

# CHALLENGES FACING LGBTQ YOUTH

EDITED BY AMANDA MAZE-SCHULTZ

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## I. INTRODUCTION

This Article discusses the myriad challenges lesbian, gay, bisexual, transgender, and questioning<sup>1</sup> (LGBTQ) youth face in the United States (U.S.). The Article focuses 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.

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1. In this Article, the term “transgender” youth, unless otherwise stated, refers 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). Cisgender is the adjective this Article will use to denote someone whose sense of identity corresponds with the sex assigned to them at birth. See *Cisgender*, OXFORD ENGLISH DICTIONARY, <https://perma.cc/CP2U-M5HX> (last visited Feb. 25, 2023).

## II. CHALLENGES IN SCHOOLS

### A. OVERVIEW OF FEDERAL AND STATE PROTECTIONS

Since the turn of the twentieth century, public education has grown in importance across the U.S. Today, every state constitution contains an education provision.<sup>2</sup>

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2. ALA. CONST. art. XIV, § 256 (West, Westlaw through June 10, 2022); ALASKA CONST. art. VII, § 1 (West, Westlaw through amendments received through the 2022 2nd Reg. Sess. of the 32nd Leg.); ARIZ. CONST. art. XI, § 1 (West, Westlaw through the 2nd Reg. Sess. of the 55th Leg. (2022)); ARK. CONST. art. XIV, § 1, *amended by* ARK. CONST. amend. 53 (West, Westlaw through acts of the 2023 Reg. Sess. of the 94th Ark. Gen. Assemb. effective Feb. 13, 2023); CAL. CONST. art. IX, § 1 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); COLO. CONST. art. IX, § 2 (West, Westlaw through amendments adopted through the Nov. 8, 2022 Election); CONN. CONST. art. VIII, § 1 (West, Westlaw through Gen. Stat. of Conn., Revision of 1958, Revised to Jan. 1, 2023); DEL. CONST. art. X, § 1 (West, Westlaw through Ch. 5 of the 152nd Gen. Assemb. (2023–2024)); FLA. CONST. art. IX, § 1 (amended 1998) (West, Westlaw through the Nov. 3, 2020, Gen. Election); GA. CONST. art. VIII, § 1, ¶ 1 (West, Westlaw through legislation passed at the 2022 Reg. Sess. of the Ga. Gen. Assemb.); HAW. CONST. art. X, § 1 (West, Westlaw through the end of the 2022 Reg. Sess.); IDAHO CONST. art. IX, § 1 (West, Westlaw through effective legislation through Ch. 1 of 1st Reg. Sess. of the 67th Idaho Leg.); ILL. CONST. art. X, § 1 (West, Westlaw through Oct. 1, 2021); IND. CONST. art. VIII, § 1 (West, Westlaw through all legislation of the 2022 2nd Reg. Sess., the 2nd Reg. Technical Sess., & the 2nd Reg. Spec. Sess. of the 122nd Gen. Assemb. effective through Sept. 15, 2022); IOWA CONST. art. IX, 2nd, § 3 (West, Westlaw through legislation effective Feb. 16, 2023 from the 2023 Reg. Sess.); KAN. CONST. art. VI, § 1 (West, Westlaw through laws enacted during the 2022 Reg. Sess. of the Kan. Leg. effective on July 1, 2022); KY. CONST. § 183 (West, Westlaw through laws effective Jan. 6, 2023 and the Nov. 8, 2022 Election); LA. CONST. art. VIII, § 1 (West, Westlaw through amendments through Jan. 1, 2023); ME. CONST. art. VIII, part 1, § 1 (West, Westlaw through emergency legislation through Ch. 2 of the 2023 1st Reg. Sess. of the 131st Leg.); MD. CONST. art. VIII, § 1 (West, Westlaw through all legislation from the 2022 Reg. Sess. of the Gen. Assemb.); MASS. CONST. pt. 2, Ch. V, § 2 (West, Westlaw through amendments approved Feb. 1, 2022); MICH. CONST. Ch. 1, art. VIII, § 2 (West, Westlaw through amendments approved through the Nov. 2022 Gen. Election); MINN. CONST. art. XIII, § 1 (West, Westlaw through legislation effective through Feb. 8, 2023 from the 2023 Reg. Sess.); MISS. CONST. art. VIII, § 201 (West, Westlaw through laws from the 2022 Reg. Sess. effective through July 1, 2022); MO. CONST. art. IX, § 1, cl. a (West, Westlaw through the 2022 2nd Reg. and 1st Extra. Sess. of the 101st Gen. Assemb.); MONT. CONST. art. X, § 1 (West, Westlaw through the 2021 Sess. of the Mont. Leg.); NEB. CONST. art. VII, § 1 (amended 1972) (West, Westlaw through the 2nd Reg. Sess. of the 107th Leg. (2022)); NEV. CONST. art. XI, § 2 (amended 1938) (West, Westlaw through Ch. 2 (End) of the 33rd Spec. Sess. (2021)); N.H. CONST. pt. 2, art. 83 (West, Westlaw through Ch. 1 of the 2023 Reg. Sess.); N.J. CONST. art. VIII, § 4, ¶. 1 (West, Westlaw through amendments approved at Nov. 3, 2020 Election); N.M. CONST. art. XII, § 1 (West, Westlaw through the Nov. 2020 Gen. Election); N.Y. CONST. art. XI, § 1 (amended 2001) (West, Westlaw through L. 2022, Chs. 1 to 841); N.C. CONST. art. IX, § 2 (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.); N.D. CONST. art. VIII, § 1 (West, Westlaw through results of the Nov. 3, 2020 Gen. Election); OHIO CONST. art. VI, § 3 (West, Westlaw through File 177 (End) of the 134th Gen. Assemb. (2021–2022) & 2022 Statewide Issue 1 & 2022 Statewide Issue 2); OKLA. CONST. art. XIII, § 1 (West, Westlaw through amendments received through June 30, 2020); OR. CONST. art. VIII, § 3 (West, Westlaw through laws enacted in the 2022 Reg. Sess. of the 81st Leg. Assemb.); PA. CONST. art. III, § 14 (amended 1967) (West, Westlaw through Nov. 8, 2022, Gen. Election); R.I. CONST. art. XII, § 1 (West, Westlaw through effective legislation through Ch. 442 of the 2022 Reg. Sess. of the R.I. Leg.); S.C. CONST. art. XI, § 3 (West, Westlaw through 2022 Act No. 268); S.D. CONST. art. VIII, § 1 (West, Westlaw through the 2022 Gen. Election); TENN. CONST. art. XI, § 12 (amended 1977) (West, Westlaw through laws from the 2022 2nd Reg. Sess. of the 112th

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,<sup>3</sup> and transgender students are routinely denied access to gender-corresponding sex-segregated facilities and educational and athletic programs.<sup>4</sup>

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 (DOJ) issued a memo clarifying Title IX's prohibition on discrimination.<sup>5</sup> It explained that "on the basis of sex" includes discrimination on the basis of gender identity or sexual orientation.<sup>6</sup> Shortly thereafter, the U.S. Department of Education (DOE) confirmed that it will enforce Title IX protections on this basis.<sup>7</sup> 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.<sup>8</sup> This section summarizes the various laws that provide students with some protection against discrimination based on sexual orientation and gender identity. This section discusses, in respective order, how (1) federal constitutional law, (2) federal statutory law, and (3) state law apply to some of the more common challenges facing LGBTQ students at school.

## 1. Federal Constitutional Law

### *a. Fourteenth Amendment Equal Protection.*

i. **Gender Identity.** Although the Supreme Court has not identified transgender persons as members of a suspect class, a consensus is emerging that disparate

Tenn. Gen. Assemb.); TEX. CONST. art. VII, § 1 (West, Westlaw through the end of the 2021 Reg. & Called Sess. of the 87th Leg.); UTAH CONST. art. X, § 1 (West, Westlaw through laws through the 2022 3rd Spec. Sess.); VT. CONST. Ch. II, § 68 (West, Westlaw through the 2022 Gen. Election); VA. CONST. art. VIII, § 1 (West, Westlaw through the 2022 Reg. Sess. & Spec. Sess. I); WASH. CONST. art. IX, § 1 (West, Westlaw through Nov. 8, 2022); W. VA. CONST. art. XII, § 1 (West, Westlaw through legislation of the 2023 Reg. Sess. approved through Feb. 15, 2023); WIS. CONST. art. X, § 3 (amended 1972) (West, Westlaw through amendments received through July 1, 2018); WYO. CONST. art. VII, § 1 (West, Westlaw through amendments received through Feb. 21, 2023 of the 2023 Gen. Sess. of the Wyo. Leg.).

3. See *infra* Section II.E.

4. See *infra* Section II.B.2.

5. Pamela S. Karlan, *Application of Bostock v. Clayton County to Title IX of the Education, U.S. DEP'T OF JUST., C.R. DIV.* (2021), <https://perma.cc/NT6D-SHXG>.

6. *Id.*

7. See *Bostock v. Clayton Cnty.*, 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. 13,988, 86 Fed. Reg. 7,023 (Jan. 20, 2021); *Enforcement of Title IX with Respect to Sexual Orientation and Gender Identity in Light of Bostock v. Clayton Cnty.*, 86 Fed. Reg. 32, 637 (June 22, 2021).

8. See *infra* Part II.A.1–3.

or discriminatory treatment based on a person's status as transsexual or transgender may constitute a denial of equal protection under the Fourteenth Amendment.<sup>9</sup> Federal courts are split as to whether they should apply a rational basis<sup>10</sup> or intermediate scrutiny<sup>11</sup> 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.<sup>12</sup> On the other hand, intermediate scrutiny requires that a statutory classification be substantially related to an important government objective.<sup>13</sup>

Various courts of appeals also consider discrimination against transgender individuals as unconstitutional sex-based discrimination.<sup>14</sup> This level of scrutiny may continue to be extended following the Supreme Court's decision in *Bostock*, which held that sex necessarily includes sexual orientation and gender identity and is thus subject to intermediate scrutiny.<sup>15</sup> In *Price Waterhouse v. Hopkins*,<sup>16</sup> an employer denied a woman a promotion because she did not act "feminine" enough.<sup>17</sup> 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.<sup>18</sup> Applying *Price Waterhouse*, many courts have found that discrimination against transgender individuals is unlawful under the Equal Protection Clause.<sup>19</sup> For example, in *Glenn v. Brumby*,<sup>20</sup> the Eleventh Circuit held that discrimination against someone on the basis of gender

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9. See James Lockhart, Annotation, *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 (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. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 427 (D. Conn. 2016).

10. See *Johnston v. Univ. of Pittsburgh Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Pa. Mar. 31, 2015); *Kaeo-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. USPS*, Civ. A. No. 84-3296, 1985 WL 9446, at \*4 (D.D.C. 1985).

11. 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).

12. See *Heller v. Doe*, 509 U.S. 312, 320 (1993) (finding a law does not "run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose").

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

14. See *Grimm v. Gloucester City Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016); *Glenn*, 663 F.3d at 1317; *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).

15. 140 S. Ct. at 1741; see also Sharita Gruberg, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020, 9:01 AM), <https://perma.cc/JCX6-6L2C>.

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

17. *Id.*

18. *Id.* at 250.

19. See Lockhart, *supra* note 9, § 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).

20. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

nonconformity constitutes sex-based discrimination in violation of the Equal Protection Clause.<sup>21</sup> Thus, a transgender state employee who was fired because her supervisor 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.<sup>22</sup>

ii. Liability. Both individual school employees and school districts may be held accountable for sex-based discrimination under the Equal Protection Clause.<sup>23</sup> However, neither may be held liable under a theory of *respondeat superior*.<sup>24</sup>

(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.<sup>25</sup> The custom can either derogate from a policy or rise to the level of a policy.<sup>26</sup>

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.<sup>27</sup> For example, in *Montgomery v. Independent School Dist. No. 709*,<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

Conversely, in *Brown v. Ogletree*,<sup>31</sup> a case initiated by the estate of a student who committed suicide due to harassment regarding his sexual orientation, a

21. *Id.*; see also *Adams ex rel. Kasper v. Sch. Bd.*, 968 F.3d 1286 (11th Cir. 2020) (finding a school district’s policy banning a transgender male student from using the boys’ restroom violates the Equal Protection Clause).

22. 663 F.3d at 1317; 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 . . .”).

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

24. See *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1116 (E.D. Cal. 2011) (noting that 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).

25. See *Conner*, 2013 WL 3984336, at \*8.

26. *Id.*

27. See *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1097 (D. Minn. 2000). See also *S.E.S. ex rel. J.M.S. v. Galena Unified Sch. Dist. No. 499*, 446 F. Supp. 3d 743 (D. Kan. 2020) (holding a rational trier of fact could find the discrimination was because of sex since student-harassers’ objectives were to criticize J.M.S.’s lack of masculinity).

28. See generally 109 F. Supp. 2d 1081.

29. *Id.* at 1097.

30. *Id.*

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

school district's motion for summary judgment was granted, even though the school ignored incidents of LGBTQ bullying for over two years.<sup>32</sup> The court was unable to distinguish between the school's responses to this bullying and its responses to bullying and harassment of other students.<sup>33</sup>

Plaintiffs have also been successful at proving school district liability where the district has failed to follow its written anti-discrimination policies in response to discrimination based on sexual orientation.<sup>34</sup> The departure from district policies, in this context, is sufficient to establish discriminatory intent.<sup>35</sup>

(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.<sup>36</sup> Mere negligence is insufficient.<sup>37</sup>

As with school district liability, the failure to respond with the same vigor to complaints of LGBTQ-based discrimination can be evidence of deliberate indifference.<sup>38</sup> The same is true for failure to follow district policies.<sup>39</sup> Moreover, a school district employee's discriminatory statements may provide additional evidence of deliberate indifference.<sup>40</sup> For example, in *Nabozny v. Podlesny*,<sup>41</sup> 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."<sup>42</sup>

Finally, in order to hold an individual school employee liable in an equal protection claim under Section 1983, a plaintiff must overcome the employee's claim of qualified immunity.<sup>43</sup> 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."<sup>44</sup> 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

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32. *Id.* at \*1–3.

33. *Id.* at \*12. *See also* Hoffman v. Saginaw Pub. Sch., No. 12-10354, 2012 WL 2450805 (E.D. Mich. June 27, 2012) (finding the plaintiff failed to demonstrate the bullying was based on sex and dismissing the Title IX claim).

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

35. *See id.*

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

37. *Id.*

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

39. *See id.*

40. *See id.*

41. *Id.*

42. *Id.* at 452.

43. *See id.* at 457.

44. *Id.*

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.<sup>45</sup>

This proposition has only become clearer in the wake of the 2015 marriage equality Supreme Court decision,<sup>46</sup> 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;<sup>47</sup> and the Student Non-Discrimination Act, which notes the extensive discrimination and harassment experienced by LGBTQ youth.<sup>48</sup>

*b. First Amendment Retaliation.* Students have brought successful First Amendment retaliation claims when school personnel have discriminated against them based on their sexual orientation.<sup>49</sup> In order to prevail on such a claim, the student must prove that the speech in question was (1) constitutionally protected and (2) “a substantial or motivating factor” for “the adverse action.”<sup>50</sup> The school then has the opportunity to demonstrate that it would have taken the same action had the student not engaged in protected speech.<sup>51</sup>

For example, in *Wolfe v. Fayetteville, Arkansas School District*,<sup>52</sup> 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.<sup>53</sup> Based on this evidence, the district court denied the school’s motion to dismiss the First Amendment retaliation claim.<sup>54</sup> 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.<sup>55</sup> Moreover, to prove a Title IX deliberate indifference claim against a school district, there needs to be proof of sex-based motivation.<sup>56</sup>

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45. *Id.*

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

47. Equality Act, S. 1858, H.R. 3185, 114th Cong. (2015). *See also* Equality Act, H.R.5, 117th Cong. (2021) (Reintroduced by Rep. David Cicilline on Feb. 18, 2021).

48. The Student Non-Discrimination Act, S. 439, H.R. 846, 114th Cong. (2015). *See also* The Student Non-Discrimination Act, H.R. 5374, 115th Cong. (2018) (Reintroduced by Rep. Jared Polis on Mar. 21, 2018).

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

50. *Id.*

51. *Id.*

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

53. *Id.*

54. *Id.*

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

56. *Id.* at 865.



