-consuming and financial commitments. Three months of psychotherapy are required to obtain an evaluation for hormone therapy and one or two years spent living twenty-four hours a day as the target gender while continuing hormone therapy. The procedures and operations themselves, can add up to \$50,000 and sometimes more than \$100,000. The standards for obtaining SRS, and its requirement for a legal change of sex, are often inherently heterosexist, cissexist, and classist.

Blaise Vanderhorst, *Whither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex*, 9 Harv. L. & Pol’y Rev. 241, 264 (2015).

465. *Id.*

466. Jennifer L. Casazza, *Sex Reassignment Surgery: Required for Transgendered Prisoners but Forbidden for Medicaid, Medicare, and CHAMPUS Beneficiaries*, 20 Wm. & Mary J. Women & L. 625, 642 (2014). *But see* G.B. v. Lackner, 80 Cal. App. 3d 64 (Cal. Ct. App. 1978) (“Medi-Cal must cover medically necessary [sex reassignment surgery] procedures and cannot arbitrarily define [sex reassignment surgery] as a cosmetic surgery to avoid such coverage.”).

467. Dep’t of Health and Human Servs., *Transsexual Surgery*, NCD 140.3 (May 30, 2014).

468. *Id.*

469. *Id.*

rate of payment for services[;] and administers its own Medicaid program.”⁴⁷⁰ While the Medicaid rules of eighteen states and the District of Columbia explicitly provide for “medically necessary” transition-related services,⁴⁷¹ there is no indication that these services will be available to minors.⁴⁷² Additionally, many state Medicaid rules previously contained “blanket exclusions for procedures related to gender transition.”⁴⁷³ However, these blanket exclusions are no longer valid due to a final rule issued by HHS, which requires that insurers cover medical treatments for transgender people if they could cover those treatments for people who are not transgender.⁴⁷⁴ Going forward, this rule will provide greater clarity as to whether courts should uphold a state’s prohibition of the coverage of certain medical services that have previously been limited, if not denied to the transgender community.⁴⁷⁵

470. *What are Medicare and Medicaid?*, MED. NEWS TODAY, <https://www.medicalnewstoday.com/articles/what-are-medicare-and-medicaid#medicaid> (last visited Nov. 1, 2021).

471. See Christy Mallory & William Tentindo, *Medicaid Coverage for Gender Affirming Care 2* (William Institute 2019).

472. These states include California (*see What Transgender Californians Need to Know About Health Care Reform*, Transgender Law Ctr., <http://transgenderlawcenter.org/archives/9145>) (last visited Sept. 8, 2016)); Maryland (*see* Josh Hicks, *New LGBT Protections to Take Effect Without Gov. Hogan’s Signature*, Wash. Post (May 24, 2015), https://www.washingtonpost.com/local/md-politics/new-lgbt-protections-to-become-law-in-md-without-gov-hogans-signature/2015/05/24/1c11e57a-018a-11e5-833c-a2de05b6b2a4_story.html); Massachusetts (*see* Karen Moulding *et al.*, 1 *Sexual Orientation and the Law* § 10:23 (2014) (citing Office of Consumer Affairs and Business Regulation, Div. of Ins., Massachusetts Transgender Political Coalition, Bulletin 2014-03 (June 20, 2014), <http://www.masstpc.org/pubs/3party/DOI%20Bulletin%202014-03.pdf>)); New York (*see Transgender Related Care Services*, HealthNY.Gov (March 2016), https://www.health.ny.gov/regulations/recently_adopted/docs/2015-03-11_transgender_related_care_and_services.pdf); and Oregon (*see* Kristian Foden-Vencil, *In Oregon, Medicaid Now Covers Transgender Medical Care*, NPR (Jan. 12, 2015), <http://www.npr.org/sections/health-shots/2015/01/10/376154299/in-oregon-medicaid-now-covers-transgender-medical-care>); Karen Moulding *et al.*, 1 *Sexual Orientation and the Law* § 10:23 (2014) (citing Minn. Stat. § 256B.0625(3a) (West, Westlaw with legislation through ch. 14 of the 2017 Reg. Sess.); 89 Ill. Admin. Code § 140.6(1) (West, Westlaw through rules published in the Ill. Register Vol. 41, Issue 15, Apr. 14, 2017); Alaska Admin. Code, tit. 7, § 43.385(a)(1) (West, Westlaw through changes received by the publisher through Dec. 12, 2016 (Register 220))).

