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June 11, 2021

Submitted via T9PublicHearing@ed.gov

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue SW
Washington DC, 20202

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

Re: Written Comment: Title IX Public Hearing (Discrimination Against Students with LGBTQ+ Families), 86 FR 27429

Dear Secretary Cardona and Acting Assistant Secretary Goldberg,

The undersigned XX organizations are pleased to submit this comment regarding the Title IX regulations addressing sexual harassment in education in response to the Department of Education's public hearing.

As the nation's leading organization for lesbian, gay, bisexual, transgender, and queer (LGBTQ+)-headed families and those who wish to form them, Family Equality appreciates President Biden's executive order affirming the administration's commitment to enforce Title IX's protections to prevent and combat discrimination based on sexual orientation and gender identity and all forms of sex discrimination,¹ and the U.S. Department of Education's subsequent announcement of its plans to publish a new proposed rule on Title IX.² We write, along with the undersigned organizations, to comment on steps the Department can take to ensure that schools provide students with educational environments free from discrimination and, specifically, to address discrimination based on family members' sexual orientation and gender identity in educational environments.

¹ Exec. Order No. 14021, 86 Fed. Reg. 13803 (Mar. 8, 2021), <http://federalregister.gov/d/2021-05200>.

² Dep't of Educ., Office for Civil Rights, Letter to Students, Educators, and other Stakeholders re Executive Order 14021 (Apr. 6, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-co-14021.pdf>.

For over 40 years, Family Equality has worked to advance legal and lived equality for LGBTQ+ families and those who wish to form them. Family Equality is the only national organization exclusively dedicated to securing justice and equality for LGBTQ+ parents and their children by advancing legal and lived equality for all families.

We share and echo the concerns raised by several of our sister organizations³ regarding the pervasive discrimination faced by LGBTQ+ students and staff members and believe it is essential for the Department to enforce the protections of Title IX in this context. We submit this separate testimony to bring the Department's attention to the discriminatory harassment faced by students with LGBTQ+ families. We ask that the Department issue clarifying guidance to ensure that educational institutions are aware that discrimination against a student because a parent or other family member is LGBTQ+ violates Title IX and that they are obligated under federal law to protect students with LGBTQ+ families from discriminatory acts. We also ask the Department to explicitly recognize harassment based on association with an LGBTQ+ family member as protected by the Title IX regulations on sexual harassment.

LGBTQ+-Headed Families

A growing percentage of Americans identify as LGBTQ+, and with younger generations more likely to identify as LGBTQ+ than older generations, that trend should continue.⁴ In fact, one in six adult members of Generation Z (ages 18 to 23 in 2020) identify as LGBTQ+.⁵ In 2015, it was estimated that between 2 million and 3.7 million children under age 18 had an LGBTQ+ parent,⁶ but with the increasing percentage of Americans identifying as LGBTQ+ and the establishment of nationwide marriage equality in 2015,⁷ the United States will see new growth in the number of LGBTQ+-headed families in the coming years.⁸

A 2019 Family Equality study revealed that 77% of LGBTQ+ Millennials (ages 18-35 in 2019) are either already parents or are considering having children, which is a 44% increase over their elders.⁹ The difference in parenting rates between LGBTQ+ and non-LGBTQ+ adults is expected to significantly narrow in the future, with a difference of only 7% between LGBTQ+ and non-LGBTQ+ Millennials reporting they are planning to have children.¹⁰ With up to 3.8

³ GLSEN et al., *Comment Letter on Public Hearing: Title IX of the Education Amendments of 1972*, Office for Civil Rights, U.S. Department of Education (June 11, 2021), (forthcoming comment letter)

⁴ Jones, Jeffrey, *LGBT Identification Rises to 5.6% in Latest Estimate*, Gallup (Feb. 4, 2021), available at <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx>.