## 2. Federal Statutory Law: Title IX<sup>57</sup>

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 in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>58</sup>

Although Title IX refers to sex and not to sexual orientation or gender identity, in January 2001, the DOE’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.<sup>59</sup> The majority of courts have adopted this interpretation.<sup>60</sup> OCR also issued a Notice of Proposed Rulemaking on July 12, 2022 to amend the regulations implementing Title IX and to clarify its scope and implementation.<sup>61</sup> The new rule will provide greater clarity regarding recipients’ obligations not to discriminate based on sexual orientation and gender identity.

*a. Lesbian, Gay, and Bisexual Students.* As a threshold matter, plaintiffs must prove that they were, in fact, discriminated against based on a failure to conform to gender stereotypes.<sup>62</sup> 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.<sup>63</sup> For example, in *A.E. ex rel. Evans v. Harrisburg School District No. 7*,<sup>64</sup> 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.<sup>65</sup> The district court found that he could not avail himself of Title IX’s protections.<sup>66</sup> Some courts have

57. Some advocates have sought to establish Gender Identity Disorder (GID) as a disability, *see infra* note 131; 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).

58. 20 U.S.C. § 1681(a) (1972).

59. *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).

60. *See Doe ex rel. Conner v. United Sch. 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 DOE’s interpretation of its regulation as encompassing gender identity should be given deference).

61. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. 106).

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

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

64. *Id.*

65. *Id.*

66. *Id.*

suggested that “homophobic slur[s]” are among “a variety of generic middle school insults.”<sup>67</sup> 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.<sup>68</sup>

At the same time, at least one court that has considered bullying and harassment claims has recognized that homophobic terms were deliberately chosen and has allowed Title IX suits to proceed even in the absence of evidence that the plaintiff’s behavior or presentation failed to conform to gender stereotypes.<sup>69</sup> In *Theno v. Tonganoxie Unified School District No. 464*,<sup>70</sup> even though the plaintiff testified that he was teased for his unique haircuts and for participating in taekwondo,<sup>71</sup> 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.”<sup>72</sup> 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.<sup>73</sup>

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.<sup>74</sup> For example, in *Preston v. Hilton Cent. Sch. Dist.*,<sup>75</sup> 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.<sup>76</sup>

*b. Transgender Students.* 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.<sup>77</sup> Schools may also offer certain sex-

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

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

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

70. *Id.*

71. *Id.* at 1306.

72. *Id.* at 1307.

73. E.g., *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 152 (E.D.N.Y. 2011); *J.R. v. New York City Dep’t of Educ.*, No. 14 CIV. 0392 ILG RML, 2015 WL 5007918 (E.D.N.Y. Aug. 20, 2015)

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

75. *Id.*

76. *Id.*

77. 34 C.F.R. § 106.33 (2000).

segregated classes, such as human sexuality, physical education and chorus.<sup>78</sup> 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.<sup>79</sup>

In a 2013 resolution agreement entered into by Arcadia School District, the OCR reasoned that, under Title IX, schools should separate students based on gender rather than natal sex.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> The DOE has taken this position in subsequent policy guidance.<sup>83</sup>

Not all federal courts have accepted the DOE's interpretation of Title IX.<sup>84</sup> In a 2015 decision, the U.S. District Court for the Eastern District of Virginia did not defer to the DOE'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.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

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78. *Id.* § 106.34.

79. *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.").

80. *See* RESOLUTION AGREEMENT BETWEEN THE ARCADIA UNIFIED SCH. DIST., U.S. DEP'T OF EDUC. OFF. FOR C.R., & U.S. DEP'T OF JUST., No. 09-12-1020 (OCR), No. 169-12C-70 (DOJ) (2013), <https://perma.cc/KXE7-27E8> [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).

81. ARCADIA SETTLEMENT, *supra* note 80, at 1.

82. *Id.* at 3.

83. Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton Cnty.* (Interpretation), 81 Fed. Reg. 32,637 (June 22, 2021).

84. *See* Johnston v. Univ. of Pittsburgh Sys. of Higher Educ., 97 F. Supp. 3d 657, 674–78 (W.D. Pa. 2015); *Grimm*, 132 F. Supp. 3d at 746.

85. *Grimm*, 132 F. Supp. 3d at 744–46.

86. *Id.*

87. *Id.* at 746.

Title IX provides an exemption for religious institutions whose religious practices are inconsistent with the requirements of the statute,<sup>88</sup> and 277 higher education institutions have been issued exemptions by the DOE.<sup>89</sup> These institutions are exempt from Title IX requirements in admissions, housing, access to bathrooms, and/or athletics opportunities as they pertain to transgender students.<sup>90</sup>

*c. Liability.*<sup>91</sup> Once a plaintiff has established that Title IX applies, they must still overcome several hurdles to prevail on a Title IX claim. A plaintiff must prove that (1) the school had actual knowledge of discrimination based on sex; (2) the discrimination was so “severe, pervasive, and objectively offensive that it [could] be said to deprive the [plaintiff] of access to” educational opportunities; and (3) the school was deliberately indifferent to the discrimination.<sup>92</sup> Only institutions receiving federal funding can be liable under Title IX and there is no individual liability.<sup>93</sup>

(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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup>

(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.<sup>97</sup> Some courts have insisted that a plaintiff’s grades must suffer in order to prove that he or

88. 20 U.S.C. § 1681(a)(3) (2015); 34 C.F.R. § 106.12(a) (2013).

89. *Inst. Currently Holding Religious Exemption*, U.S. DEP’T OF EDUC., <https://perma.cc/PT7T-CFDT> (last updated Mar. 4, 2023).

90. For more information regarding religious exemptions, see Liam Stack, *Colleges Obtain Waivers to Law that Protects Transgender Students*, N.Y. TIMES (Dec. 10, 2015), <https://perma.cc/RG8T-DFU6>.

91. 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). But see *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009) (finding a Title IX claim does not preclude relief under § 1983).

92. See *Davis v. Monroe Cnty. 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).

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

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

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

96. *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).

97. See *Hoffman*, 2012 WL 2450805, at \*7.

she was deprived of educational opportunities.<sup>98</sup> Other courts have suggested that a disrupted school environment<sup>99</sup> or deprivation of non-academic school resources, such as access to the school cafeteria or school bus, is sufficient.<sup>100</sup>

(3) Deliberate Indifference. Finally, in order to satisfy the deliberate indifference requirement, the school's reaction to the discrimination must have been "clearly unreasonable."<sup>101</sup> Courts emphasize that schools are not required to "'remedy' peer harassment," but merely to respond to it appropriately.<sup>102</sup> 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.<sup>103</sup> Conversely, courts have imposed liability in other cases where the school responded to allegations of harassment in a manner insufficient to stop the harassment.<sup>104</sup> Courts were 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.<sup>105</sup>

### 3. State Law

States have adopted varying levels of protection for students based on their sexual orientation—these protections are embedded in education laws,<sup>106</sup> public accommodations laws,<sup>107</sup> tort laws,<sup>108</sup> and disability laws.<sup>109</sup>

Twelve states and the District of Columbia (D.C.) have state-level non-discrimination laws that protect students from discrimination based on their sexual orientation,<sup>110</sup> and seventeen states and D.C. prohibit discrimination or

98. *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).

99. *See Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 228 (D. Conn. 2006) (discussing that the 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).

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

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

102. *Id.*

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

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

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

106. *See infra* section II.A.3.

107. *See infra* section II.A.3.

108. *See infra* section II.A.3.

109. *See infra* section II.A.3.

110. CAL. EDUC. CODE § 220 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); COLO. REV. STAT. § 24-34-301 (West, Westlaw through 2nd Reg. Sess., 73rd Gen. Assemb. (2022)); CONN. GEN. STAT. ANN. § 46a-75 (West, Westlaw through Gen. Stat. of Conn., Revision of 1958, Revised to Jan. 1, 2023); D.C. CODE ANN. § 2-1402.41 (West, Westlaw through Dec. 28, 2022); 775 ILL. COMP. STAT. ANN. 5/1-102 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); IOWA CODE ANN. § 216.9 (West, Westlaw through legislation effective Feb. 16, 2023 from the 2023 Reg. Sess.); ME. REV. STAT.

harassment based on gender identity in schools.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup>

Legal challenges to anti-discrimination statutes that protect transgender students have been largely unsuccessful.<sup>114</sup> In California, two plaintiffs challenged Sections 220 and 210.7 of the California Education Code.<sup>115</sup> The plaintiffs argued that the California Legislature had “recklessly abandon[ed]

ANN. tit. 5 § 4601-02 (West, Westlaw through emergency legislation through Ch. 2 of the 2023 1st Reg. Sess. of the 131st Leg.); MASS. GEN. LAWS ANN. Ch. 76, § 5 (West, Westlaw through 2022 2nd Ann. Sess.); MINN. STAT. ANN. § 363A.13 (West, Westlaw through Feb. 8, 2023 from the 2023 Reg. Sess.); N.J. STAT. ANN. §10:5-12 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1); OR. REV. STAT. ANN. § 659.850 (West, Westlaw through laws enacted in the 2022 Reg. Sess. of the 81st Leg. Assemb.); WASH. REV. CODE ANN. § 49.60.030 (West, Westlaw through all legislation from the 2022 Reg. Sess. of the Wash. Leg.); WIS. STAT. ANN. § 106.58 (West, Westlaw through 2021 Act 267, published Apr. 16, 2022).

111. CAL. EDUC. CODE § 220 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); COLO. REV. STAT. § 24-34-301 (West, Westlaw through 2nd Reg. Sess., 73rd Gen. Assemb. (2022)); CONN. GEN. STAT. ANN. § 10-15c (West, Westlaw through Gen. Stat. of Conn., Revision of 1958, Revised to Jan. 1, 2023); D.C. CODE § 2-1402.41 (West, Westlaw through Dec. 28, 2022); 6 DEL. CODE ANN. § 4503 (West, Westlaw through Ch. 5 of the 152nd Gen. Assemb. (2023–2024)); IOWA CODE ANN. § 216.9 (West, Westlaw through legislation effective Feb. 16, 2023 from the 2023 Reg. Sess.); MASS. GEN. LAWS ANN. Ch. 76, § 5 (West, Westlaw through 2022 2nd Ann. Sess.); MINN. STAT. § 121A.031 (West, Westlaw through Feb. 8, 2023 from the 2023 Reg. Sess.); N.J. STAT. ANN. 18A:37-14 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1); N.M. STAT. ANN. § 28-1-2 (West, Westlaw through 2022 2nd Reg. Sess. and 3rd Spec. Sess. of the 55th Leg. (2022)); N.Y. EDUC. LAW §§ 11, 16 (West, Westlaw through L. 2022, Chs. 1 to 841); N.C. GEN. STAT. ANN. § 115C-407.15 (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.); OR. REV. STAT. ANN. §§ 174.100, 659.850 (West, Westlaw through laws enacted in the 2022 Reg. Sess. of the 81st Leg. Assemb.); 11 R.I. GEN. LAWS 1956, § 11-24-2.1 (West, Westlaw through effective legislation through Ch. 442 of the 2022 Reg. Sess. of the R.I. Leg.); VT. STAT. ANN. tit. 16, § 11 (West, Westlaw through Chs. 186 (End) and M-19 (End) of the Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb. (2022)); WASH. REV. CODE §§ 49.60.040(2), 49.60.215 (West, Westlaw through all legislation from the 2022 Reg. Sess. 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).

112. *Cf. Calif. Sch. System Fights Transgender Law: Orange Cnty District Risks Millions in State Funds*, NBC NEWS (Mar. 31, 2004, 3:47 PM), <https://perma.cc/S2SS-RSLJ>.

113. CAL. EDUC. CODE § 221 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); CONN. GEN. STAT. § 46a-81aa (West, Westlaw through Gen. Stat. of Conn., Revision of 1958, Revised to Jan. 1, 2023); 775 ILL. COMP. STAT. 5/5-101(A)(11) (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); IOWA CODE ANN. § 216.9 (West, Westlaw through legislation effective Feb. 16, 2023 from the 2023 Reg. Sess.); N.M. STAT. ANN. § 28-1-9 (West, Westlaw through 2022 2nd Reg. Sess. and 3rd Spec. Sess. of the 55th Leg. (2022)); N.Y. EDUC. LAW § 17 (West, Westlaw through L. 2022, Chs. 1 to 841).

114. 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).

115. See *Cal. Educ. Comm. v. O’Connell*, No. 34-2008-00026507-CU-CR-GDS (Cal. Super. Ct. 2009), <https://perma.cc/V4VC-73PG>.

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.<sup>116</sup> 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.”<sup>117</sup>

Six states and D.C. have enacted public accommodations laws that prohibit discrimination based on sexual orientation and apply explicitly to schools.<sup>118</sup> Another twelve states’ public accommodations laws prohibit discrimination based on sexual orientation and could be interpreted to apply to schools.<sup>119</sup> The public accommodations laws of California,<sup>120</sup> Maine,<sup>121</sup> Minnesota,<sup>122</sup> and Washington<sup>123</sup> 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

116. 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).

117. *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).

118. COLO. REV. STAT. ANN. § 24-34-601 (West, Westlaw through 2nd Reg. Sess., 73rd Gen. Assemb. (2022)); D.C. CODE ANN. §§ 2-1402.01, 2-1402.31 (West, Westlaw through Dec. 28, 2022); 775 ILL. COMP. STAT. ANN. 5/1-102 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); IOWA CODE ANN. § 216.7, 216.2 (West, Westlaw through legislation effective Feb. 16, 2023 from the 2023 Reg. Sess.); N.J. STAT. ANN. §§ 10:5-5, 10:5-12 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1); VT. STAT. ANN. tit. 9, §§ 4501-02 (West, Westlaw through Chs. 186 (End) and M-19 (End) of the Adjourned Sess. of the 2021-2022 Vt. Gen. Assemb. (2022)); WASH. REV. CODE §§ 49.60.215, 49.60.40 (West, Westlaw through all legislation from the 2022 Reg. Sess. of the Wash. Leg.).

119. CAL. CIV. CODE § 51 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); 6 DEL. CODE ANN. § 4504 (West, Westlaw through Ch. 5 of the 152nd Gen. Assemb. (2023-2024)); HAW. REV. STAT. ANN. § 489-3 (West, Westlaw through the end of the 2022 Reg. Sess.); ME. REV. STAT. ANN. tit. 4 § 4591-92 (West, Westlaw through emergency legislation through Ch. 2 of the 2023 1st Reg. Sess. of the 131st Leg.); MD. CODE ANN., STATE GOV’T § 20-301 (West, Westlaw through all legislation from the 2022 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. Ch. 272, §§ 92A, 98 (West, Westlaw through 2022 2nd Annual Sess.); MINN. STAT. ANN. § 363A.11 (West, Westlaw through Feb. 8, 2023 from the 2023 Reg. Sess.); N.H. REV. STAT. ANN. §§ 354-A:2, A:17 (West, Westlaw through Ch. 1 of the 2023 Reg. Sess.); N.M. STAT. ANN. § 28-1-7 (West, Westlaw through 2022 2nd Reg. Sess. and 3rd Spec. Sess. of the 55th Leg. (2022)); OR. REV. STAT. ANN. §§ 659A.400, 03 (Westlaw through laws enacted in the 2022 Reg. Sess. of the 81st Leg. Assemb.); 11 R.I. GEN. LAWS ANN. §§ 11-24-2.3 (West, Westlaw through effective legislation through Ch. 442 of the 2022 Reg. Sess. of the R.I. Leg.); VT. STAT. ANN. tit. 9, §§ 4501-02 (West, Westlaw through Chs. 186 (End) and M-19 (End) of the Adjourned Sess. of the 2021-2022 Vt. Gen. Assemb. (2022)); WIS. STAT. ANN. § 106.52 (West, Westlaw through 2021 Act 267, published Apr. 16, 2022).

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

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

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

123. *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).

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.<sup>124</sup>

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,<sup>125</sup> bystander emotional distress,<sup>126</sup> and negligent infliction of emotional distress (NIED),<sup>127</sup> although these claims are not universally successful.<sup>128</sup> Plaintiffs have been less successful when alleging intentional infliction of emotional distress.<sup>129</sup>

Like the federal disability laws, most state disability rights laws either explicitly exclude gender identity disorder or exclude it through judicial interpretation.<sup>130</sup> However, state courts in Massachusetts, New Jersey, and New York have extended state disability protections to transgender people.<sup>131</sup>

### 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.<sup>132</sup> Many schools are unprepared to address the privacy and affirmation needs of transgender students, and some school policies may be outright hostile

124. *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).