473. *Id.*

474. 45 C.F.R. § 92.207 (West, Westlaw current through Apr. 13, 2017; 82 FR 17767).

475. See, e.g., Jennifer L. Casazza, *Sex Reassignment Surgery: Required for Transgendered Prisoners but Forbidden for Medicaid, Medicare, and CHAMPUS Beneficiaries*, 20 Wm. & Mary J. Women & L. 625, 642 (2014) (citing *Ravenwood v. Daines*, No. 06-CV-6355-CJS, 2009 WL 2163105, at *1 (W.D.N.Y. July 17, 2009)) (citing *Casillas v. Daines*, 580 F. Supp. 2d 235 (S.D.N.Y. 2008)) (citing *Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001) (holding that legislation prohibiting the coverage of SRS was valid under the federal Medicaid regulation because it was not deemed arbitrary or capricious)) (citing *Rush v. Parham*, 625 F.2d 1150 (5th Cir. 1980)); *FAQ: Equal Access to Health Care*, Lambda Legal, <http://www.lambdalegal.org/know-your-rights/transgender/transition-related-care-faq> (last visited Apr. 21, 2017) (citing *O’Donnabhain v. C.I.R.*, 134 T.C. 34 (2010)) [hereinafter *Equal Access to Health Care*]. But see *Equal Access to Health Care* (citing *Fields v. Smith*, 712 F. Supp. 2d 830 (E.D. Wis. 2010), *supplemented* (July 9, 2010), *aff’d*, 653 F.3d 550 (7th Cir. 2011) (holding a statute limiting preventing therapy/SRS for inmates was facially unconstitutional)).

IV. CHALLENGES FACING LGBTQ YOUTH IN THE JUVENILE JUSTICE SYSTEM

A. THE PREVALENCE OF LGBTQ YOUTH IN THE JUVENILE JUSTICE SYSTEM

LGBTQ youth are at high risk of ending up in the juvenile justice system.⁴⁷⁶ They are twice as likely to be arrested and detained for status offenses and other nonviolent offenses.⁴⁷⁷ A report in 2017 showed that while LGB youth make up seven to nine percent of all youth nationwide, they account for twenty percent of those currently in the juvenile system.⁴⁷⁸ Given this disparity and the overrepresentation of LGBTQ youth in the system,⁴⁷⁹ it is important to discuss the challenges these youths face while detained. The following sections will discuss the harassment LGBTQ youth face, the challenges transgender youth confront, and, finally, how courts resolve allegations of abuse from LGBTQ youth in the juvenile justice system.

B. HARASSMENT AND ABUSE LGBTQ YOUTH FACE GENERALLY

LGBTQ youth in the juvenile justice system, like LGBTQ youth in general, experience higher rates of abuse and harassment.⁴⁸⁰ In a study mandated by the Prison Rape Elimination Act (PREA), the Department of Justice found that LGBT and intersex individuals are particularly vulnerable to rape in prison settings.⁴⁸¹ Moreover, almost double the amount of LGBTQ Youth reported sexual victimization in juvenile facilities at 12 percent compared to the reported six and half percent for heterosexual juveniles.⁴⁸² In *R.G. v. Koller*, three plaintiffs (a boy “perceived to be gay,” a lesbian, and a transgender girl) filed suit for injunctive relief based on abuse and harassment they experienced from both other detainees and prison staff.⁴⁸³ The court found that the other detainees and the prison staff verbally abused the plaintiffs because of the plaintiffs’ actual or perceived sexual orientation or gender identity.⁴⁸⁴ The court also found that other detainees

476. LGBTQ Youths in the Juvenile Justice System, OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, DEP’T OF JUST. (Aug. 2014), <http://www.ojjdp.gov/mpg/litreviews/LGBTQYouthsInTheJuvenileJusticeSystem.pdf>.

477. *Id.*

478. UNJUST: LGBTQ YOUTH INCARCERATED IN THE JUV. JUST. SYSTEM (June 2017), <https://bjs.ojp.gov/content/pub/pdf/vpicsvyjf18st.pdf>.

479. LGBTQ Youths in the Juvenile Justice System, *supra* note 476.

480. *Id. at 6.*

481. *Id.*

482. Michael B. Field & Elizabeth Davis, *Victim, Perpetrator, and Incident Characteristics of Sexual Victimization of Youth in Juvenile Facilities, 2018 – Statistical Tables*, U.S. DEP’T OF JUST. (2020), <https://bjs.ojp.gov/content/pub/pdf/vpicsvyjf18st.pdf>.