⁵ *Id.*

⁶ Gary J. Gates, *Marriage and Family: LGBT Individuals and Same-Sex Couples*, *The Future of Children*, 25(2):67–87 (Princeton: Brookings, Fall 2015), available at https://futureofchildren.princeton.edu/sites/futureofchildren/files/media/marriage_and_child_wellbeing_revisited_2_full_journal.pdf.

⁷ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁸ Family Equality, *LGBTQ Family Building Survey* (2019), available at <https://familyequality.org/fbs>.

⁹ *Id.*

¹⁰ *Id.* “Among Millennials, 55% of non-LGBTQ individuals and 48% of LGBTQ individuals reported that they are planning to have children, a difference of only 7%.”

million LGBTQ+ Millennials considering expanding their families in the coming years, LGBTQ+-headed families will be more prevalent in society and, correspondingly, educational institutions.

Discrimination Against Students with LGBTQ Parents

Through Family Equality’s outreach and communications with LGBTQ+ parents, we know discrimination against their children occurs all too frequently. Unfortunately, there are few studies that fully examine the school-related experiences of youth with LGBTQ+ parents, particularly post-marriage equality. A 2008 report by GLSEN, in partnership with Family Equality and COLAGE, documented experiences of youth who were subjected to bullying and harassment when they revealed that they had LGBTQ+ parents.¹¹ In that study, 18% of students with LGBTQ+ parents said they heard negative remarks about having an LGBTQ+ parent “often” or “frequently,” with 11% of students reporting they heard these types of comments from most of the students in their school.¹² The report concludes that “[f]or many students with LGBT parents, school is not a very safe environment.”¹³ Nearly one in every four students with LGBTQ+ parents reported feeling unsafe at school, and 40% reported verbal harassment at school based on their LGBTQ+ parents.¹⁴ The study also revealed that most students do not tell school authorities about the harassment they experienced.¹⁵

Below is a sample of the experiences shared by students of LGBTQ+-headed families in that report, showing discrimination kept them from being able to fully participate in educational activities:

- *In Spanish [class], we were doing a project that involved describing our home and introducing our family. I talked to my teacher and explained my situation, and she said it would be better for me to say i had a single mother and not mention her partner at all. It made me mad, so I made a point of including my other mom, and I ended up failing the project. (11th grader)*
- *We had a dance team banquet and we were supposed to have our parents come, but our directors said it would be better if i only brought one of my moms so i would not cause a disruption. (9th grader)*
- *They said I couldn’t put a picture of my parents kissing on a picture collage even though other children could. (9th grader)*
- *I was doing a family tree and got told to put my step mom down as an aunt... (8th grader)*
- *My biology class discussed genetics and my class assignment was to go home and record the hair color, eye color and other physical attributes of my MOTHER AND FATHER,*

¹¹ Kosciw J. G., Diaz E. M., *Involved, Indivisible, Ignored: The Experiences of Lesbian, Gay, Bisexual, and Transgender Parents and Their Children in Our Nation’s K-12 Schools* (2008), New York, NY: GLSEN, available at <https://files.eric.ed.gov/fulltext/ED500474.pdf>.

¹² *Id.* at 50-51.

¹³ *Id.* at xv.

¹⁴ *Id.* at xvi.

¹⁵ *Id.*

when I returned my information with the data from my two mothers, my teacher told me I had done the assignment wrong and told me to go home and ask my mother about my father's attributes, as all students have a mother and father, and my mother must at least know the color of my father's eyes and hair. (12th grader)

- *When some people found out that my dad was gay they said "Oh, that explains why [name of respondent] acts like [a] fag."* (8th grader)
- *Called "devil's daughter" "Lesbo." Someone said "At least my mom's not gay" + "I'd kill myself if my mom was gay."* (8th grader)¹⁶

There is little doubt that students with LGBTQ+ parents continue to face anti-LGBTQ+ harassment and discrimination. Recent data shows that discrimination and hate crimes against LGBTQ+ people are on the rise,¹⁷ and we know from GLSEN's recent school climate reports that anti-LGBTQ+ discrimination and harassment continues in schools across the U.S.¹⁸ There is nothing to suggest that students with LGBTQ+ family members are exempt from these disturbing trends or the consequences of such harassment, which can include worse educational outcomes and poorer psychological well-being, such as missing school, depression, and lower grades.¹⁹