125. *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). *But see* *Yarbrough v. Denton Indep. Sch. Dist.*, No. 420CV00433SDJCAN, 2021 WL 4704579 (E.D. Tex. Feb. 5, 2021) (finding the defendant is entitled to governmental immunity as a school district and is therefore barred from liability).

126. *See* *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1126 (E.D. Cal. 2011). *But see* *Shridhar v. Vantage Travel Serv., Inc.*, No. CV1409793BROPJWX, 2016 WL 146076 (C.D. Cal. Jan. 7, 2016) (finding the plaintiff cannot prevail on an NIED claim because the plaintiff did not witness the injury-producing event).

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

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

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

130. DEREK BLACK, *EDUCATION LAW: EQUALITY, FAIRNESS AND REFORM* 465 (2013).

131. *See* *Lie v. Sky Publ'g Corp.*, No. 013117J, 2002 WL 31492397, at \*7 (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 (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).

132. Reports from advocates who work directly with transgender youth provide helpful insight into the experiences of transgender youth. *See* M.V. Lee Badgett, Kellan E. Baker, Kerith J. Conron, Gary J. Gates, Alison Gill, Emily Greytak, & Jody L. Herman, *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys*, *Gender Identity in U.S. Surveillance Group*, UCLA SCH. OF L. WILLIAMS INST. 2 (Sept. 2014), <https://perma.cc/WJ4A-JTAL>. As highlighted in the 2014 report, there is a lack of population-based data about transgender people, including transgender youth.



to transgender students.<sup>133</sup> The section below describes common challenges transgender students face in gaining recognition and acceptance from their schools.<sup>134</sup>

### 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 DOJ and DOE jointly issued a Dear Colleague Letter (DCL) which provides helpful guidance on schools' Title IX legal obligations regarding transgender students.<sup>135</sup> 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."<sup>136</sup> 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."<sup>137</sup> 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 conditions,<sup>138</sup> or personal choice.<sup>139</sup> 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."<sup>140</sup> Federal funding is conditional on compliance with Title IX.<sup>141</sup>

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133. See Neal A. Palmer, Emily A. Greytak, & Joseph G. Kosciw, *Educational Exclusion: Drop Out, Push Out, and the School-to-Prison Pipeline Among LGBTQ Youth*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK 13 (2016), <https://perma.cc/UF4G-XPAM>.

134. 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). 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 Orr & Joel Baum, *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools*, AM. C.L. UNION 15 (2015), <https://perma.cc/XYM7-LNBY>.

135. *Dear Colleague Letter on Transgender Students*, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST. 1 (May 13, 2016), <https://perma.cc/DT9L-V2ZJ> [hereinafter *Dear Colleague Letter*]. But note that the Trump Administration later rescinded 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 EDUC. LGBT RES. PROS., <https://perma.cc/5LT8-46VM> (last visited Mar. 4, 2023).

136. *Dear Colleague Letter*, *supra* note 135, at 2.

137. *Id.*

138. See BIEGEL, *supra* note 134, at 179.

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

140. *Dear Colleague Letter*, *supra* note 135, at 3.

141. *Id.* at 1.

After its publication, federal courts were left to grapple with whether the DCL guidelines should be given deference, and they came to different conclusions.<sup>142</sup> On October 28, 2016, the Supreme Court granted certiorari on this issue in *G.G. ex rel. Grimm v. Gloucester County School Board*.<sup>143</sup> 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.<sup>144</sup> On March 6, 2017, the Supreme Court vacated the judgment and remanded the case to the U.S. Court of Appeals for the Fourth Circuit for reconsideration in light of the new DCL guidelines.<sup>145</sup> 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."<sup>146</sup> The school board appealed and the Supreme Court denied certiorari on June 28, 2021, allowing the Fourth Circuit's decision to stand.<sup>147</sup>

## 2. Schools' Duties

*a. Names and Pronouns.* Experts emphasize that it is very important for transgender youth to have their gender recognized and validated.<sup>148</sup> For example, chosen name use is associated with decreased depressive symptoms and suicidal ideation among transgender youth.<sup>149</sup> However, about 53% of transgender students and 49% of nonbinary students surveyed by the Gay, Lesbian & Straight Education Network (GLSEN) reported that they experienced discrimination regarding their names or pronouns in school.<sup>150</sup> Advocacy groups

142. In August 2016, the U.S. District Court for the Middle District of Texas granted a preliminary injunction, enjoining the U.S. 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 Cnty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016).

143. *Grimm*, 822 F.3d 709, cert. granted, 136 S. Ct. 2442 (2016); see also *G.G. v. Gloucester Cnty. Sch. Board*, AM. C.L. UNION, <https://perma.cc/W43X-7Y7L> (last updated Mar. 4, 2023); see Kristian Foden-Vencil, *In Oregon, Medicaid Now Covers Transgender Medical Care*, NPR (Jan. 12, 2015, 5:07 pm), <https://perma.cc/W3BV-YCWS>.

144. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. Aug. 2020).

145. *Gloucester Cnty. Sch. Bd. v. Grimm*, 137 S. Ct. 1239, 1239 (2017).

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

147. *Gloucester Cnty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878, 2878 (2021) (Thomas & Alito, JJ., dissenting).

148. See, e.g., *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, AM. PSYCH. ASS'N 840 (2015), <https://perma.cc/72QC-W7U9>.

149. Stephen T. Russell, Amanda M. Pollitt, Gu Li, & Arnold H. Grossan, *Chosen Name Use is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior Among Transgender Youth*, J. ADOLESCENT HEALTH (Oct. 2018).

150. Joseph G. Kosciw, Caitlin M. Clark, & Leesh Menard, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK 92 (2021), <https://perma.cc/VWD8-ZZP6>. The report also found that during the 2020–2021

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.<sup>151</sup> DOJ and DOE 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.”<sup>152</sup> The three largest school districts in the U.S.—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.<sup>153</sup>

*b. Access to Sex-Segregated Spaces.* Transgender students face serious safety concerns when attempting to use gender-corresponding, sex-segregated spaces.<sup>154</sup> In particular, transgender activists have noted increased risks in bathroom facilities where other bathroom users aggressively police sex segregation.<sup>155</sup> GLSEN reported that about 68% of the transgender students they surveyed were required to use the bathroom and about 71% were required to use the locker room of their legal sex while in school.<sup>156</sup> However, an increasing number of schools and districts have adopted policies that allow transgender students to use sex-segregated facilities in accordance with their gender identity.<sup>157</sup>

The DOJ 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.<sup>158</sup> The Fourth Circuit held that the DOE’s interpretation of its Title IX

school year, 29.2% of LGBTQ+ students were prevented from using their chosen name or pronouns in their schools. *Id.* at 32. *Cf.* Palmer, Greytak, & Kosciw, *supra* note 133, at 14 (finding that during the 2012–2013 school year, 10.8% of LGBTQ+ students were prevented from using their chosen name in their schools).

151. See *Best Practices for Serving Transgender and Gender Nonconforming Students in Schools*, MASS. TRANSGENDER POL. COAL. POL’Y COMM. (Nov. 2012), <https://perma.cc/Q6QK-EXPJ>; *Fact Sheet: Transgender & Gender Nonconforming Youth in Schools*, SYLVIA RIVERA L. PROJECT (2015), <https://perma.cc/H8BQ-HY6F>; see, e.g., *Model District Policy on Transgender and Gender Nonconforming Students: Model Language, Commentary & Resources*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK 6 (2014), <https://perma.cc/YL9W-J5JL>.

152. *Dear Colleague Letter*, *supra* note 135, at 3.

153. See *Guidelines to Support Transgender and Gender Expansive Students*, N.Y.C. DEP’T OF EDUC., <https://perma.cc/68DX-S28M> (last visited Feb. 25, 2023); David Holmquist, *Transgender Students—Ensuring Equity and Nondiscrimination*, L.A. UNIFIED SCH. DIST., 5 (Aug. 20, 2014), <https://perma.cc/TSN4-6ANB>; *CPS Guidelines Regarding the Support of Transgender and Gender Nonconforming Students*, CHI. PUB. SCH., 4–5, <https://perma.cc/TRH2-38G5> (last visited Feb. 25, 2023).

154. See Tara Mateik, *Toilet Training (Law and Order in the Bathroom)*, VIMEO, <https://perma.cc/WG5S-Q9R6> (last visited Feb. 25, 2023); *Equal Access to Public Restrooms*, LAMBDA LEGAL 1 (2011), <https://perma.cc/H84W-NR56>.

155. *Equal Access to Public Restrooms*, *supra* note 154, at 1.

156. Kosciw, Clark, & Menard, *supra* note 150, at 92.

157. See Alia Wong, *The K-12 Binary*, THE ATLANTIC (July 9, 2015), <https://perma.cc/QE7F-PQDC>. See also *Model District Policy on Transgender and Gender Nonconforming Students: Model Language, Commentary & Resources*, *supra* note 151.

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

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.<sup>159</sup> 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.<sup>160</sup> 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.<sup>161</sup> The school board appealed, but the Supreme Court denied certiorari.<sup>162</sup>

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.<sup>163</sup> Further, in a now-rescinded joint guidance letter, the DOJ and DOE 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.<sup>164</sup>

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.<sup>165</sup> North Carolina received significant public attention following former Governor Patrick McCrory's signing House Bill 2 into law on March 23, 2016.<sup>166</sup> As a result of House Bill 2, North Carolina boards of 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.<sup>167</sup> The DOJ sued, alleging that the bill violated the Violence Against Women Act, Title IX, and Title VII of the Civil Rights Act.<sup>168</sup> The District Court for the Middle District of North Carolina enjoined the U.S. from cutting off federal funding to North Carolina for violating these acts, pending an outcome on the merits of the case.<sup>169</sup> In *Carcaño v.*

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159. *Id.* at 721.

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

161. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020).

162. Orion Rummeler, *Supreme Court Won't Rule on Transgender Bathroom Access in Schools*, CONN. MIRROR (July 3, 2021, 8:00 PM), <https://perma.cc/6YSG-DFUM>.

163. ARCADIA SETTLEMENT, *supra* note 80, at 3.

164. *Dear Colleague Letter*, *supra* note 135, at 3.

165. *See e.g.*, *Mathis v. Fountain-Fort Carson Sch. Dist. No. 8*, Charge No. P20130034X (Colo. C.R. Div. June 17, 2013).

166. Tal Kopan & Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN (Mar. 24, 2016, 11:12 AM), <https://perma.cc/TDC6-T9BE>.

167. N.C. GEN. STAT. § 115C-521.2(b) (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.).

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

169. *Id.*

*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.<sup>170</sup> 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.<sup>171</sup> 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.<sup>172</sup> Eventually, following widespread criticism, North Carolina's House Bill 2 was repealed.<sup>173</sup>

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.<sup>174</sup> 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.<sup>175</sup> 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."<sup>176</sup> It held "telling [Coy] that she must disregard her identity while performing one of the most essential human functions constitutes severe and pervasive treatment, and creates an environment that is objectively and subjectively hostile, intimidating or offensive."<sup>177</sup>

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.<sup>178</sup> Soon after, Governor Lee signed a second bill into law requiring businesses and government facilities open to the public to put up a sign

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

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

172. *Carcaño*, 315 F.R.D. at 179.

173. Jason Hanna, Madison Park, & Elliott C. McLaughlin, *North Carolina Repeals 'Bathroom Bill'*, CNN POLITICS (Mar. 30, 2017), <https://perma.cc/J62S-F5AT>.

174. Sunnive Brydum, *Not So Elementary: A Trans Student's Fight With Her School*, ADVOCATE (Apr. 5, 2013, 11:00 AM), <https://perma.cc/44LL-RC6V>.

175. *Id.*

176. *Mathis v. Fountain-Fort Carson Sch. Dist. No. 8*, Charge No. P20130034X, at 12–13 (Colo. C. R. Div. June 17, 2013).

177. *Id.* at 12.

178. *Tennessee Governor Signs Transgender 'Bathroom Bill' For Schools*, NBC NEWS (May 18, 2021, 11:53 AM), <https://perma.cc/6L3V-JFGP>.

informing customers if transgender people are permitted to use multi-person restrooms.<sup>179</sup> 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.<sup>180</sup> Similarly, the ACLU has challenged the law requiring signs to be posted in businesses that allow transgender customers to utilize multi-person restrooms.<sup>181</sup>

*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.<sup>182</sup> Schools often exclude transgender students from gender-corresponding physical education classes and participation in sports.<sup>183</sup> For example, Mississippi enacted Senate Bill 2536, more commonly known as the “Mississippi Fairness Act,” in March of 2021.<sup>184</sup> 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 states.<sup>185</sup> Additionally, exclusion from school athletic teams diminishes transgender students’ ability to obtain athletic scholarships for higher education.<sup>186</sup>

However, some states do have more progressive policies; fifteen states and D.C. have statewide athletic association guidance that is specifically inclusive of transgender students.<sup>187</sup> Connecticut and Massachusetts, for example, have both analyzed how their states’ statutory bans on gender identity based discrimination

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179. Kimberlee Kruesi & Jonathan Mattise, *Tennessee Bill Mandating Bathroom Signs Called ‘Humiliating’ for Transgender People*, THE TENNESSEAN (May 20, 2021), <https://perma.cc/BN5Q-QED8>.

180. Kimberlee Kruesi, *Tennessee Sued Over Transgender ‘Bathroom Bill’ For Public Schools*, PBS NEWSHOUR (Aug. 3, 2021, 4:12 PM), <https://perma.cc/N993-5LKM>; Hannah Sarisohn, *Parents of transgender 3rd grader sue the state over Tennessee school bathroom law*, CNN (Aug. 5, 2022, 10:14 PM), <https://perma.cc/6PXA-47M4>. See also Complaint, *D.H. v. Williamson Cnty. Bd. of Educ.*, No. 3:22-cv-00570 (Aug. 1, 2022), available at <https://perma.cc/936M-D2AY>.

181. Ashley Sharp, *Tennessee Transgender Bathroom Bill Put on Pause Due to Ongoing Lawsuit*, WJHL (July 12, 2021), <https://perma.cc/T7DB-W3XR>.

182. 34 C.F.R. § 106.41 (West, Westlaw through Feb. 23, 2023, 88 Fed. Reg. 11,778).

183. See Erin E. Buzuvis, *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).

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

185. See *State School Health Policy Database: Physical Education and Activity*, NAT’L ASS’N OF STATE BDS. OF EDUC., <https://perma.cc/A59B-CZ7G> (last visited Feb. 25, 2023).

186. Approximately 57% of Division I athletes and 63% of Division II athletes receive some level of athletics-related financial aid. *NCAA Recruiting Facts*, NAT’L COLLEGIATE ATHLETIC ASS’N., <https://perma.cc/KA2S-A2AR> (last visited Feb. 25, 2023).

187. 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://perma.cc/55Q4-JSR9>.

apply to sex-segregated athletics.<sup>188</sup> 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.<sup>189</sup> 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.<sup>190</sup> 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."<sup>191</sup> Other states, including California, Colorado, Connecticut, Delaware, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont, and Washington, as well as D.C., have similar policies allowing students to participate in sports teams consistent with their gender identity, without regard to what their birth certificate might say.<sup>192</sup>

Four state athletic associations, which are authorized by state governments to organize athletics programs in public elementary and secondary schools,<sup>193</sup> have policies that require transgender students to participate on the sports team that aligns with the sex listed on their birth certificate.<sup>194</sup> In these states, gender

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188. See 603 MASS. CODE REGS. 26.05(3) (2021) (West, Westlaw through Register No. 1485, dated Dec. 23, 2022); *Guidelines for Connecticut Schools to Comply with Gender Identity & Expression Non-Discrimination Laws*, Conn. SAFE SCH. COAL. 8–9, <https://perma.cc/RR8Y-D25Y> (last visited Feb. 25, 2023).