483. *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1133–34 (D. Haw. 2006).

484. *Id. at 1144.* Because the transgender female aged out of the juvenile justice system at the time of the case, the court found she did not have standing. *Id. at 1139.* However, the court still found evidence of abuse against the transgender female relevant to the claims of the other two plaintiffs in subsequent analysis. *Id.*

physically assaulted the plaintiffs because of their actual or perceived sexual orientation or gender identity.⁴⁸⁵

The attempted solution to prevent harassment and abuse in the juvenile justice system is often isolation.⁴⁸⁶ The juvenile is separated from the rest of the population.⁴⁸⁷ Though this is done with the safety of the juvenile in mind, this solution has negative consequences.⁴⁸⁸ For example, the juvenile may negatively internalize their isolation as punishment for being LGBTQ.⁴⁸⁹ The American Academy of Child & Adolescent Psychiatry's Juvenile Justice Reform Committee found that solitary confinement and isolation can lead to depression, anxiety, and psychosis.⁴⁹⁰ The Committee also found that juveniles, in particular, are at a higher risk of suffering these negative consequences, and that "the majority of suicides in juvenile correctional facilities occur when the individual is isolated."⁴⁹¹ The district court in *R.G.* found that the plaintiffs had a valid claim of abuse when the staff isolated them because the punitive effects of the confinement outweighed the safety benefits.⁴⁹²

C. PROBLEMS TRANSGENDER YOUTH FACE

In addition to harassment and abuse, transgender individuals face additional obstacles in the juvenile justice system; this subsection will discuss (1) how correctional institutions encounter difficulty in determining whether they should place transgender youth with male or female populations; and (2) the lack of proper medical care transgender youth receive in correctional facilities.

1. Placement

Correctional facilities encounter difficulty when trying to determine where to place transgender juveniles.⁴⁹³ Prior to PREA, these facilities would systematically place juveniles into male or female populations based on their birth sex.⁴⁹⁴ Now, PREA requires correctional institutions to make housing and program placement decisions relating to transgender and intersex youth on an individualized basis.⁴⁹⁵ Dr. Bob Bidwell, member of the Equity Project Advisory Committee and pediatrician at the Hawai'i Youth Correctional Facility, has

485. *Id.* at 1147–48.

486. See KATAYOON MAJD ET AL., HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 106 (2009), <http://www.hivlawandpolicy.org/resources/hidden-injustice-lesbian-gay-bisexual-and-transgender-youth-jvenile-courts-equity-project>.

487. *Id.*

488. *Id.*

489. *Id.* at 107.

490. Juvenile Justice Reform Comm., *Solitary Confinement of Juvenile Offenders*, AM. ACAD. CHILD & ADOLESC. PSYCHIATRY (Apr. 2012), https://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx.

491. *Id.*

492. *R.G.*, 415 F. Supp. 2d at 1155-56.

493. Majd et al., *supra* note 486, at 108.

494. LGBTQ Youths in the Juvenile Justice System, *supra* note 476, at 7.

495. *Id.*

argued that, “if a transgender boy cannot be safe with the boys, he can be placed with the girls, but only if his male identity is acknowledged and respected by the staff and other youth.”⁴⁹⁶ However, the gender identity of transgender individuals is often not respected by staff members.⁴⁹⁷

Placing the transgender individual into the wrong sex-based population can have detrimental effects on the individual.⁴⁹⁸ The transgender youth can face “significant stress from being forced to conform to societal gender roles, as well as physical and sexual abuse perpetrated by residents and facility staff.”⁴⁹⁹ This was the case in *R.G.*, where the correctional facility staff verbally assaulted the transgender plaintiff.⁵⁰⁰ The staff threatened to and did transfer the plaintiff to the male population where she was sexually assaulted.⁵⁰¹