Legal Foundation for Associational Discrimination Claims Under Title IX

Title IX of the Education Amendments of 1972 states that "[n]o person in the United States 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."²⁰ The plain language of Title IX as well as the development of jurisprudence applying nondiscrimination laws to protect individuals associated with a protected class – even if not part of that class themselves – supports application of Title IX protections to those associated with classes protected by Title IX. This is consistent with the Supreme Court's longstanding directive that "if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language."²¹

Just three years before the enactment of Title IX, the U.S. Supreme Court ruled that a retaliation claim could be brought by individuals who were retaliated against for opposing discrimination against others in a protected class, even if not in the protected class themselves.²² However, it

¹⁶ *Id.* at 66-68.

¹⁷ Gruberg, Sharita, Mahowald, Lindsay, and Halpin, John, "The State of the LGBTQ Community in 2020" (October 6, 2020), available at <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020/>; FBI 2019 Hate Crime Statistics, available at <https://ucr.fbi.gov/hate-crime/2019/hate-crime>.

¹⁸ Kosciw, J. G., Clark, C. M., Truong, N. L., & Zongrone, A. D. (2020). The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools. New York: GLSEN.

¹⁹ *Id.*

²⁰ 20 U.S.C. § 1681(a).

²¹ *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982).

²² *Sullivan v. Little Hunting Park Inc.*, 396 U.S. 229 (1969).

was not until the 2005 case of *Jackson v. Birmingham Board of Education*²³ that the Supreme Court applied this holding in the context of a Title IX retaliation claim. In *Jackson*, the Court ruled that a male high school coach who was fired after raising concerns regarding equal funding and access to equipment for his girls' basketball team could raise such a complaint under Title IX even though he himself was not a member of the protected class.²⁴ The Court explained that this holding was based on its interpretation of the plain text of Title IX, emphasizing that “the statute is broadly worded” and does not require that the discrimination be based on the sex of the person discriminated against – just that the person is subjected to discrimination “because of” sex.²⁵

While the U.S. Supreme Court has not yet weighed in directly on the concept of associational discrimination, there is widespread agreement in the circuit courts recognizing such claims in the context of Title VII employment discrimination cases. The Second, Fifth, Sixth, and Eleventh Circuits held that an employee's allegation of employment discrimination because of the employee's association with a person of another race is a viable claim under Title VII.²⁶ And courts have applied this to all protected classes of Title VII, including sex.²⁷ With the Supreme Court's recent holding in *Bostock*,²⁸ this would encompass discrimination against an employee based on their association with an LGBTQ+ person.

While there is little caselaw applying associational discrimination claims in the context of Title IX, courts “often look to the Title VII context to analyze the scope of Title IX.”²⁹ Indeed, looking to the Title VII cases, a district court in Massachusetts recently held that the associational discrimination theory does apply in a Title IX case because the alleged discriminatory act by a university occurred only after the University analyzed the sex of the students with whom the student discriminated against wanted to associate.³⁰ Thus, applying the logic employed by courts interpreting Title VII and Title IX since 1969, Title IX's prohibition against sex discrimination includes protections for students who are discriminated against because of the sex of their family member(s).

Title IX Encompasses Discrimination on the Basis of Sexual Orientation and Gender Identity

President Biden's January 20, 2021, Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation requires government agencies to apply all federal laws that prohibit sex discrimination – including Title IX – to

²³ 544 U.S. 167 (2005).

²⁴ *Id.* at 176.

²⁵ *Id.* at 178-79.

²⁶ *E.g.*, *Holcomb v. Iona College*, 521 F.3d 130 (2d. Cir. 2008); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986).

²⁷ *E.g.*, *Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017).