189. 603 MASS. CODE REGS. 26.06 (2021) (West, Westlaw through Register No. 1485, dated Dec. 23, 2022); see also *Memorandum from Mitchell Chester, Commissioner, Massachusetts Department of Elementary and Secondary Education to Members of the Board of Elementary and Secondary Education*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC. (June 19, 2012), <https://perma.cc/P7B2-WQ3B> ("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.").

190. CONN. SAFE SCH. COAL., *supra* note 188, at 32.

191. *Bylaws of the Florida High School Athletic Association, Inc. 2019-2020 Edition*, FHSAA, <https://perma.cc/YFA3-NQ3S>.

192. Katie Barnes, *Alabama to Wyoming: State policies on transgender athlete participation*, ESPN (Aug. 5 2022), <https://perma.cc/L4VY-K75U>.

193. 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).

194. See *2012-13 Case Studies*, ALA. HIGH SCH. ATHLETIC ASS'N, <https://perma.cc/V293-4WHF> (last visited Feb. 25, 2023); *GHSAA Constitution and By-Laws for 2022-2023*, GA. HIGH SCH. ASS'N 16, <https://perma.cc/N85L-BKGU> (last visited Feb. 25, 2023); *NCHSAA Handbook 2021-2022*, N.C. HIGH

affirmation surgery is required to alter one's birth certificate, making their policy a *de facto* ban on gender-corresponding sports participation for transgender youth.<sup>195</sup> 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.<sup>196</sup> Additionally, the Idaho High School Activities Association policy requires hormone treatment for one year before a male-to-female student athlete is allowed to compete on a girls' team.<sup>197</sup>

Critics of transgender students' participation in school athletics programs argue that cisgender female athletes will be robbed of fair opportunities to compete.<sup>198</sup> 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 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.<sup>199</sup>

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."<sup>200</sup> The Statement goes on to state that per NCAA policy, championships should only be hosted

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SCH. ATHLETIC ASS'N, <https://perma.cc/K8LA-Q7L6> (last visited Feb. 25, 2023); *New Mexico Activities Association Handbook: Section 6 (Eligibility)*, N.M. ACTIVITIES ASS'N, <https://perma.cc/9TJM-2DJ3> (last visited Feb. 25, 2023).

195. See ALA. CODE § 22-9A-19(d) (West, Westlaw through 2022 Reg. and 1st Spec. Sess.); GA. CODE ANN. § 31-10-23(e) (West, Westlaw through legislation passed at the 2022 Reg. Sess. of the Ga. Gen. Assemb.); N.M. STAT. ANN. § 24-14-25(D) (West, Westlaw through 2022 2nd Reg. Sess. and 3rd Spec. Sess. of the 55th Leg. (2022)); N.C. GEN. STAT. § 130A-118(b) (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.). For further discussion of the major challenges transgender youth face seeking gender affirmation surgery, see *infra* Section III.D.1.

196. 2021-2022 *KHSAA Handbook*, KY. HIGH SCH. ATHLETIC ASS'N 24, <https://perma.cc/UT55-RTAK> (last visited Feb. 25, 2023).

197. *Rules and Regulations 2019-2020*, IDAHO HIGH SCH. ACTIVITIES ASS'N, <https://perma.cc/26ML-HRGU> (last visited Feb. 25, 2023).

198. 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).

199. Pat Griffin & Helen Carroll, *NCAA Inclusion of Transgender Student-Athletes*, NCAA OFF. OF INCLUSION 7 (Aug. 2011), <https://perma.cc/RSW3-H7EZ>.

200. *NCAA Board of Governors Statement on Transgender Participation*, NCAA (Apr. 12, 2021, 2:20 PM), <https://perma.cc/4B2Z-8434>.



at locations that can commit to providing an environment that is “safe, healthy and free of discrimination.”<sup>201</sup>

In January 2022, however, the NCAA announced a new policy regarding transgender participation in sports.<sup>202</sup> 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.<sup>203</sup> The NCAA’s new approach is modeled after the U.S. Olympic and Paralympic Committee and International Olympic Committee Guidelines.<sup>204</sup> 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.<sup>205</sup> Additionally, transgender student athletes will be required to document testosterone levels starting four weeks before their sport’s championship selections.<sup>206</sup> 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.<sup>207</sup> Speaking about the policy, John DeGioia, chair of the NCAA Board of Governors, stated that the NCAA is “steadfast in [its] support 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.”<sup>208</sup> The policy has already been criticized for “lack[ing] clarity” and for being difficult to enforce.<sup>209</sup>

There has also been legislation proposed on the federal level.<sup>210</sup> 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.”<sup>211</sup> Further, Utah’s Mike Lee, along with thirteen other senators, has

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201. *Id.*

202. Katie Barnes, *NCAA Updates Policy on Transgender Participation, to Let Each Sport Set Eligibility Requirements*, ESPN (Jan. 20, 2022), <https://perma.cc/4H7C-XSWY>.

203. Jenna Lemoncelli, *NCAA Adopts New Transgender Policy as Lia Thomas Controversy Brews*, N.Y. POST (Jan. 19, 2022), <https://perma.cc/9MTY-2Z9X>.

204. *Board of Governors Updates Transgender Participation Policy*, NCAA (Jan. 19, 2022, 8:41 PM), <https://perma.cc/DAQ2-M5XF>.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. Jo Yurcaba, *NCAA’s New Trans Athlete Guidelines Sow Confusion Amid Lia Thomas Debate*, NBC NEWS (Jan. 21, 2022), <https://perma.cc/U7VN-UFRX>.

210. Gillian R. Brassil, *How Some States Are Moving to Restrict Transgender Women in Sports*, N.Y. TIMES (June 22, 2021), <https://perma.cc/VNB5-LNGA>.

211. *Id.*; H.R. 426, 117th Cong. (2021).

introduced an identical bill in the Senate.<sup>212</sup> The bill's stated purpose is to "protect athletic opportunities for female athletes."<sup>213</sup>

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.<sup>214</sup> 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."<sup>215</sup>

### C. SEX EDUCATION

As of October 2020, thirty states and D.C. have laws requiring some form of sex education: comprehensive, abstinence-only, and/or sexually transmitted infection (STI)/HIV/AIDS-prevention.<sup>216</sup> Several federal funding streams provide resources for various forms of sex education.<sup>217</sup> Title V of the Welfare Reform Act provides more than fifty million dollars per year for grants to states for abstinence-only education.<sup>218</sup> 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.<sup>219</sup> Still, the federal funding streams and some of the state laws entrust local school boards with significant discretion.<sup>220</sup> Consequently, sex education varies tremendously from state to state and even between school districts within a particular state.<sup>221</sup>

Only nine states currently require that discussion of LGBTQ identities and relationships be affirming and inclusive.<sup>222</sup> While three states have struck laws that proscribe how LGBTQ issues are addressed in school sex education classes,<sup>223</sup> similar laws remain on the books in seven states.<sup>224</sup> For example,

212. Brassil, *supra* note 210; S. 251, 117th Cong. (2021).

213. Addy Bink, *Utah Senator Lee Introduces Legislation to 'Protect Athletic Opportunities or Female Athletes'*, ABC4 (Feb. 5, 2021, 10:53 AM), <https://perma.cc/4TNB-9WV5>.

214. Brassil, *supra* note 210; Exec. Order No. 13,988, *supra* note 7.

215. Exec. Order No. 13,988, *supra* note 7.

216. *State Policies on Sex Education in Schools*, NAT'L CONF. OF STATE LEG. (Oct. 1, 2020), <https://perma.cc/LF73-PTU5>.

217. See Matthew Lashof-Sullivan, *Sex Education in Schools*, 16 GEO. J. GENDER & L. 263 (2015); *How Sex Education Gets Funding*, PLANNED PARENTHOOD, <https://perma.cc/TJY2-63AP> (last visited Feb. 25, 2023); *Federally Funded Sex Education: Strengthening and Expanding Evidence-Based Programs*, GUTTMACHER INST. (June 2021), <https://perma.cc/5QKS-JZAH>.

218. Lashof-Sullivan, *supra* note 217, at 275.

219. *Id.* at 276–77.

220. *Id.* at 264, 277.

221. *Id.* at 264–74; *Florida State Profile*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S. (Sept. 27, 2021), <https://perma.cc/PJV6-PDUE> (last visited Feb. 25, 2023).

222. *Sex Ed State Law and Policy Chart*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S. 3 (2022), <https://perma.cc/FD9J-HWAN>.

223. 2021 ALA. ALS 293 (striking the Alabama provision on homosexuality); 2019 ARIZ. ALS 86 (striking the Arizona provision on homosexuality); UTAH CODE ANN. § 53A-13-101 (West, Westlaw through laws through the 2022 3rd Spec. Sess.) (striking the Utah provision on homosexuality).

224. LA. REV. STAT. ANN. § 17:281 (West, Westlaw through 2022 1st Extra., Veto, Reg. and 2nd Extra. Sess.).

Texas requires educators to teach that homosexuality is an unacceptable lifestyle,<sup>225</sup> 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.<sup>226</sup> Students in Oklahoma are taught that “homosexual activity . . . is now known to be primarily responsible for contact with the AIDS virus,”<sup>227</sup> which is factually misleading.<sup>228</sup> Meanwhile, South Carolina’s sex education teachers are only permitted to mention same-sex relationships in the context of STI transmission,<sup>229</sup> and in Florida, if a school district chooses to provide instruction regarding AIDS, it must also teach “the benefits of monogamous homosexual marriage.”<sup>230</sup> Louisiana prohibits “sexuality explicit materials depicting male or female homosexual activity” and otherwise focuses on abstinence,<sup>231</sup> while North Carolina mandates teaching students “a mutually faithful monogamous heterosexual relationship in the context of marriage is the best lifelong means of avoiding sexually transmitted diseases, including HIV/AIDS.”<sup>232</sup>

At least one school has used its abstinence-only policy to exclude a gay-straight alliance from meeting or advertising on campus.<sup>233</sup> 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.”<sup>234</sup>

Meanwhile, nine states—California, Colorado, Connecticut, Illinois, Maryland, New Jersey, Oregon, Rhode Island, and Washington—and D.C. have laws or regulatory guidance as of July 2022 requiring that sex education be LGBTQ-inclusive.<sup>235</sup>

225. TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West, Westlaw through the end of the 2021 Reg. and Called Sess. of the 87th Leg.).

226. TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West, Westlaw through the end of the 2021 Reg. and Called Sess. of the 87th Leg.); MISS. CODE ANN. § 37-13-171 (West, Westlaw through laws from the 2022 Reg. Sess. effective through July 1, 2022); *see also* *Lawrence v. Texas*, 539 U.S. 558, 576–78 (2003).

227. OKLA. STAT. ANN. tit. 70, § 11-103.3 (West, Westlaw through legislation of the 2nd Reg. Sess. and 1st and 2nd Extra. Sess. of the 58th Leg. (2022)).

228. *See How Is HIV Transmitted?*, HIV.Gov (June 16, 2022), <https://perma.cc/BP4Z-83ZA> (stating that people most commonly get or transmit HIV through needle or syringe use or through sexual behavior, including heterosexual vaginal sex).

229. S.C. CODE ANN. § 59-32-30(A)(5) (West, Westlaw through 2022 Act No. 268).

230. FLA. STAT. ANN. § 1003.46 (West, Westlaw through 2022 2nd Reg. Sess. & Spec. A, C, & D Sess. of the 27th Leg.).

231. LA. STAT. ANN. § 17:281 (West, Westlaw through 2022 1st Extra., Veto, Reg. & 2nd Extra. Sess.).

232. N.C. GEN. STAT. ANN. § 115C-81.30(a)(5) (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.). Illinois formerly mandated that course material and instruction “teach honor and respect for monogamous heterosexual marriage,” but that law was repealed and replaced by LGBTQ+-inclusive laws 105 ILCS 5/27-9.1a and 27-9.1b.

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

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

235. *Sex Ed State Law and Policy Chart*, *supra* note 222, at 17–19.

California explicitly prohibits sex education programs in the state from reflecting or promoting bias against LGBTQ people, among other groups.<sup>236</sup> 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,<sup>237</sup> the district adopted a sex education curriculum that includes unbiased information about sexual orientation.<sup>238</sup> Two additional states—Iowa and New Mexico—require that such instruction neither affirm nor discriminate against LGBTQ youth.<sup>239</sup>

#### D. FREEDOM OF EXPRESSION AND ASSOCIATION

Plaintiffs have brought First Amendment claims to vindicate their right to express pro-LGBTQ opinions at school<sup>240</sup> and to start gay-straight alliances (GSAs).<sup>241</sup> However, students’ free speech rights at school are not absolute because schools are often considered “limited public forums.”<sup>242</sup> This means that schools are able to prohibit some speech that could not be limited outside the schoolhouse gates.<sup>243</sup> 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.”<sup>244</sup> In addition to the First Amendment, schools are governed by the federal Equal Access Act, which concerns student organizational expression on campus.<sup>245</sup>

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 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.<sup>246</sup>

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236. CAL. HEALTH & SAFETY CODE § 151002(a)(6) (West, Westlaw through Ch. 997 of 2022 Reg. Sess.).

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

238. *Historic Ruling in ACLU Lawsuit: Abstinence-Only Sex Ed Violated State Law*, AM. C.L. UNION OF N. CAL. (May 6, 2015), <https://perma.cc/8U7J-DBG9>.

239. *Sex Ed State Law and Policy Chart*, *supra* note 222, at 19.

240. *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)).

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

242. *Id.* at 560.

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

244. *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)).

245. 20 U.S.C.A. § 4071 (West, Westlaw through Pub. L. No. 117-262).

246. ‘No Promo Homo’ Laws, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, <https://perma.cc/C9VB-XPJZ> (last visited Feb. 25, 2023).

## 1. Student Organizations

As of January 2023, there are more than 4,000 GSAs throughout the nation.<sup>247</sup> About one-third of the LGBTQ students whom GLSEN surveyed during the 2020–2021 school year reported having a GSA or similar club at their school.<sup>248</sup> This subsection will discuss the legal landscape in which these clubs operate.

The federal Equal Access Act (EAA) 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.”<sup>249</sup> Originally, the EAA was enacted to grant student-led religious groups access to school facilities on the same basis as other student groups.<sup>250</sup> However, it has since been used to allow GSAs to meet on school property.<sup>251</sup> Nonetheless, the EAA is not absolute. State law determines what constitutes a “secondary school,” and states have circumscribed the EAA’s reach by narrowly defining “secondary school” or refusing to define the term at all.<sup>252</sup>

Additionally, schools have circumvented the EAA by becoming “closed forums”—that is, by allowing only curricular student groups to meet on campus.<sup>253</sup> A Northern District of Texas court has read a students’ well-being exception into the EAA and banned a GSA, suggesting that a website listed on the club’s poster would threaten students’ well-being.<sup>254</sup> The court also objected to the club’s plans to discuss safe sex, disregarding the school’s abstinence-only policy.<sup>255</sup> However, this case continues to be seen as an exception to the trend in EAA cases.<sup>256</sup>

247. WALTER FRANK, *LAW AND THE GAY RIGHTS STORY: THE LONG SEARCH FOR EQUAL JUSTICE IN A DIVIDED DEMOCRACY* 137 (2014). However, only three states have a gay-straight alliance in more than half of their high schools: New York, Massachusetts, and Connecticut. See Dominique Parris & Brandon Stratford, *Only 3 states have a gay-straight alliance in more than half of their high schools*, CHILD TRENDS (Nov. 5, 2019), <https://perma.cc/9MHZ-HKD2>.

248. Kosciw, Clark, & Menard, *supra* note 150, at 48 (noting that 17.9% of students reported they normally had a GSA, but the club was unable to meet, possibly because of COVID-19).

249. 20 U.S.C.A. § 4071 (West, Westlaw through Pub. L. No. 117-262).

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

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

252. See *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cnty.*, 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.’”).

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

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

255. *Id.* at 563.

256. For courts finding for GSAs under the EAA, 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 (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).