2. Access to Medical Care

In addition to other challenges faced by transgender youth in the justice system, transgender youth also confront a lack of access to proper medical care while in juvenile detention.⁵⁰² When transgender youth enter a correctional facility, they may be denied access to hormone therapy despite having a previous prescription.⁵⁰³ This can result in detrimental health consequences.⁵⁰⁴ In *Rodriguez v. Johnson*,⁵⁰⁵ the New York Office of Children and Family Services denied a transgender woman access to hormone therapy even though she had received this treatment for four years prior to her detention, and, as a result, she suffered from “nausea, headaches, and increased facial hair.”⁵⁰⁶ Lambda Legal argued that the state has “a legal obligation to provide medical care and protection from harm to all young people in custody, including the provision of medically necessary care to transgender young people under 18.”⁵⁰⁷ The case was settled out of court.⁵⁰⁸ As part of the settlement, the plaintiff received monetary damages and the state agreed to implement policies to ensure that transgender youth receive proper medical care.⁵⁰⁹ Over the next five years, OCFS collaborated with Lambda Legal and other leading advocates to develop a toolkit with educational materials on ensuring the safety LGBTQ+ youth in juvenile justice and delinquency

496. Majd et al., *supra* note 486, at 108.

497. *Id.* at 108–09.

498. *Id.* at 109.

499. *Id.*

500. *R.G.*, 415 F. Supp. 2d at 1143.

501. *Id.* at 1144–45.

502. Majd et al., *supra* note 486, at 111–12.

503. *Id.* at 112.

504. *Id.*

505. *Id.*

506. *Id.*

507. *Rodriguez v. Johnson et al.*, No. 06CV00214 (S.D.N.Y. filed Jan. 11, 2006); *Rodriguez v. Johnson, et al.*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/rodriguez-v-johnson-et-al> (last visited Mar. 5, 2022).

508. Majd et al., *supra* note 486, at 112.

509. *Id.*

placements.⁵¹⁰ These materials assert that ignoring the medical care of an LGBTQ+ young person in a New York state facility violates the right to safety, including the denial of transition-related health care to transgendered youth.⁵¹¹

D. HOW COURTS RESOLVE ALLEGATIONS OF ABUSE

Courts may evaluate abuse of LGBTQ individuals in detention as cruel and unusual punishment under the Eighth Amendment or, alternatively, as a violation of substantive due process guaranteed by the Fourteenth Amendment.⁵¹² The Supreme Court held that to find an Eighth Amendment violation, the violation must be “objectively, ‘sufficiently serious’” and the prison officials must have had deliberate indifference to the inmate’s health and safety.⁵¹³ In *Farmer v. Brennan*,⁵¹⁴ the Supreme Court found a violation of the Eighth Amendment when a transgender woman in an adult prison was raped after being placed with the male prison population, and remanded the case for further discovery.⁵¹⁵ In contrast, in *Bell v. Wolfish*,⁵¹⁶ the Supreme Court declined to apply the Eighth Amendment to adult pre-trial detainees who were not convicted of a crime and instead applied Fourteenth Amendment substantive due process.⁵¹⁷ The Court held that a violation of the Fourteenth Amendment occurs if the detainee is subject “to unsafe conditions or isolation amounts . . . when done either with the express intent to punish or without a legitimate purpose.”⁵¹⁸ The Court further found that even when the defendant states a legitimate interest, there can still be a due process violation if the unsafe conditions are so excessive as to outweigh the legitimate interest.⁵¹⁹

The district court in *R.G.* held that the Fourteenth Amendment “amounts to punishment” standard, and not the Eighth Amendment “cruel and unusual punishment” standard, applies to juveniles.⁵²⁰ However, while the court applied the “amounts to punishment” due process standard to the prison staff’s decision to place the three plaintiffs in protective custody, the court also applied the Eighth

510. See *Settlement reached in case of Trans Youth against Juvenile Services*, SYLVIA RIVERA L. PROJECT (Dec. 22, 2006), <https://srllp.org/rodriguez; Informational Letter 20-OCFS-INF-10>, OFF. OF CHILD. & FAM. SERV. (July 14, 2020), https://ocfs.ny.gov/main/policies/external/ocfs_2020/INF/20-OCFS-INF-10.pdf; *Getting Down to Basics: Tools to Support LGBTQ Youth in Care*, LAMBDA LEGAL (July 31, 2014) <https://www.lambdalegal.org/publications/getting-down-to-basics>.

511. *Keeping LGBTQ Youth Safe in Juvenile Justice & Delinquency Placements*, CWLA/LAMBDA LEGAL JOINT INITIATIVE (2015), https://www.lambdalegal.org/sites/default/files/keeping_2015_final.pdf.

512. *Compare Farmer v. Brennan*, 511 U.S. 825 (1994), with *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006).