²⁸ *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020).

²⁹ *Kappa Alpha Theta Fraternity, Inc. v. Harvard Univ.*, 397 F. Supp. 3d 97, 108 (D. Mass. 2019).

³⁰ *Id.*

include discrimination based on gender identity and sexual orientation as discrimination “because of sex.”³¹ The Executive Order directs each agency to evaluate agency actions to ensure full implementation of this policy.

In reviewing the applicability of *Bostock v. Clayton County, Ga.* to Title IX, the U.S. Department of Justice Civil Rights Division issued a memorandum on March 26, 2021, confirming that, in accordance with the text of Title IX, Supreme Court precedent, and developing jurisprudence, the “best reading of Title IX’s prohibition on discrimination ‘on the basis of sex’ is that it includes discrimination on the basis of gender identity and sexual orientation.”³²

Associational Discrimination Under Title IX Protects Children with LGBTQ+ Parents

Children with LGBTQ+ parents are subjected to discrimination and harassment in their education because of who their parents are and whom their parents love, yet as the 2008 report cited above documents, they are not likely report it to school officials. Enumerating and identifying protected classes increases the likelihood that students within those classes will report discriminatory treatment and receive protections that allow them to fully participate in their education.³³ Expressly setting out legal bases for Title IX’s application to LGBTQ+ people and associational discrimination will help ensure that children subjected to sex-based discrimination because of their family members’ sexual orientation and/or gender identity are not left out of regulatory and agency actions aimed to ensure all students are free from sex discrimination.

We respectfully request that the Department of Education issue guidance clarifying that Title IX’s protections extend to those with family members who are, or are perceived to be, LGBTQ+. Further, in any guidance or regulations addressing sexual harassment, we ask the Department to explicitly enumerate harassment of students with LGBTQ+ families as a form of sex-based harassment in violation of Title IX and actionable under sexual harassment procedures and protections.

We appreciate your consideration of our comments. To further discuss actions to support all of the children with LGBTQ+ families, please do not hesitate to contact Shelbi D. Day, Chief

³¹ Executive Order 13988, 86 Fed. Reg. 7023 (Jan 20, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>

³² Memorandum from U.S. Department of Justice, Civil Rights Division, Principal Deputy Assistant Attorney General Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (March 26, 2021), available at <https://www.justice.gov/crt/page/file/1383026/download>.

³³ GLSEN, Model State Anti-Bullying and Harassment Legislation (Revised April 2020), available at <file:///C:/Users/Owner/Family%20Equality%20Council/Policy%20Team%20Library%20-%20Policy%20Team%20Library/Federal%20--%20nonECDF/Dept%20of%20Education/GLSEN-Model-State-Anti-Bullying-and-Harassment-Legislation-April-2020.PDF>.



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Respectfully submitted,

Family Equality, joined by:

Athlete Ally

Bradbury-Sullivan LGBT Community Center

Campus Pride

Center for Disability Rights

Center for LGBTQ Economic Advancement & Research (CLEAR)

CenterLink: The Community of LGBT Centers

Children's Rights

Clearinghouse on Women's Issues

COLAGE

Enough is Enough Voter Project

Feminist Majority Foundation

FORGE, Inc.

Freedom for All Americans

Gay Parents To Be at Reproductive Medicine Associates of Connecticut

Georgia Equality

Girls Inc.

GLSEN

Hispanic Federation

Impact Fund

It's On Us

Jane Doe Inc.

LatinoJustice PRLDEF

Legal Aid at Work

Movement Advancement Project

Movements for Violence Prevention

National Black Justice Coalition

National Center on Adoption and Permanency

National Indian Education Association

National LGBTQ Task Force

National PTA

National Women's Law Center

New Jersey Parents Caucus

Oasis Legal Services

OutCenter of Southwest Michigan



Philadelphia Family Pride
Public Advocacy for Kids (PAK)
Resolve New England
Stop Sexual Assault in Schools (SSAIS)