## 2. Students' Apparel and Appearance

Generally, schools adopt dress codes in order to maintain educational environments that facilitate instruction and orderliness.<sup>257</sup> While the rules vary widely, they are in place to convey standards of modesty, cleanliness, and decorum.<sup>258</sup> However, school dress codes can sometimes run afoul of students' First Amendment rights. In *Tinker v. Des Moines School District*,<sup>259</sup> 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."<sup>260</sup> The district court in *Gillman v. School Board for Holmes County*<sup>261</sup> applied the *Tinker* test and held that the school board's prohibition on students' clothing, buttons, or apparel that advocated acceptance and fair treatment of LGBTQ people violated the students' First Amendment rights.<sup>262</sup>

Public high schools and elementary schools may restrict speech that injures or encroaches on the rights of other students.<sup>263</sup> 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.<sup>264</sup> In *Harper v. Poway Unified School District*,<sup>265</sup> 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.<sup>266</sup> However, other courts have held that students have a First Amendment right to wear T-shirts printed with anti-gay slogans.<sup>267</sup>

Transgender students often rely on clothing and other appearance-related indicators to express their gender identity.<sup>268</sup> Students have challenged the overall application of gender-specific dress codes,<sup>269</sup> as well as

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

258. *Id.*

259. 393 U.S. 503 (1969).

260. *Id.* at 514.

261. 567 F. Supp. 2d 1359 (N.D. Fla. 2008).

262. *Id.* at 1375–79, 1362 (citing *Tinker*, 393 U.S. 503, 506).

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

264. FOSSEY & DEMITCHELL, *supra* note 257, at 92.

265. 445 F.3d 1166 (9th Cir. 2006).

266. *See id.* at 1191–92.

267. FOSSEY & DEMITCHELL, *supra* note 257, at 92 (citing *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001)).

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

269. *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 ex rel. Doe v. Yunits*, No. 00-1060A, 2001 WL 36648072 (Mass. Super. Feb. 26, 2001); *see also* Jan Hoffman, *Can a Boy Wear a Skirt to School?*, N.Y. TIMES (Nov. 6, 2009), <https://perma.cc/6C5R-SV9C>.

the enforcement of gender-specific dress rules for special events, like senior portraits<sup>270</sup> or prom.<sup>271</sup>

### 3. Access to Information on the Internet

Many LGBTQ youth rely on the Internet to find information on same-sex attraction and sexual health.<sup>272</sup> In 1996, Congress began a federal funding program called E-Rate to offset telecommunication and Internet costs for schools and libraries.<sup>273</sup> As a result, since 2005, nearly all public schools have had access to the Internet.<sup>274</sup> However, Congress also passed the Children's Internet Protection Act (CIPA) in 2000.<sup>275</sup> 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."<sup>276</sup> Acting in over-compliance with CIPA, many schools initially blocked well-known LGBTQ-positive websites, depriving LGBTQ students of vital online resources.<sup>277</sup>

In February 2011, the ACLU launched a campaign titled "Don't Filter Me" aimed at unblocking LGBTQ-friendly websites at public schools.<sup>278</sup> In response to the ACLU's demand letters, the majority of schools the ACLU approached voluntarily adjusted their filtering software.<sup>279</sup> However, the ACLU did sue one

270. See, e.g., Charles Joughin, *Justice for Jeydon: Senior Yearbook Will Not Bar Transgender Student*, HRC BLOG (Nov. 15, 2013), <https://perma.cc/L4RQ-FLR4>; Jill Tucker & Henry K. Lee, *S.F. Girl Booted from Yearbook for Wearing Tux*, SFGATE (May 17, 2014, 8:07 AM), <https://perma.cc/GPX5-GLUJ>; Galen Sherwin, *5 Things Public Schools Can and Can't Do When It Comes to Dress Codes*, AM. C.L. UNION BLOG (May 30, 2017, 4:00 PM), <https://perma.cc/QP9G-7GY8>.

271. 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://perma.cc/TZ47-P24W> (last visited Feb. 25, 2023).

272. 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, Kimberly J. Mitchell, & Michele Y. Ybarra, *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)).

273. *Id.* at 350.

274. *Id.* (citing John Wells, Laurie Wells, & Bernard Greene, *Internet Access in U.S. Public Schools and Classrooms: 1994-2005*, NAT'L CTR. FOR EDUC. STAT. 4 (Nov. 2006), <https://perma.cc/KE4U-VJHW>).

275. *Id.*

276. *Id.* at 350–51.

277. *Parents, Fam., & Friends of Lesbians and Gays, Inc., v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888 (W.D. Mo. 2012); see also *Don't Filter Me: Final Report*, AM. C.L. UNION 3–8 (2012), <https://perma.cc/LLZ8-MAK8> [hereinafter "Don't Filter Me" Report] (stating school internet filters 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 informative LGBTQ websites that do not contain pornography and are fully appropriate under CIPA).

278. "Don't Filter Me" Report *supra* note 277, at 3.

279. *Id.* at 5.

recalcitrant school; in that case, *Parents, Families, and Friends of Lesbians and Gays, Inc. v. Camdenton R-Ill. School District*,<sup>280</sup> the District Court for the Western District of Missouri held that the school district's filtering policy violated the First Amendment and ordered the school district to stop filtering LGBTQ-friendly websites.<sup>281</sup> The court also made clear that even though students could request that websites be unblocked, there was still a constitutional violation.<sup>282</sup>

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."<sup>283</sup> 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.<sup>284</sup>

#### 4. Faculty and Staff

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,"<sup>285</sup> seven states remain with "No Promo Homo" laws described in Section II-D.<sup>286</sup> Some school districts have also voluntarily adopted "No Promo Homo" policies in the absence of state law.<sup>287</sup> Moreover, in 2021 alone, three states introduced similar legislation targeting trans students.<sup>288</sup> An Arkansas bill would protect educators wishing to refer to students by their "biological sex."<sup>289</sup>

280. 853 F. Supp. 2d 888.

281. *Id.* at 899–901.

282. *Id.* at 900–01.

283. "Don't Filter Me" Report, *supra* note 277, at 7.

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

285. ALA. CODE § 16-40A-2 (West, Westlaw through 2022 Reg. & 1st Spec. Sess.) (deleting former (c)(8) and revising (a)(1)).

286. "No Promo Homo" laws prohibit teachers and staff from discussing LGBTQ issues in a positive light, if at all. *See* ALA. CODE § 16-40A-2 (West, Westlaw through 2022 Reg. & 1st Spec. Sess.); ARIZ. REV. STAT. ANN. § 15-716 (West, Westlaw through the 2nd Reg. Sess. of the 55th Leg. (2022)); LA. STAT. ANN. § 17:281 (West, Westlaw through 2022 1st Extra., Veto, Reg. & 2nd Extra. Sess.); MISS. CODE ANN. § 37-13-171 (West, Westlaw through laws from the 2022 Reg. Sess. effective through July 1, 2022); OKLA. STAT., tit. 70, § 11-103.3 & OKLA. ADMIN. CODE § 210:15-17-2 (West, Westlaw through legislation of the 2nd Reg. Sess. & 1st & 2nd Extra. Sess. of the 58th Leg. (2022)); S.C. CODE ANN. § 59-32-30 (West, Westlaw through 2022 Act No. 268); TEX. HEALTH & SAFETY CODE ANN. §§ 85.007, 163.002 (West, Westlaw through the end of the 2021 Reg. & Called Sess. of the 87th Leg.); UTAH CODE ANN. § 53A-13-101 & UTAH ADMIN. CODE r. 277-474-3 (West, Westlaw through laws through the 2022 3rd Spec. Sess.).

287. *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).

288. Priya Krishnakumar, *This record-breaking year for anti-transgender legislation would affect minors the most*, CNN (Apr. 15, 2021, 9:46 AM), <https://perma.cc/7XKQ-WMD7>.

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



In Iowa, one pending bill would require parents' written consent for their children to participate in curricular activities regarding gender identity,<sup>290</sup> while another would mandate that such lessons include "the potential harm and adverse outcomes of social and medical gender interventions."<sup>291</sup> And in Tennessee, a bill has been passed to permit parents to withdraw students from LGBTQ curricula,<sup>292</sup> a second bill would prohibit educators from using materials that "promote, normalize, support, or address . . . LGBTQ issues or lifestyles."<sup>293</sup>

Three states have recently repealed these types of laws and policies: Arizona in 2019, North Carolina in 2017, and Utah in 2018.<sup>294</sup> 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.<sup>295</sup>

## E. BULLYING, HARASSMENT, AND VIOLENCE

### 1. Bullying and Harassment

According to GLSEN's 2021 National School Climate Survey, 60.7% of LGBTQ students in grades six through twelve reported verbal harassment based on their sexual orientation during the 2020–2021 school year;<sup>296</sup> 57.4% described verbal harassment based on gender expression,<sup>297</sup> 22.4% testified to physical harassment based on sexual orientation, and 20.6% reported physical harassment based on gender expression.<sup>298</sup> Lastly, 8.8% of LGBTQ students surveyed were physically assaulted for their sexual orientation and 8.2% for their gender expression.<sup>299</sup>

Bullying and harassment have a tangible effect on these students' lives—32.2% 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; 11.3% missed four or more days.<sup>300</sup> Bullying and harassment also affect students' academic outcomes—students who experienced higher levels of bullying had, on average, lower GPAs than those who experienced

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

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

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

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

294. ARIZ. REV. STAT. ANN. § 15-716 (West, Westlaw through the 2nd Reg. Sess. of the 55th Leg. (2022)); N.C. GEN. STAT. ANN. § 115C-81 (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.); UTAH CODE ANN. § 53A-13-101 (West, Westlaw through laws through the 2022 3rd Spec. Sess.).

295. Consent Decree, *Doe v. Anoka-Hennepin Sch. Dist.* No. 11, No. 11-cv-01999-JNE-SER (D. Minn. Mar. 6, 2012), <https://perma.cc/L4AJ-ACGM>; see also Bolt, *supra* note 287, at 278–80 (describing the "no promo homo" and "neutrality" laws in place in the Anoka-Hennepin school district).

296. Kosciw, Clark, & Menard, *supra* note 150, at 19.

297. *Id.*

298. *Id.*

299. *Id.* at 20.

300. *Id.* at xv.

less harassment.<sup>301</sup> 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.<sup>302</sup> 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,<sup>303</sup> and over 40% of LGBT respondents to the 2020 National Survey on LGBTQ Youth Mental Health seriously considered attempting suicide in the past twelve months.<sup>304</sup>

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.<sup>305</sup>

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.<sup>306</sup> These

301. *Id.* at xix–xx (noting that LGBTQ+ students who experienced identity-based discrimination at school had an average GPA of 2.92, while their peers who experienced no anti-LGBTQ+ discrimination had an average GPA of 3.34; students who experienced higher levels of in-person victimization based on gender identity had an average GPA of 2.76).

302. *Id.* at xix.

303. *National Survey on LGBTQ Youth Mental Health 2020*, TREVOR PROJECT 2 (2020), <https://perma.cc/WMW6-TKVD>.

304. *Id.*

305. ARK. CODE ANN. § 6-18-514 (West, Westlaw through acts of the 2023 Reg. Sess. of the 94th Ark. Gen. Assemb. effective Feb. 13, 2023); CAL. EDUC. CODE § 234.1 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); COLO. REV. STAT. ANN. § 22-32-109.1 (West, Westlaw through 2nd Reg. Sess., 73rd Gen. Assemb. (2022)); CONN. GEN. STAT. ANN. § 10-222d (West, Westlaw through Gen. Stat. of Conn., Revision of 1958, Revised to Jan. 1, 2023); 105 ILL. COMP. STAT. ANN. 5/27-23.7 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); IOWA CODE ANN. § 280.28 (West, Westlaw through legislation effective Feb. 16, 2023 from the 2023 Reg. Sess.); ME. REV. STAT. ANN. tit. 20-A, § 6554 (West, Westlaw through emergency legislation through Ch. 2 of the 2023 1st Reg. Sess. of the 131st Leg.); MD. CODE ANN., EDUC. § 7-424.1 (West, Westlaw through all legislation from the 2022 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 71, § 370 (West, Westlaw through 2022 2nd Ann. Sess.); MINN. STAT. ANN. § 121A.031 (West, Westlaw through legislation effective through Feb. 8, 2023 from the 2023 Reg. Sess.); NEV. REV. STAT. ANN. § 388.122 (West, Westlaw through the 2nd Reg. Sess. of the 107th Leg. (2022)); N.J. STAT. ANN. § 18A:37-15 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1); N.Y. EDUC. LAW § 13 (West, Westlaw through L. 2022, Chs. 1 to 841); N.C. GEN. STAT. ANN. §§ 115C-407.15 to .16 (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.); OR. REV. STAT. ANN. § 339.356 (West, Westlaw through laws enacted in the 2022 Reg. Sess. of the 81st Leg. Assemb.); 11 R.I. GEN. LAWS ANN. §§ 16-21-33 to -34 (West, Westlaw through effective legislation through Ch. 442 of the 2022 Reg. Sess. of the R.I. Leg.); VT. STAT. ANN. tit. 16, § 11 (West, Westlaw through Chs. 186 (End) and M-19 (End) of the Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb. (2022)); WASH. REV. CODE ANN. § 28A.300.285 (West, Westlaw through all legislation from the 2022 Reg. Sess. of the Wash. Leg.); *see also State Maps*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, <https://perma.cc/MM3L-4QUJ> (last visited Feb. 25, 2023).

306. *Enumeration of Statewide Anti-Bullying Laws and Local Policies*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, <https://perma.cc/ERR4-KNE3> (last visited Feb. 25, 2023).

policies “specifically protect students based on their actual or perceived race, color, national origin, sex, disability status, sexual orientation, gender identity, and religion.”<sup>307</sup> In GLSEN’s 2021 School Climate Survey, 15.5% fewer students reported hearing homophobic remarks “often or frequently” when their schools had enumerated policies than when their schools had no anti-bullying policies.<sup>308</sup> By comparison, only 4.5% fewer students reported hearing homophobic remarks “often or frequently” when their schools had generic anti-bullying policies than when their schools had no bullying policies at all.<sup>309</sup> Additionally, teachers in schools with enumerated anti-bullying policies are more likely to intervene to stop bullying and harassment.<sup>310</sup>

Enumerated anti-bullying policies must be carefully crafted to survive judicial scrutiny.<sup>311</sup> 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, values, and social skills.<sup>312</sup> The court was particularly fixated on expression of values as a core First Amendment activity.<sup>313</sup> 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.<sup>314</sup> However, the court also noted that some anti-harassment policies can withstand First Amendment scrutiny,<sup>315</sup> including potential prohibition on anti-LGBTQ bullying.<sup>316</sup>

## 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.<sup>317</sup> Transgender youth, especially young people of color, experience even more dramatic rates of violence.<sup>318</sup> This subsection discusses the statistical disparities in violence suffered by LGBTQ youth and legal protections against excessive violence.

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307. *Id.*

308. Kosciw, Clark, & Menard, *supra* note 150, at xxiii.

309. *Id.*

310. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, *Enumeration of Statewide Anti-Bullying Laws and Local Policies*, *supra* note 306.

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

312. *Id.* at 210.

313. *Id.*

314. *Id.* at 216.

315. *Id.* at 209.

316. *See id.* at 210.

317. *See Kosciw, Clark, & Menard, supra* note 150, at 19–20.

318. *Hate Violence in 2013*, NAT’L COAL. ANTI-VIOLENCE PROGRAMS 103–04 (2014), <https://perma.cc/8MM4-QE9Q>.

Primarily as a result of school bullying and family rejection,<sup>319</sup> LGBTQ youth suffer from low self-esteem, feelings of isolation, and depression.<sup>320</sup> 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.<sup>321</sup> As a result of these combined pressures, LGBTQ youth commit suicide at shockingly high rates.<sup>322</sup>

It is estimated that gay youth are two to three times more likely to attempt suicide than non-LGBTQ youth.<sup>323</sup> Approximately 30% of annual completed suicides among youth are committed by members of the LGBTQ community.<sup>324</sup> A 2011 Oregon study of over 30,000 eleventh grade students found that 21.5% of LGBTQ youth attempted suicide in the previous twelve months, compared with 4.2% of non-LGBTQ youth.<sup>325</sup> The study also found that the risk of suicide attempts was 20% higher in unsupportive environments than in supportive environments.<sup>326</sup> A 2016 study found that almost half of all transgender individuals surveyed had a history of attempting suicide.<sup>327</sup> In the past year, nearly 1 in 5 transgender and non-binary youth attempted suicide and LGBTQ youth of color reported higher rates than their white peers.<sup>328</sup> 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.<sup>329</sup> The subject of bathrooms as they relate to rights for transgender persons is discussed in a later section of this Article.<sup>330</sup> National initiatives like the "It Gets Better" campaign have been developed to provide hope to LGBTQ youth contemplating suicide.<sup>331</sup>

319. 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.").