513. *Farmer*, 511 U.S. at 82627.

514. *Id.* at 833–34.

515. *Id.* at 832–33, 852.

516. *Bell v. Wolfish*, 441 U.S. 520 (1979).

517. *Id.* at 535.

518. *R.G.*, 415 F. Supp. 2d at 1152 (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

519. *Id.*

520. *Id.*

Amendment “deliberate indifference” standard to the staff’s reaction to the abuse and harassment suffered by the plaintiff at the hands of the other delinquents.⁵²¹ The court then found that the correctional facility staff’s decision to place the plaintiffs in isolation amounted to punishment and that the staff was deliberately indifferent to the other delinquents harming the three plaintiffs.⁵²² The Supreme Court has yet to clarify whether or not the Eighth Amendment standard is appropriate when evaluating abuse in juvenile detention centers.⁵²³

V. CURRENT DEVELOPMENTS PERTAINING TO LGBTQ YOUTH

A. ESEA REAUTHORIZATION AND THE STUDENT NON-DISCRIMINATION ACT

In 2015, the House of Representatives⁵²⁴ and the Senate⁵²⁵ both passed bills to update the Elementary and Secondary Education Act (ESEA). The Student Non-Discrimination Act (SNDA) was first introduced in 2011 and would prohibit elementary and secondary schools from discriminating against students based on their actual or perceived sexual orientation or gender identity or their association with someone who is LGBT (e.g., a parent or friend).⁵²⁶ It received fifty-two votes as an amendment to the Senate ESEA bill, but, because it was subject to a sixty-vote threshold, the amendment was not added to the bill.⁵²⁷ Advocates were unsuccessful in pushing for the amendment’s addition in conference, and thus the ESEA reauthorization that became law does not include this provision.⁵²⁸ In the past, SNDA has been introduced as a standalone bill.⁵²⁹ The bill was reintroduced into Congress in March of 2018. However, as of January 2022, there has been no further action taken on the bill.⁵³⁰

B. THE EQUALITY ACT

In 2015, Senators Merkley, Baldwin, and Booker and Representatives Cicilline and Lewis introduced the Equality Act, which would extend a slew of civil rights protections to LGBT persons.⁵³¹ Most notably for LGBTQ youth, the bill would update Title VI of the 1964 Civil Rights Act to include sexual orientation, gender

521. *Id.* at 1150–54.

522. *Id.* at 1154–59.

523. See James Alec Gelin, *Unwarranted Punishment: Why the Practice of Isolating Transgender Youth in Juvenile Detention Facilities Violates the Eighth Amendment*, 18 U.C. DAVIS J. JUV. L. & POL’Y 1, 5 (2014).

524. Student Success Act, H.R. 5, 114th Cong. (2015).

525. Every Student Succeeds Act, S. 1177, 114th Cong. (2015) (enacted).

526. Every Child Achieves Act, S. 1177, 114th Cong. (2015).

527. *On the Amendment (Franken Amend. No. 2093)*, U.S. SENATE ROLL CALL VOTES 114TH CONGRESS—1ST SESSION (Jul. 14, 2015, 4:53 PM), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm?congress=114&session=1&vote=00236.

528. See Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

529. Student Non-Discrimination Act of 2015, S. 439, H.R. 846, 114th Cong. (2015).

530. *Student Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN, (Mar. 21, 2018), <http://www.hrc.org/resources/student-non-discrimination-act>.

531. Equality Act, S. 1858, H.R. 3185, 114th Cong. (2015).

identity, and sex.⁵³² Title VI prohibits any entity that receives government funds from discriminating based on the statute’s enumerated protected classes.⁵³³ In its current form, Title VI can be used to stop schools from discriminating against minority students and English Language Learners.⁵³⁴ Should the Equality Act pass, it could be used to help prevent schools from discriminating against LGBTQ students.

The Equality Act would also update Title II of the 1964 Civil Rights Act to provide protections based on sexual orientation, sex, and gender identity in public accommodations.⁵³⁵ The bill would expand the categories of public places that fall under Title II.⁵³⁶ While schools would not be explicitly included, a court could find that schools fit into one of the new, broadly worded categories that the Equality Act would add which include places of business such as restaurants, pharmacies, and entertainment venues.⁵³⁷

The House bill was submitted to the Subcommittee on the Constitution and Civil Justice on September 8, 2015.⁵³⁸ The bill was not passed during the 114th Congress and has not been introduced by the 115th Congress to date.⁵³⁹ During the 116th Congress, the Act originally passed in the House of Representatives in 2019, but the Senate failed to act on it further.⁵⁴⁰ The Act was reintroduced this year during the 117th Congress and once again passed by a vote of 224-206 in the House of Representatives but once again has yet to pass in the Senate.⁵⁴¹

C. THE DEPARTMENT OF HEALTH AND HUMAN SERVICES’ REGULATIONS IMPLEMENTING SECTION 1557 OF THE AFFORDABLE CARE ACT

Section 1557 of the Patient Protection and Affordable Care Act prohibits health care programs from discriminating against individuals based on race, color, national origin, sex, age, or disability.⁵⁴² On September 8, 2015, the U.S. Department of Health and Human Services issued a proposed rule implementing Section 1557.⁵⁴³ The final rule was issued and became effective in July of 2016.⁵⁴⁴ The rule prohibits discrimination based on both sexual orientation and

532. *Id.* at § 3.

533. 42 U.S.C. § 2000a (1964).

534. *See id.* (Title VI already includes protections for classes such as race and nationality).

535. Equality Act § 3, S. 1858, H.R. 3185, 114th Cong. (2015).

536. *Id.*

537. *Id.* (For example, the Equality Act would apply to places that provide “exercise”—like a school P.E. class—“gathering,” or “program[s]”).

538. *Id.*

539. *See* H.R. Con. Res. 104, 114th Cong. (2015) (enacted).

540. H.R. 5—Equality Act, 116th Cong. (2019-2020).

541. H.R. 5—Equality Act, 117th Cong. (2020-2021).

542. Nondiscrimination, 42 U.S.C. § 18116 (2010).

543. 45 C.F.R. § 92.1 (2020); *see also* Press Release, U.S. HHS takes next step in advancing health equity through the Affordable Care Act, U.S. Dep’t. Health & Human Servs. (Sept. 3, 2015), <http://wayback.archive-it.org/3926/20170127190513/https://www.hhs.gov/about/news/2015/09/03/hhs-takes-next-step-advancing-health-equity-through-affordable-care-act.html> [hereinafter Press Release].

544. 45 C.F.R. § 92.1 (2020).

gender identity.⁵⁴⁵ Among many other things, the rule prohibits blanket exclusions against services related to gender transition.⁵⁴⁶

D. TRANSGENDER ACCESS TO PUBLIC FACILITIES AND RESTROOMS

The most publicized aspect of the struggle for transgender rights in 2016 has been the debate surrounding so-called “bathroom bills” in state legislatures.⁵⁴⁷ The crux of these bills is that, in non-gender-neutral public facilities, transgender citizens will be required to use the facility that corresponds to the gender they were assigned at birth instead of the facility that corresponds to their gender identity.⁵⁴⁸ Proponents of the bill argue that the bill will increase public safety by stopping sexual predators being able to enter the bathroom of the opposite sex and thus, allowing them to get closer to their victims.⁵⁴⁹ However, in the 18 states and over 200 municipalities that have allowed citizens to use the facility that corresponds with their gender identity, there has not been an increase in public safety incidents.⁵⁵⁰ The opponents of this bill argue that it actually creates a safety hazard for transgender citizens due to the heightened risk of assault or harassment if they use the opposite facility of their gender identity.⁵⁵¹ Additionally, they could face criminal prosecution if they do choose to use the facility that corresponds to their gender identity.⁵⁵²

The primary bill being challenged is the Public Facilities Privacy and Security Act, otherwise known as House Bill 2, that was passed by the North Carolina legislature in March of 2016.⁵⁵³ The Department of Justice filed suit against North Carolina in the Middle District of North Carolina on May 9, 2016, arguing that the law was in violation of Title VII of the 1964 Civil Rights Act, the Violence Against Women Act (“VAWA”), and Title IX of the Education Amendments of 1972.⁵⁵⁴ A preliminary injunction was issued, halting the United States from cutting off federal funding to North Carolina, pending the outcome of the case.⁵⁵⁵ Initially, North Carolina filed a counter-action seeking a declaratory judgment that the bill did not violate Title VII, VAWA, or Title IX.⁵⁵⁶ However, on September 16, 2016, Governor McCrory dropped the lawsuit because “it did

545. See Press Release; see also *supra* note 494.

546. See *id.*

547. *New HRC Report Reveals Unprecedented Onslaught of State Legislation Targeting Transgender Americans*, HUMAN RIGHTS CAMPAIGN (Feb. 22, 2016), <https://www.hrc.org/press-releases/new-hrc-report-reveals-unprecedented-onslaught-of-state-legislation-targeting-transgender-americans> (last visited Mar. 5, 2022).