320. *Id.* at 169, 181.

321. *See id.* at 169–70.

322. Nearly one in five transgender and nonbinary youth attempted suicide and LGBTQ youth of color reported higher rates than their white peers. *See 2022 National Survey on LGBTQ Youth Mental Health*, TREVOR PROJECT (2022), <https://perma.cc/A2N6-5F3R>.

323. 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).

324. *Id.*

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

326. *Id.*

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

328. *2022 National Survey on LGBTQ Youth Mental Health*, *supra* note 322.

329. Seelman, *supra* note 327, at 1389.

330. *See discussion infra*, Section V-D.

331. 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 About Our Global Movement*, IT GETS BETTER PROJECT, <https://perma.cc/LF7T-K5CC> (last visited Feb. 25, 2023). To view a statement issued by the White House Off. of Communications lending its support to the campaign, *see* Brian Bond, "It Gets Better", White House Off. of Commc'ns, 2010 WL 3946661 (Oct. 9, 2010).

Young people continue to face threats of murder and hate crimes by their peers because of their sexual orientation and gender expression.<sup>332</sup> 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.<sup>333</sup> In addition to providing funds to investigate and prosecute hate crimes, the Act grants the Federal Bureau of Investigation (FBI) the authority to pursue cases that are neglected by local authorities,<sup>334</sup> as well as to track data on crimes based on gender identity and sexual orientation.<sup>335</sup>

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.<sup>336</sup> An analysis of the data reveals that gay and lesbian individuals report hate crimes at a higher rate per capita than any other group.<sup>337</sup> LGBTQ youth of color experience the increased violence of intersectional discrimination.<sup>338</sup> A 2017 report by the National Coalition of Anti-Violence Programs found that, of all anti-LGBTQ homicides in 2016, 79% were committed against people of color and 68% against transgender individuals.<sup>339</sup> The murder rate among transgender individuals is troubling,<sup>340</sup> prompting campaigns such as "Trans Lives Matter."<sup>341</sup> Thirty states and D.C. have passed hate crime laws that

332. See Rob Wile, *It's Still Dangerous to be Gay in America. Here are the Statistics that Prove It*, SPLINTER (June 12, 2016, 8:49 PM), <https://perma.cc/MC3Z-8AVA> (stating that between 20–25% of lesbian and gay people report experiencing hate crimes in their lifetimes, 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), <https://perma.cc/QAG5-UTCF> (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), <https://perma.cc/MT84-QCQY> (describing the anti-gay-motivated murder of 15-year-old Lawrence "Larry" King by a teenage classmate).

333. Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C.A. § 249 (West, Westlaw through Pub. L. No. 117-262).

334. See *Anti-Defamation League, Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (HCPA): What You Need to Know*, ADL (Feb. 27, 2015), <https://perma.cc/G4P7-5HXP>.

335. 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), <https://perma.cc/C3U5-AYWT>.

336. *Hate Crime Statistics*, FBI (Nov. 16, 2020), <https://perma.cc/P5W4-2NRX>.

337. 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).

338. See Wile, *supra* note 332.

339. *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2016*, NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS 9 (2017), <https://perma.cc/Y5HT-XXRN>.

340. *Addressing Anti-Transgender Violence, Exploring Realities, Challenges and Solutions for Policymakers and Community Advocates*, HUM. RTS CAMPAIGN 2 (Nov. 2015), <https://perma.cc/64DX-V26M> (finding that at least twenty-one 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 EUR. (May 19, 2009), <https://perma.cc/3JNG-N7DN>.

341. Jen Richards, *It's Time for Trans Lives to Truly Matter to Us All*, ADVOCATE (Feb. 18, 2015, 8:15 AM), <https://perma.cc/EC2N-9E9E>.

protect LGB individuals, but only seventeen states and D.C. protect transgender individuals as well.<sup>342</sup>

#### F. STUDENT PRIVACY AND LEGAL RECOURSE FOR “OUTING” BY SCHOOL OFFICIALS

Coming out is often an intensely personal decision, involving self-discovery and acceptance.<sup>343</sup> “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.<sup>344</sup> 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 . . . .”<sup>345</sup> While students do have a privacy interest in their sexual orientation,<sup>346</sup> that interest is not absolute.<sup>347</sup> Rather, it is subject to a balancing of the school’s interest in disclosure and the student’s interest in secrecy.<sup>348</sup> An estimated 44% of LGBT students do not report incidents of harassment or assault to school staff for fear of being outed.<sup>349</sup>

### III. CHALLENGES FACING FAMILIES OF LGBTQ YOUTH

#### A. CONVERSION THERAPY

Approximately 350,000 adults in the U.S. received conversion therapy as adolescents.<sup>350</sup> Conversion therapy<sup>351</sup> is “any attempt to change a person’s sexual orientation, gender identity, or gender expression.”<sup>352</sup> Conversion therapy stems from a belief that being in the LGBTQ community is unnatural or immoral.

342. *Hate Crime Laws*, MOVEMENT ADVANCEMENT PROJECT (Mar. 3, 2022) <https://perma.cc/UZL2-L6TV>; see CAL. PENAL CODE § 422.56 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.) (protecting against gender discrimination, explicitly inclusive of gender identity and gender expression). *But see* N.Y. PENAL LAW § 485.05 (West, Westlaw through L. 2022, Chs. 1 to 841) (protecting against gender discrimination, but not defining gender as inclusive of gender identity or gender expression).

343. 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).

344. *Outing*, MERRIAM-WEBSTER, <https://perma.cc/8BR8-QDM4> (last visited Feb. 25, 2023).

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

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

347. *Id.* at 1193.

348. *Id.* at 1195.

349. Kosciw, Clark, & Menard, *supra* note 150, at 27.

350. Christy Mallory, Taylor N.T. Brown, & Kerith J. Conron, *Conversion Therapy and LGBT Youth*, UCLA SCH. OF L. WILLIAMS INST. (June 2019), <https://perma.cc/U5JL-BG4Y> (defining adolescent as anyone under age eighteen).

351. “Conversion therapy” is also referred to as “sexual orientation change efforts (SOCE)”, “reparative therapy,” or “ex-gay ministry.” See *Conversion Therapy*, GLAAD, <https://perma.cc/9MX5-7E6E> (last visited Feb. 25, 2023); see also *#BornPerfect: The Facts About Conversion Therapy*, NAT’L CTR. FOR LESBIAN RTS., <https://perma.cc/7FH8-LR3V> (last visited Feb. 25, 2023) (detailing the purpose of and evidence for laws banning conversion therapy).

352. *Conversion Therapy*, *supra* note 351.

Although conversion therapy has been practiced for over fifty years,<sup>353</sup> recent judicial rulings and legislative developments highlight a significant shift in socio-cultural attitudes away from its acceptability.<sup>354</sup> Although the American Psychiatric Association has not listed homosexuality as a mental disorder in its Diagnostic and 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.<sup>355</sup> Gender dysphoria<sup>356</sup> and transvestic disorder<sup>357</sup> 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.<sup>358</sup> Continuing to view these identities as mental illnesses has devastating effects on LGBTQ youth.<sup>359</sup> However, courts and legislatures are beginning to treat conversion therapy as either consumer fraud or as psychologically harmful to minors.<sup>360</sup> Twenty-one states ban conversion therapy and six states partially ban it.<sup>361</sup> Three states have prevented enforcement of conversion therapy bans.<sup>362</sup>

### 1. 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

353. Stephen Vider & David S. Byers, *A Half-Century of Conflict Over Attempts to 'Cure' Gay People*, TIME (Feb. 12, 2015, 12:00 PM), <https://perma.cc/TNG5-ZE5R>; see also Jamie Scot, *Shock the Gay Away: Secrets of Early Gay Aversion Therapy Revealed*, HUFFINGTON POST (Dec. 6, 2017), <https://perma.cc/WNQ8-GN63>.

354. See *infra* Section III.A.1–2.

355. 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)).

356. 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. PSYCHIATRIC ASS’N (Nov. 2020), <https://perma.cc/QBR7-A8DX>.

357. 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.” *Paraphilic Disorders*, AM. PSYCHIATRIC ASS’N (2013), <https://perma.cc/LS2R-CHLT>.

358. Kayley Whalen, *(In)validating Transgender Identities: Progress and Trouble in the DSM-5*, NAT’L LGBTQ TASK FORCE, <https://perma.cc/8JAN-R4HV> (last visited Feb. 25, 2023).

359. See Martin, *supra* note 319, at 174 (noting that belief in conversion therapy leads to parental rejection of queer youth); see also *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150, 152–53 (3d Cir. 2015).

360. See *Conversion “Therapy” Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/FM3A-XPEH> (last visited Apr. 25, 2023). See e.g., 405 ILL. COMP. STAT. ANN. 48/25 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); CAL. BUS. & PROF. CODE § 865 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); N.J. STAT. ANN. §§ 45:1–54, 55 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1); OR. REV. STAT. ANN. § 675.850 (West, Westlaw through laws enacted in the 2022 Reg. Sess. of the 81st Leg. Assemb.); VT. STAT. ANN. tit. 18, § 8353 (West, Westlaw through Chs. 186 (End) and M-19 (End) of the Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb. (2022)); D.C. CODE ANN. § 7-1231.14(a) (West, Westlaw through Dec. 28, 2022)); see *infra* Section III.A.1–2.

361. *Conversion “Therapy” Laws*, *supra* note 360.

362. *Id.*

efforts and amends the State's Consumer Fraud and Deceptive Practices Act.<sup>363</sup> It provides in relevant part that:

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.<sup>364</sup>

In setting forth its legislative findings, the Illinois General Assembly discussed at length<sup>365</sup> its conclusion that gay conversion therapy is both ineffective and has incredibly detrimental effects.<sup>366</sup> Illinois was the fourth state to ban gay conversion therapy for people under the age of eighteen, but the first state to pass a law banning conversion therapy on the basis that it is consumer fraud.<sup>367</sup>

363. Youth Mental Health Protection Act, 405 ILL. COMP. STAT. ANN. 48/25 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.).

364. *Id.*; see also Consumer Fraud And Deceptive Practices Act, 815 ILL. COMP. STAT. ANN. 505/1 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); cf. FRANK, *supra* note 247, at 147–48 (discussing the beginning of this kind of legislation and the first law of this kind in California).

365. H.B. 217, 2015 ILL. LEGIS. SERV. P.A. 99-411 (H.B. 217).

366. 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.* 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.

*Id.* (citing *Appropriate Therapeutic Responses to Sexual Orientation*, AM. PSYCH. ASS'N (2009), <https://perma.cc/74V5-7L54>); see also *Substance Abuse & Mental Health Servs. Admin, Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Oct. 2015), <https://perma.cc/ETP2-M42J>.

367. See Mark Joseph Stern, *Illinois Bans Anti-Gay Conversion “Therapy” for Minors, Linking It to Consumer Fraud*, SLATE (Aug. 21, 2015, 11:30 AM), <https://perma.cc/VJ2X-3CJJ>; see also *Conversion “Therapy” Laws*, *supra* note 360 (reporting that twenty states and D.C. ban conversion therapy for minors); *LGBT Youth: Conversion “Therapy” Laws*, MOVEMENT ADVANCEMENT PROJECT (Jan. 1, 2023), <https://perma.cc/CJ3R-TUQW> (reporting that six states partially ban conversion therapy for minors by limiting state funds and regulating medical licenses); *Illinois Law Banning Conversion Therapy Against LGBT Youth First to Contain ‘Consumer Fraud’ Provision*, ERIE GAY NEWS (Aug. 21, 2015), <https://perma.cc/7YD2-HM65>.



In a 2015 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.”<sup>368</sup> The therapy provided by JONAH purported to “change plaintiffs’ sexual orientation from homosexual to heterosexual.”<sup>369</sup> 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.”<sup>370</sup> 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.”<sup>371</sup>

## 2. Bans Based on Psychological Harm to Minors

The Third<sup>372</sup> and Ninth<sup>373</sup> Circuits have each upheld the constitutionality of state laws that ban the provision of gay conversion therapy to LGBTQ

368. *Ferguson v. JONAH*, 2015 WL 609436, at \*1 (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 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.*

369. *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.

370. *Id.* at \*1 (citing N.J. STAT. ANN. §§ 56:8-1 to 56:8-20 (West, Westlaw through L. 2023, c. 9 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.* at \*2 (citation omitted).

371. *Id.* at \*1.

372. *See Doe ex rel. Doe v. Governor of New Jersey*, 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. 2023, c. 9 and J.R. No. 1)).

373. *See Pickup v. Brown*, 740 F.3d 1208, 1223 (9th Cir. 2013), *cert. denied*, 573 U.S. 945 (2014), *cert. denied sub nom. Welch v. Brown*, 573 U.S. 945 (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. 997 of 2022 Reg. Sess.). *See Pickup v. Brown*, 740 F.3d 150 (3d Cir. 2014).

youth.<sup>374</sup> In 2013, both California<sup>375</sup> and New Jersey<sup>376</sup> 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,”<sup>377</sup> 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.”<sup>378</sup> 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.”<sup>379</sup>

In *Doe ex. rel. Doe v. Governor of New Jersey*,<sup>380</sup> 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.<sup>381</sup> When deciding this case, the Third Circuit discussed a similar case, *King v. Governor of New Jersey*,<sup>382</sup> in which licensed counselors challenged the constitutionality of the gay conversion therapy ban.<sup>383</sup> The court upheld *King*’s reasoning.<sup>384</sup>

374. Oregon and D.C. 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 laws enacted in the 2022 Reg. Sess. of the 81st Leg. Assemb.). Effective March 11, 2015, the D.C. ban provided that a:

[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 ANN. § 7-1231.14a (West, Westlaw through Dec. 28, 2022).

375. See CAL. BUS. & PROF. CODE §§ 865.1–865.2 (West, Westlaw through Ch. 997 of 2022 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. 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.

376. See N.J. STAT. ANN. § 45:1-54 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1).

377. *Id.* 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. 997 of 2022 Reg. Sess.).

378. See S.B. 1172, 2012 Leg. Reg. Sess. (Cal. 2012) (codified at CAL. BUS. PROF. CODE § 865.1 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.)); N.J. STAT. ANN. § 45:1-54 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1).

379. N.J. STAT. ANN. § 45:1-54 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1).

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

381. *Id.* at 151.

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

383. *Id.* at 151.

384. The court in *King* 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.” *Id.* at 153 (citing *King*, 767 F.3d at 235).

[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.”<sup>385</sup>

The Third Circuit also agreed with the Ninth Circuit’s reasoning in *Pickup v. Brown*,<sup>386</sup> a case involving a challenge to California’s statute prohibiting sexual orientation change efforts counseling to minors.<sup>387</sup> 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.”<sup>388</sup>

#### 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.”<sup>389</sup> 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.<sup>390</sup> 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.<sup>391</sup> 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.<sup>392</sup>

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385. *Id.* at 153 (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).

386. *Pickup v. Brown*, 740 F.3d 1208, 1223 (9th Cir. 2013), *cert. denied*, 573 U.S. 945 (2014), *cert. denied sub nom. Welch v. Brown*, 573 U.S. 945 (2014).

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

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

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

390. LINDA D. ELDRON, *CHILD CUSTODY PRAC. & PROC.* § 4:1 (2016 Ed.).

391. Hulstein, *supra* note 389, at 173.

392. *Id.*; see also *Smith v. Smith*, No. 05 JE 42, 2007 WL 901599, at \*1 (Ohio Ct. App. Mar. 23, 2007) (upholding a lower court’s finding, without medical diagnosis, that the child did not suffer from GID 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.<sup>393</sup> In addition, scholars argue that *Lawrence v. Texas*<sup>394</sup> requires equal treatment of youth in custody proceedings.<sup>395</sup> However, there is a need for greater understanding of gender identity, sexual orientation, and the interests of LGBTQ youth in custody proceedings.<sup>396</sup>

For example, in *Smith v. Smith*,<sup>397</sup> an Ohio court awarded custody to the estranged father of Christine, a child who was born male but sought treatment for GID with the support of her mother.<sup>398</sup> 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.<sup>399</sup> In addition to granting custody to the father, the court issued an order requiring Christine be treated as if she were a boy.<sup>400</sup> 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 childrearing and childhood mental health issues."<sup>401</sup>

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.<sup>402</sup> 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.<sup>403</sup>

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

394. 539 U.S. 558 (2003).