548. Pub. Facilities Privacy & Sec. Act, Gen. Assemb. (N.C. 2015).

549. See *The Facts: Bathroom Safety, Nondiscrimination Laws, and Bathroom Ban Laws*, MOVEMENT ADVANCEMENT PROJECT, (Jul. 2016), <https://www.lgbtmap.org/bathroom-ban-laws>.

550. *Id.*

551. *Id.*

552. *Id.*

553. *United States v. North Carolina*, 192 F. Supp. 3d 620, 622 (M.D.N.C. 2016).

554. *Id.*

555. *Id.* at 628–29.

556. *Id.* at 620–22.

not serve the ‘interests of judicial economy and efficiency.’”⁵⁵⁷ A three year legal battle ensued,⁵⁵⁸ and a settlement was finally reached in July of 2019.⁵⁵⁹ The settlement prohibits the state government from banning citizens from using the bathroom facility that corresponds with their gender identity in state government buildings.⁵⁶⁰

The economic and social backlash against this bill has been strong.⁵⁶¹ The CEOs of more than 200 major companies, many of which do a large amount of business in North Carolina, have signed an open letter calling for the repeal of the bill.⁵⁶² Major entertainers have refused to perform in the state, and several businesses have ceased investments in the states.⁵⁶³ Perhaps most telling, an August 2016 poll found that fifty-eight percent of North Carolina citizens believe the bill is harming the state’s economy and reputation.⁵⁶⁴

In 2017, a transgender student in Florida sued the school board after he was told he would not be able to use the boy’s restroom at the school going forward.⁵⁶⁵ In 2019, a Florida federal court held that it was unconstitutional for a school to prohibit its students from using the bathroom facility that corresponds with their gender identity.⁵⁶⁶ The next year in 2020, the 11th Circuit affirmed the lower court’s decision, holding that the schools may not punish students for gender non-conformity and treat some students differently because they are transgender.⁵⁶⁷

VI. CONCLUSION

Although almost all lesbian, gay, bisexual, transgender, queer, and questioning people have long faced difficulties finding inclusive public education, supportive environments at home, safe environments, and accessible health care, LGBTQ youth are particularly vulnerable to the harms of discrimination and are barred from various legal benefits. The battle for the protection of LGBTQ youth “is uphill because children are children, voteless and largely voiceless, and

557. Rebecca Hersher, *North Carolina Governor Drops ‘Bathroom Bill’ Lawsuit Against U.S.*, NPR (Oct. 27, 2016), <http://www.npr.org/sections/thetwo-way/2016/09/19/494573314/north-carolina-governor-drops-bathroom-bill-lawsuit-against-u-s> (last visited Mar. 3, 2022).

558. Dan Levin, *North Carolina Reaches Settlement on ‘Bathroom Bill’*, NY TIMES (Jul. 23, 2019), <https://www.nytimes.com/2019/07/23/us/north-carolina-transgender-bathrooms.html> (last visited Mar. 3, 2022).

559. *Id.*

560. *Id.*

561. *North Carolina*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/local-issues/north-carolina> (last visited Mar. 3, 2022).

562. *Id.*

563. *Id.*

564. *Id.*

565. Li Cohen, *Federal court rules that transgender students must be allowed to use bathrooms that match their gender*, CBS News (Aug. 9, 2020), <https://www.cbsnews.com/news/federal-court-rules-that-transgender-students-must-be-allowed-to-use-bathrooms-that-match-their-gender/> (last visited Mar. 3, 2022).

566. *Id.*

567. *Id.*

consequently relatively powerless. It is particularly uphill in the United States, with our tradition of individual autonomy which keeps the government largely out of the family, limiting its role in protecting children.”⁵⁶⁸ However, in recent years, the government, in both its judicial and legislative capacity, has increasingly recognized the equal rights of the LGBTQ community.

568. Elizabeth Bartholet, *The Challenge of Children's Rights Advocacy: Problems and Progress in the Area of Child Abuse and Neglect*, 3 WHITTIER J. CHILD & FAM. ADVOC. 215, 216 (2004).