395. 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 389, 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).

396. 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 & FAM. ADVOC. 367, 367–93 (2010).

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

398. *Id.* at \*2–6.

399. *Id.* at \*1–2.

400. *Id.* at \*5.

401. *Id.* at \*12.

402. 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).

403. *Id.*

### C. HOMELESSNESS AMONG LGBTQ YOUTH AND RELATED ISSUES

Children and teenagers who identify as LGBTQ are 2.2 times more likely to experience homelessness than heterosexual, cisgender youth.<sup>404</sup> Studies estimate that more than 4.2 million youths in the U.S. are currently experiencing some form of homelessness,<sup>405</sup> with up to 40% identifying as LGBT.<sup>406</sup> Within this population, African-American LGBTQ youth are overrepresented; 31% of homeless LGBTQ youth are African-American.<sup>407</sup> Studies have also shown that transgender and gender nonconforming youth are at especially high risk of homelessness.<sup>408</sup> Homeless LGBTQ youth also have more barriers to accessing services and are more likely to have experienced trauma than non-LGBTQ homeless youth.<sup>409</sup>

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

Familial rejection is cited as the primary cause of homelessness among LGBTQ youth.<sup>410</sup> 55% of homeless gay, lesbian, and bisexual youth and 67% of homeless transgender youth reported that either being “forced out by parents or [running] away because of Sexual Orientation, Gender Identity and Gender Expression” was the reason they were homeless.<sup>411</sup>

404. See M.H. Morton, A. Dworsky, & G.M. Samuels, *Missed Opportunities: Youth Homelessness in America*, VOICES OF YOUTH COUNT (Apr. 2018), <https://perma.cc/BXC7-LTTC>; see also Adam P. Romero, Shoshana K. Goldberg, & Luis A. Vasquez, *LGBT People and Housing Affordability, Discrimination, and Homelessness*, UCLA SCH. OF L. WILLIAMS INST. (Apr. 2020), <https://perma.cc/XN7Q-JZ8Z>; Nusrat Ventimiglia, *LGBT Selective Victimization: Unprotected Youth on the Streets*, 13 J. L. SOC'Y 439, 440 (2012).

405. 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, *Lesbian, Gay, Bisexual, and Transgender Youth: An Epidemic of Homelessness*, NAT’L COALITION FOR THE HOMELESS, NAT’L GAY & LESBIAN TASK FORCE POLICY INST. 14 (2006)).

406. *LGBTQ+ Youth Homelessness*, NAT’L NETWORK FOR YOUTH, <https://perma.cc/E5GY-GF8F> (last visited Mar. 4, 2023).

407. Soon Kyu Choi, Bianca D.M. Wilson, Jama Shelton, & Gary J. Gates, *Serving Our Youth: The Needs and Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness*, UCLA SCH. OF L. WILLIAMS INST. 4 (June 2015), <https://perma.cc/5XMY-8U4H> (finding, in a study of 183 youths experiencing homelessness in New York City, that 20% identified as gay or lesbian, 7% identified as bisexual, and 2% identified as questioning).

408. 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 RTS. (2011), <https://perma.cc/8X5L-EB52> (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 (2004) (finding that 4% of youth experiencing homeless in San Diego identified as transgender girls)).

409. Choi, Wilson, Shelton, & Gates, *supra* note 407, at 14, 18.

410. *Id.* at 5.

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

Additionally, LGBTQ youth are more likely to experience emotional, physical, and sexual abuse while in foster care, a potential alternative to homelessness for youth.<sup>412</sup> 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.<sup>413</sup>

## 2. LGBTQ Youth-Specific Difficulties

LGBTQ youth, on average, experience homelessness and housing insecurity for longer periods of time than heterosexual youth.<sup>414</sup> 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.<sup>415</sup> Transgender youth often experience difficulty in securing placement in gender-segregated accommodations or are placed in these accommodations at odds with their gender identity.<sup>416</sup> 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.<sup>417</sup>

LGBTQ youth are especially vulnerable to violence and harassment while experiencing homelessness.<sup>418</sup> Among homeless LGB youth, 70% reported harassment and bullying, while 60% also reported physical, emotional, or sexual abuse.<sup>419</sup> Transgender youth experienced even higher rates of violence while homeless; 90% reported harassment and bullying, and 75% experienced physical, emotional, or sexual abuse.<sup>420</sup> Homeless LGBTQ youth are also likely to be involved in the sex trade.<sup>421</sup> 10% of homeless LGB youth and 20% of homeless transgender youth reported having been sexually exploited or trafficked.<sup>422</sup>

412. 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).

413. 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).

414. Choi, Wilson, Shelton, & Gates, *supra* note 407, at 4 (noting that 61% of LGB and 80% of transgender youth were homeless for longer periods of time than non-LGBT youth according to providers interviewed).

415. *Id.* at 5.

416. See, e.g., Shannon Minter & Christopher Daley, *Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities*, NAT'L CTR. FOR LESBIAN RTS. 9 (2003), <https://perma.cc/YZZ2-TBS9>.

417. *Understanding Issues Facing Transgender Americans*, GLAAD 4 (Feb. 23, 2015), <https://perma.cc/JHT2-SQPV>.

418. See Choi, Wilson, Shelton, & Gates, *supra* note 407, at 5.

419. See *id.*

420. See *id.*

421. See *id.* at 14; see also Tamar R. Birkhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1093 (2011).

422. See Choi, Wilson, Shelton, & Gates, *supra* note 407, at 5; see also Birkhead, *supra* note 421, at 1093.

In addition to physical traumas associated with housing insecurity, LGBTQ youth experience a great deal of emotional and mental harm.<sup>423</sup> 65% of homeless LGB youth and 75% of homeless transgender and gender nonconforming youth identified as having mental health issues.<sup>424</sup> 35% of homeless LGB youth reported abusing alcohol or other substances; 40% of their transgender counterparts reported substance abuse.<sup>425</sup>

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.<sup>426</sup> 15% of LGB and 20% of transgender youth surveyed in 2014 reported having some interaction in the juvenile or criminal justice system.<sup>427</sup> 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.<sup>428</sup> 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.<sup>429</sup>

### 3. Proposed Legal Solutions

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.<sup>430</sup>

*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*

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423. See Choi, Wilson, Shelton, & Gates, *supra* note 407, at 5.

424. See *id.*

425. See *id.*

426. See *id.*

427. See *id.*

428. See Marksamer, *supra* note 408, at 22; *USA: Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual, and Transgender People in the U.S.*, AMNESTY INT’L 33 (Sept. 2005), <https://perma.cc/B3DG-KX6G>.

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

430. Lolai, *supra* note 405, 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 Yasmee Stossel, *Addressing the Harm of Silence and Assumptions of 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); Shannan Wilber, Caitlin Ryan, & Jody Marksamer, *CWLA Best Practices Guidelines: Serving LGBT Youth in Out of Home Care*, CHILD WELFARE LEAGUE OF AM., 50 (2006) <https://perma.cc/98L5-HSLR>; Rob Woronoff, Rudy Estrada, & Susan Sommer, *Out of the Margins: A Report on Regional Listening Forums Highlighting the Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth in Care*, LAMBDA LEGAL (2006), <https://perma.cc/43AT-GSUS>.

*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.<sup>431</sup> Lolai discusses the possible positive effects of reducing homelessness, enabling youth employment, and minimizing interactions with the child welfare and juvenile justice system.<sup>432</sup> 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.<sup>433</sup>

*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,<sup>434</sup> the right of equal protection,<sup>435</sup> freedom of speech, and freedom of religion.<sup>436</sup> Additionally, many organizations and scholars advocate for the implementation of model standards and best practices in foster care,<sup>437</sup> focusing on effective non-discrimination policies that are clear to all caseworkers, staff members, and caregivers.<sup>438</sup> 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.<sup>439</sup>

*c. Prevention of Discrimination in Emergency Shelters and 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.<sup>440</sup>

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

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431. Lolai, *supra* note 405, at 78.

432. *Id.* at 81–83.

433. *Id.* at 85–88.

434. See Estrada & Marksamer, *supra* note 430, at 422–23; see also Hernandez *ex rel.* Hernandez v. Tex. Dep't of Protective & Regul. 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).

435. See Estrada & Marksamer, *supra* note 430, at 431.

436. *Id.* at 432.

437. Stossel, *supra* note 430, at 115 (quoting Wilber, Ryan, & Marksamer, *supra* note 430). 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.*

438. *Id.*; see also Woronoff, Estrada, & Sommer, *supra* note 430, for full recommendations and toolkit for implementation.

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

440. See Wilber, Ryan, & Marksamer, *supra* note 430, at 50.



identity.<sup>441</sup> The Administration for Children and Families<sup>442</sup> 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.”<sup>443</sup>

While federal protection against housing discrimination for LGBTQ Americans has been historically scarce, in February 2021, the Department of Housing and Urban Development announced that it would enforce the Fair Housing Act to prohibit discrimination on the basis of sexual orientation and gender identity.<sup>444</sup> 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.<sup>445</sup>

Currently, only twenty-three states and D.C. have laws explicitly prohibiting housing and lending discrimination based on both sexual orientation and gender identity.<sup>446</sup> Eight 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 nondiscrimination laws.<sup>447</sup> One other state prohibits housing discrimination based on sexual orientation, but offers no protections for gender identity.<sup>448</sup>

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441. *Id.*

442. 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. FOR CHILD. & FAM., <https://perma.cc/NC58-9F8G> (last visited Feb. 25, 2023).

443. *Advancing LGBT Health and Well Being*, U.S. DEP’T. OF HEALTH & HUM. SERVS. 7 (2014), <https://perma.cc/GM36-YV63>. 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.

444. *HUD to Enforce Fair Housing Act to Prohibit Discrimination on the Basis of Sexual Orientation and Gender Identity*, U.S. DEP’T OF HOUSING & URB. DEV. (Feb. 11, 2021), <https://perma.cc/7533-WXMA>.

445. *Bostock v. Clayton Cnty*, 140 S. Ct. 1731, 1737 (2020).

446. See *Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/YAC8-LG3G> (last visited Feb. 25, 2023) (noting that California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Virginia, Washington, and D.C. explicitly prohibit discrimination based on sexual orientation and gender identity).

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

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

#### D. ACCESS TO MEDICAL TREATMENT

Transgender people face substantial barriers to accessing health care<sup>449</sup> and are “among the most stigmatized and medically underserved groups.”<sup>450</sup> 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.”<sup>451</sup> 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.”<sup>452</sup> However, the lack of established case law may be mitigated by regulatory developments, discussed below.

##### 1. Hormone Replacement Therapy and Gender Affirmation Surgeries

Doctors have found hormone therapy to be medically necessary for many people.<sup>453</sup> Transgender adolescents often have difficulty obtaining hormones due to “barriers imposed by the medical establishment and the legal system.”<sup>454</sup> 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

449. 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. OF OBSTETRICIANS & GYNECOLOGISTS 78 (Mar. 2021), <https://perma.cc/6QDN-G5ZV> (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), <https://perma.cc/7PYU-N363>.

450. 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)).

451. Kellan Baker & Andrew Cray, *Why Gender-Identity Nondiscrimination in Insurance Makes Sense*, CTR. FOR AM. PROGRESS 6 (May 2, 2013), <https://perma.cc/3CMH-UAXB>.

452. “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) (“[Because] the parents of transgender youth are often hostile or absent, the parental consent requirement imposed by informed consent laws adds to these barriers.”).

453. *FAQ: Equal Access to Health Care*, LAMBDA LEGAL, <https://perma.cc/LH3X-JLLR> (last visited Feb. 25, 2023).

454. Carroll, *supra* note 452, at 735.

them at risk of inappropriate dosing and the subsequent [after effects]<sup>455</sup> threatening the adolescent transgender community's safety and well-being.

The Medicaid rules in eighteen states and D.C. have chosen to specifically include coverage for gender affirming care.<sup>456</sup> Developments as recent as early 2023, including a rule finalized by the Department of Health and Human Services (HHS) Office for Civil Rights regarding anti-discrimination, seem promising for the future of transgender youth.<sup>457</sup> However, certain medical uncertainties, such as the timing of gender-affirming hormone treatment to transgender minors, still need to be addressed.<sup>458</sup> The issue of timing will only gain importance as trans people are increasingly able to seek and obtain gender affirmation at younger ages.<sup>459</sup>

For transgender youth, access to gender affirming care is incredibly costly.<sup>460</sup> A person wishing to access gender-affirming surgery (also known as "sex reassignment surgery" or SRS) must first be diagnosed with GID, which carries "the attendant stigma of a mental disorder."<sup>461</sup> After receiving a GID diagnosis, state law may still prohibit health insurance coverage of SRS even if deemed "medically necessary."<sup>462</sup>

455. *Committee Opinion No. 823, Health Care for Transgender and Gender Diverse Individuals*, *supra* note 449, at 79.

456. Christy Mallory & William Tentindo, *Medicaid Coverage for Gender Affirming Care*, UCLA SCH. OF L. WILLIAMS INST. 2 (Oct. 2019), <https://perma.cc/5N54-HYVZ>.

457. *See* 45 C.F.R. § 92.1 (West, Westlaw through Feb. 23, 2023, 88 Fed. Reg. 11,778).

458. "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." Boghani, *supra* note 449. 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.*

459. Jae A. Puckett, *Trans youth are coming out and living in their gender much earlier than older generations*, THE CONVERSATION (Apr. 26, 2021 3:05 PM), <https://perma.cc/XJ8A-GLZF> ("We found little difference between the generations in when they recognized that their gender felt different than their sex assigned at birth. . . . However, the boomers reported reaching the other major milestones [e.g., 'living in their affirmed gender all the time'] later than younger groups.").

460. 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).

461. *Id.*

462. 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 [gender affirmation surgery] procedures and cannot arbitrarily define [gender affirmation surgery] as a cosmetic surgery to avoid such coverage.").

In May 2014, the HHS Departmental Appeals Board determined that the National Coverage Determination (NCD) denial of Medicare coverage of gender affirmation as a treatment for “transsexualism is not valid under the Board’s ‘reasonableness standard.’”<sup>463</sup> As a result, the previous NCD denial is “no longer a valid basis for denying claims for Medicare coverage of transsexual surgery.”<sup>464</sup> 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.”<sup>465</sup>

## 2. Legal Advances in Response to the Medicaid Coverage Ban

The 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 rate of payment for services[;] and administers its own Medicaid program.”<sup>466</sup> While the Medicaid rules of eighteen states and D.C. explicitly provide for “medically necessary” transition-related services,<sup>467</sup> there is no indication that these services will be available to minors.<sup>468</sup> Additionally, many state Medicaid rules previously contained “blanket exclusions for procedures related to gender transition.”<sup>469</sup> 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.<sup>470</sup> Going forward, this rule will provide greater clarity as to whether courts should uphold a state’s prohibition of the

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463. *Transsexual Surgery, NCD 140.3*, U.S. DEP’T OF HEALTH & HUM. SERVS. (May 30, 2014), <https://perma.cc/6R8P-GBUJ>.

464. *Id.*

465. *Id.*

466. *What are Medicare and Medicaid?*, MED. NEWS TODAY, <https://perma.cc/PL79-82QA> (last visited Feb. 26, 2023).

467. See Mallory & Tentindo, *supra* note 456.

468. These states include California (see *What Transgender Californians Need to Know About Health Care Reform*, TRANSGENDER L. CTR., <https://perma.cc/N9RB-LBZH>) (last visited Feb. 26, 2023); Maryland (see Josh Hicks, *New LGBT Protections to Take Effect Without Gov. Hogan’s Signature*, WASH. POST (May 24, 2015), <https://perma.cc/TU3T-TFLW>); Massachusetts (see Karen Moulding, 1 SEXUAL ORIENTATION AND THE LAW § 10:23 (2014) (citing *Bulletin 2014-03*, OFF. OF CONSUMER AFF. & BUS. REGUL., DIV. OF INS. (June 20, 2014), <https://perma.cc/P3PV-8M3G>); New York (see *Transgender Related Care Services*, HEALTHNY.GOV (Aug. 31, 2016), <https://perma.cc/6W8D-XZW6>); and Oregon (see Foden-Vencil, *supra* note 143). Moulding, *supra* note 468 (citing MINN. STAT. ANN. § 256B.0625(3a) (West, Westlaw through legislation effective through Feb. 8, 2023 from the 2023 Reg. Sess.); ILL. ADMIN. CODE tit. 89, § 140.6(1) (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); ALASKA ADMIN. CODE, tit. 7, § 43.385(a)(1) (West, Westlaw through 2022 Reg. and 1st Spec. Sess.)).

469. *Id.*

470. 45 C.F.R. § 92.207 (West, Westlaw through Feb. 23, 2023, 88 Fed. Reg. 11,778), repealed by Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37, 160, <https://perma.cc/DZZ6-M3KV>.

coverage of certain medical services that have previously been limited, if not denied to the transgender community.<sup>471</sup>

#### IV. CHALLENGES FACING LGBTQ YOUTH IN THE JUVENILE JUSTICE SYSTEM

##### A. THE PREVALENCE OF LGBTQ YOUTH

LGBTQ youth are at high risk of ending up in the juvenile justice system.<sup>472</sup> They are twice as likely to be arrested and detained for status offenses and other nonviolent offenses.<sup>473</sup> A report in 2017 showed that while LGB youth make up 7–9% of all youth nationwide, they account for 20% of those currently in the juvenile system.<sup>474</sup> Given this disparity and the overrepresentation of LGBTQ youth in the system,<sup>475</sup> 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 OF LGBTQ YOUTH

LGBTQ youth in the juvenile justice system, like LGBTQ youth in general, experience higher rates of abuse and harassment.<sup>476</sup> In a study mandated by the Prison Rape Elimination Act (PREA), the DOJ found that LGBT and intersex individuals are particularly vulnerable to rape in prison settings.<sup>477</sup> Moreover, almost double the amount of LGBTQ Youth reported sexual victimization in juvenile facilities at 12% compared to the reported 6.5% for heterosexual juveniles.<sup>478</sup> 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.<sup>479</sup> The court

471. See, e.g., Casazza, *supra* note 462 at 642, 646 (citing *Casillas v. Daines*, 580 F. Supp. 2d 235 (S. D.N.Y. 2008); *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); *Rush v. Parham*, 625 F.2d 1150 (5th Cir. 1980); *Ravenwood v. Daines*, No. 06-CV-6355-CJS, 2009 WL 2163105, at \*1 (W.D.N.Y. July 17, 2009)); *FAQ: Equal Access to Health Care*, *supra* note 453 (citing *O’Donnabhain v. C.I.R.*, 134 T.C. 34 (2010)). But see *FAQ: Equal Access to Health Care*, *supra* note 453 (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)).

472. *LGBTQ Youths in the Juvenile Justice System*, OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, U.S. DEP’T OF JUST. (Aug. 2014), <https://perma.cc/94QU-KU2X>.

473. *Id.*

474. *Unjust: LGBTQ Youth Incarcerated In the Juvenile Justice System*, MOVEMENT ADVANCEMENT PROJECT 2 (June 2017), <https://perma.cc/6V8U-XQMQ>.

475. *LGBTQ Youths in the Juvenile Justice System*, *supra* note 472.

476. *Id.* at 6.

477. *Id.*

478. 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://perma.cc/MY97-V4BS>.

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

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.<sup>480</sup> The court also found that other detainees physically assaulted the plaintiffs because of their actual or perceived sexual orientation or gender identity.<sup>481</sup>

The attempted solution to prevent harassment and abuse in the juvenile justice system is often isolation.<sup>482</sup> The juvenile is separated from the rest of the population.<sup>483</sup> Though this is done with the safety of the juvenile in mind, this solution has negative consequences.<sup>484</sup> For example, the juvenile may negatively internalize their isolation as punishment for being LGBTQ.<sup>485</sup> 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.<sup>486</sup> 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."<sup>487</sup> 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.<sup>488</sup>

### C. PROBLEMS SPECIFIC TO TRANSGENDER YOUTH

In addition to harassment and abuse, transgender individuals face additional obstacles in the juvenile justice system; this section discusses (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.<sup>489</sup> Prior to PREA, these facilities would systematically place juveniles into male or female populations based on their birth sex.<sup>490</sup>

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480. *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.*

481. *Id.* at 1147–48.

482. See Katayoon Majd, Jody Marksamer, & Carolyn Reyes, *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts*, CTR. FOR HIV L. & POL'Y 106 (2009), <https://perma.cc/CKV4-LVQA>.

483. *Id.*

484. *Id.*

485. *Id.* at 107.

486. *Solitary Confinement of Juvenile Offenders*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Apr. 2012), <https://perma.cc/AC5V-JVKP>.

487. *Id.*

488. *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1155–56 (D. Haw. 2006).

489. Majd, Marksamer, & Reyes, *supra* note 482, at 108.

490. *LGBTQ Youths in the Juvenile Justice System*, *supra* note 472, at 7.

Now, PREA requires correctional institutions to make housing and program placement decisions relating to transgender and intersex youth on an individualized basis.<sup>491</sup> Dr. Bob Bidwell, member of the Equity Project Advisory Committee and pediatrician at the Hawai'i Youth Correctional Facility, has 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."<sup>492</sup> However, the gender identity of transgender individuals is often not respected by staff members.<sup>493</sup>

Placing the transgender individual into the wrong sex-based population can have detrimental effects on the individual.<sup>494</sup> 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."<sup>495</sup> This was the case in *R.G.*, where the correctional facility staff verbally assaulted the transgender plaintiff.<sup>496</sup> The staff threatened to and did transfer the plaintiff to the male population where she was sexually assaulted.<sup>497</sup>

## 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.<sup>498</sup> When transgender youth enter a correctional facility, they may be denied access to hormone therapy despite having a previous prescription.<sup>499</sup> This can result in detrimental health consequences.<sup>500</sup> In *Rodriguez v. Johnson*,<sup>501</sup> the New York Office of Children and Family Services (OCFS) 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."<sup>502</sup> 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."<sup>503</sup> The case was settled out of court.<sup>504</sup> As part of the settlement, the plaintiff received monetary

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491. *Id.*

492. Majd, Marksamer, & Reyes, *supra* note 482, at 108.

493. *Id.* at 108–09.

494. *Id.* at 109.

495. *Id.*

496. *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1143 (D. Haw. 2006).

497. *Id.* at 1144–45.

498. Majd, Marksamer, & Reyes, *supra* note 482, at 111–12.

499. *Id.* at 112.

500. *Id.*

501. *Id.*

502. *Id.*

503. *Rodriguez v. Johnson*, No. 06CV00214 (S.D.N.Y. filed Jan. 11, 2006); *Rodriguez v. Johnson, et al.*, LAMBDA LEGAL, <https://perma.cc/S4U2-3XRK> (last visited Feb. 26, 2023).

504. Majd, Marksamer, & Reyes, *supra* note 482, at 112.

damages and the state agreed to implement policies to ensure that transgender youth receive proper medical care.<sup>505</sup> 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 placements.<sup>506</sup> 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.<sup>507</sup>

#### 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.<sup>508</sup> 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.<sup>509</sup> In *Farmer v. Brennan*,<sup>510</sup> 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.<sup>511</sup> In contrast, in *Bell v. Wolfish*,<sup>512</sup> 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.<sup>513</sup> 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.”<sup>514</sup> 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.<sup>515</sup>

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505. *Id.*

506. See *Settlement reached in case of Trans Youth against Juvenile Services*, SYLVIA RIVERA L. PROJECT (Dec. 22, 2006), <https://perma.cc/89EB-HUQA>; *Informational Letter 20-OCFS-INF-10*, N.Y. OFF. OF CHILD. & FAM. SERVS. (July 14, 2020), <https://perma.cc/5W8T-ZL8V>; *Getting Down to Basics: Tools to Support LGBTQ Youth in Care*, LAMBDA LEGAL (July 31, 2014), <https://perma.cc/L88U-UVKC>.

507. *Keeping LGBTQ Youth Safe in Juvenile Justice & Delinquency Placements*, LAMBDA LEGAL (2015), <https://perma.cc/LE82-S3WV>.

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

509. *Farmer*, 511 U.S. at 826–27.

510. *Id.* at 833–34.

511. *Id.* at 832–33, 852.

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

513. *Id.* at 535.

514. *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1152 (D. Haw. 2006) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

515. *Id.*



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.<sup>516</sup> 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 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.<sup>517</sup> 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.<sup>518</sup> The Supreme Court has yet to clarify whether or not the Eighth Amendment standard is appropriate when evaluating abuse in juvenile detention centers.<sup>519</sup>

## V. CURRENT DEVELOPMENTS PERTAINING TO LGBTQ YOUTH

### A. THE ELEMENTARY AND SECONDARY EDUCATION ACT AND THE STUDENT NON-DISCRIMINATION ACT

In 2015, the House of Representatives<sup>520</sup> and the Senate<sup>521</sup> 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).<sup>522</sup> 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.<sup>523</sup> 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.<sup>524</sup> In the past, SNDA has been introduced as a standalone bill.<sup>525</sup> The bill was reintroduced into Congress in March of 2018.<sup>526</sup> However, as of February 2023, there has been

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516. *Id.*

517. *Id.* at 1150–54.

518. *Id.* at 1154–59.

519. 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).

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

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

522. *Id.*

523. *On the Amendment (Franken Amend. No. 2093)*, U.S. SENATE (July 14, 2015, 4:53 PM), <https://perma.cc/5CW9-FJLP>.

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

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

526. Jennifer Pike Bailey, *Student Non-Discrimination Act Reintroduced in Congress*, HUM. RTS. CAMPAIGN (Mar. 21, 2018), <https://perma.cc/SC3W-Y7F8>.

no further action taken on the bill.<sup>527</sup>

## 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.<sup>528</sup> Most notably for LGBTQ youth, the bill would update Title VI of the 1964 Civil Rights Act to include sexual orientation, gender identity, and sex.<sup>529</sup> Title VI prohibits any entity that receives government funds from discriminating based on the statute's enumerated protected classes.<sup>530</sup> In its current form, Title VI can be used to stop schools from discriminating against minority students and English Language Learners.<sup>531</sup> 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.<sup>532</sup> The bill would expand the categories of public places that fall under Title II.<sup>533</sup> 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.<sup>534</sup>

The House bill was submitted to the Subcommittee on the Constitution and Civil Justice on September 8, 2015.<sup>535</sup> The bill was not passed during the 114th Congress and has not been introduced by the 115th Congress.<sup>536</sup> During the 116th Congress, the Act originally passed in the House of Representatives in 2019, but the Senate failed to act on it further.<sup>537</sup> The Act was reintroduced during the 117th Congress and passed by a vote of 224-206 in the House of Representatives but once again has yet to pass in the Senate.<sup>538</sup>

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527. *H.R.5374 - Student Non-Discrimination Act of 2018*, CONGRESS.GOV, (Mar. 21, 2018), <https://perma.cc/3Q2P-NR5K>.

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

529. *Id.* § 3.

530. 42 U.S.C. § 2000a (1964) (West, Westlaw through Pub. L. No. 117-262).

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

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

533. *Id.*

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

535. *Id.*

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

537. H.R. 5—Equality Act, 116th Cong. (2019–2020).

538. H.R. 5—Equality Act, 117th Cong. (2020–2021).

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.<sup>539</sup> On September 8, 2015, HHS issued a proposed rule implementing Section 1557.<sup>540</sup> The final rule was issued and became effective in July of 2016.<sup>541</sup> The rule prohibits discrimination based on both sexual orientation and gender identity.<sup>542</sup> Among many other things, the rule prohibits blanket exclusions against services related to gender transition.<sup>543</sup>

D. TRANSGENDER ACCESS TO PUBLIC FACILITIES AND RESTROOMS

The most publicized aspect of the struggle for rights for transgender persons in 2016 has been the debate surrounding so-called "bathroom bills" in state legislatures.<sup>544</sup> 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.<sup>545</sup> Proponents of bathroom bills argue that these bills will increase public safety by stopping sexual predators from being able to enter the bathroom of the opposite sex and thus allowing them to get closer to their victims.<sup>546</sup> 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.<sup>547</sup> The opponents of these bills argue that the bills actually create 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.<sup>548</sup> Additionally, they could face criminal prosecution if they do choose to use the facility that corresponds to their gender identity.<sup>549</sup>

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539. Nondiscrimination, 42 U.S.C. § 18116 (2010) (West, Westlaw through Pub. L. No. 117-262).

540. 45 C.F.R. § 92.1 (2020) (West, Westlaw through Feb. 23, 2023, 88 Fed. Reg. 11,778); *see also* HHS takes next step in advancing health equity through the Affordable Care Act, WDAM (Sept. 5, 2015), <https://perma.cc/DBK3-DNYK>.

541. 45 C.F.R. § 92.1 (2020).

542. *See* HHS takes next step in advancing health equity through the Affordable Care Act, *supra* note 540.

543. *See id.*

544. *New HRC Report Reveals Unprecedented Onslaught of State Legislation Targeting Transgender Americans*, HUM. RTS. CAMPAIGN (Feb. 22, 2016), <https://perma.cc/N6YX-9JY2>.

545. Public Facilities Privacy & Security Act, H.B. 2 (N.C. 2015).

546. *See The Facts: Bathroom Safety. Nondiscrimination Laws, and Bathroom Ban Laws, Movement Advancement Project*, MOVEMENT ADVANCEMENT PROJECT (July 2016), <https://perma.cc/59L7-R4KR>.

547. *Id.*

548. *Id.*

549. *Id.*

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.<sup>550</sup> The DOJ 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.<sup>551</sup> A preliminary injunction was issued, halting the U.S. from cutting off federal funding to North Carolina, pending the outcome of the case.<sup>552</sup> Initially, North Carolina filed a counter-action seeking a declaratory judgment that the bill did not violate Title VII, VAWA, or Title IX.<sup>553</sup> However, on September 16, 2016, Governor McCrory dropped the lawsuit because “it did not serve the ‘interests of judicial economy and efficiency.’”<sup>554</sup> A three year legal battle ensued,<sup>555</sup> and a settlement was finally reached in July of 2019.<sup>556</sup> The settlement prohibits the state government from banning citizens from using the bathroom facility that corresponds with their gender identity in state government buildings.<sup>557</sup> On December 1, 2020, House Bill 2 was officially repealed after it reached sunset and was automatically terminated.<sup>558</sup>

In 2017, a transgender student in Florida sued his school board after being told he would not be able to use the boys restroom at the school going forward.<sup>559</sup> 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.<sup>560</sup> In 2020, the Eleventh Circuit affirmed the lower court’s decision, holding that the schools may not punish students for gender nonconformity or treat trans students differently.<sup>561</sup>

## 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

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

551. *Id.*

552. *Id.* at 628–29.

553. *Id.* at 620–22.

554. Rebecca Hersher, *North Carolina Governor Drops ‘Bathroom Bill’ Lawsuit Against U.S.*, NPR (Sept. 19, 2016), <https://perma.cc/X5BA-2BGP>.

555. Dan Levin, *North Carolina Reaches Settlement on ‘Bathroom Bill’*, N.Y. TIMES (July 23, 2019), <https://perma.cc/F5K7-B4VB>.

556. *Id.*

557. *Id.*

558. Max Millington, *HB2 Is Officially Dead and Gone in NC. Here’s Why That Matters*, CARDINAL & PINE (Dec. 3, 2020, 4:10 PM), <https://perma.cc/63QD-3AJY>.

559. Li Cohen, *Federal court rules that transgender students must be allowed to use bathrooms that match their gender*, CBS NEWS (Aug. 9, 2020), <https://perma.cc/VD2F-5CZA>.

560. *Id.*

561. *Id.*

from various legal benefits. The battle for the protection of LGBTQ youth “is uphill because children are children, voteless and largely voiceless, and consequently relatively powerless. It is particularly uphill in the U.S., with our tradition of individual autonomy which keeps the government largely out of the family, limiting its role in protecting children.”<sup>562</sup> However, the government, in both its judicial and legislative capacity, is increasingly recognizing the equal rights of the LGBTQ community.

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562. 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).