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To: T9PublicHearing
Cc: Mary Bonauto; Ben Marcus
Subject: Written Comment: Title IX Public Hearing (topic of the comment).
Attachments: GLAD Comment for Public Hearing re Improving Enforcement of Title IX.pdf

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Please see the attached written comment from GLBTQ Legal Advocates & Defenders regarding Title IX enforcement.

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June 11, 2021

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 (Improving School Climates and Ensuring Equal Opportunity for All Students, Including LGBTQ Students, After *Bostock*)

Dear Acting Assistant Secretary Goldberg:

GLBTQ Legal Advocates & Defenders (GLAD) is a New England-wide public interest legal organization. Through strategic litigation, public policy advocacy, and education, GLAD works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation.

GLAD applauds President Biden's and the Department of Education's commitment to applying correctly the U.S. Supreme Court's decision in *Bostock* to Title IX. Doing so will protect young people from discrimination in the form of sexual harassment—which includes sexual assault and violence. As a result, the Department will improve the school climate for LGBTQ youth and ensure that all students, including LGBTQ students, have equal opportunities to flourish as individuals and as productive members of our communities.

GLAD submits this comment as a supplement to the comments offered by the Family Equality Council, GLSEN, and the National Women's Law Center. While we commend our colleagues for their contributions—especially GLSEN's comments on ensuring equal opportunities through guidance, enforcement, reporting, and best practices—we offer our own comment to emphasize two particular points that are crucial to GLAD and the communities with which we work: (I) Fully enforcing Title IX will benefit students everywhere, including students in New England and LGBTQ students, who are negatively impacted by harassment based on sexual orientation and gender identity; and (II) Applying *Bostock* to Title IX will align federal regulations with court precedent both before and after *Bostock*.

I. Fully enforcing Title IX will benefit students everywhere, including students in New England and LGBTQ students, who are negatively impacted by harassment based on sexual orientation and gender identity.

Fully enforcing Title IX can (1) improve the school climate for all students, including LGBTQ students, to improve students' mental and physical health; and (2) assure that all young people benefit from the opportunities and advantages of a robust education so that they can contribute productively to our communities.

(1) Improving the school climate for all students, including LGBTQ students, will improve student mental and physical health.

Research shows that reducing victimization of LGBTQ young people “will likely result in significant long-term health gains and will reduce health disparities.”¹ Conversely, ongoing discrimination against sexual and gender diverse youth can grievously impact their mental and physical health.² Teachers play a critical role in reducing victimization. In fact, researchers have found that having a supportive teacher is a protective factor for LGBTQ students.³

Unfortunately, LGBTQ youth face a disproportionate level of bullying. The 2015 Youth Risk Behavior Survey found that thirty-four percent of LGB students reported being bullied at school—fifteen points higher than heterosexual students.⁴ The 2017 Youth Risk Behavior Survey found that thirty-five percent of trans students⁵ also reported being bullied at school.⁵

Even in New England, the region in which GLAD focuses its work, a disproportionate number of LGBTQ youth experience harassment at school. In fact, a majority of LGBTQ students in Connecticut,⁶ Maine,⁷ Massachusetts,⁸ and New Hampshire⁹ experienced anti-LGBTQ victimization at school.¹⁰ LGBT students in Vermont were more than twice as likely as

¹ Russell, S.T. et al. (2010). Lesbian, Gay, Bisexual, and Transgender Adolescent School Victimization: Implications for Young Adult Health and Adjustment. *Journal of School Health*, 81(5), 223-230.

² Russell, S.T., Sinclair, K.O., Poteat, V.P., and Koenig, B.W. (2012). Adolescent health and harassment based on discriminatory bias. *American Journal of Public Health*, 102(3), 493-495; Perez-Brumer, A., Day, J.K., Russell, S.T., and Hatzenbuehler, M.L. (2017). Prevalence and correlates of suicidal ideation among transgender youth in California: Findings from a representative, population-based sample of high school students. *Journal of the American Academy of Child and Adolescent Psychiatry*, 56(9), 739-746; Day, J.K., Fish, J.N., Perez-Brumer, A., Hatzenbuehler, M.L., and Russell, S.T. (2017). Transgender youth substance use disparities: Results from a population-based sample. *Journal of Adolescent Health*, 61(6), 729-735.

³ Russell, S.T., Seif, H., and Truong, N.L. (2001). School outcomes of sexual minority youth in the United States: Evidence from a national study. *Journal of Adolescence*, 24(1), 111-127.

⁴ Kann, L., Olsen, E.O.M., McManus, T., Harris, W.A., Shanklin, S.L., Flint, K.H., Queen, B., Lowry, R., Chyen, D., Whittle, L., Thornton, J, Lim, C., Yamakawa, Y., Brener, N., and Zaza, S. (2016). Sexual identity, sex of sexual contacts, and health-related behaviors among students in grades 9–12—United States and Selected Sites, 2015. *Morbidity and Mortality Weekly Report: Surveillance Summaries*, 65(9).

⁵ Johns, M.M., Lowry, R., Andrzejewski, J., Barrios, L.C., Demissie, Z., McManus, T., Rasberry, C.N., Robin, L., and Underwood, J.M. (2019). Transgender identity and experiences of violence victimization, substance use, suicide risk, and sexual risk behaviors among high school students—19 states and large urban school districts, 2017. *Morbidity and Mortality Weekly Report*, 68(3), 67-71.

⁶ GLSEN. (2021). *School Climate for LGBTQ Students in Connecticut (State Snapshot)*. New York: GLSEN.

⁷ GLSEN. (2021). *School Climate for LGBTQ Students in Maine (State Snapshot)*. New York: GLSEN.

⁸ GLSEN. (2021). *School Climate for LGBTQ Students in Massachusetts (State Snapshot)*.

⁹ GLSEN. (2021). *School Climate for LGBTQ Students in New Hampshire (State Snapshot)*. New York: GLSEN.

¹⁰ Note: GLSEN did not collect data for Rhode Island or Vermont.

heterosexual and cisgender students to be bullied in 2019,¹¹ and a majority of LGB students in Rhode Island reported feelings of sadness or hopelessness in 2017.¹²

(2) Assuring that all young people benefit from the opportunities and advantages of a robust education will make them better able to contribute productively to our communities.

LGBTQ students are future leaders, essential workers, voters, and neighbors. As such, it is in the nation's best social, political, economic, and public health interest to ensure that LGBTQ students have the same educational opportunities as their heterosexual and cisgender peers.

Research shows that LGBTQ youth who experience discrimination are less able to benefit from the opportunities and advantages of a robust education, and as a result they are less able to contribute productively to our communities. For example, some researchers have shown that many LGBT students have reported "negative peer experiences" as well as higher rates of suspension or expulsion,¹³ which has led the National Academy of Sciences to hypothesize that such "experiences may undermine academic focus and achievement or prompt disengagement at school."¹⁴ In addition, LGBTQ college students who experience discrimination at school express greater vocational indecision, and such discrimination affects their college adjustment.¹⁵

By fully enforcing Title IX to protect LGBTQ students, the Department of Education can protect our nation's greatest assets: our young people. Instead of dropping out at a disproportionate rate, LGBTQ young people who feel welcome at school will learn the content, skills, and dispositions that can make them successful and productive at college, in their careers, and in their personal lives.

II. Applying *Bostock* to Title IX will align federal regulations with court precedent both before and after *Bostock*.

The promise of equal opportunity for all students is encapsulated in the plain language of Title IX, which provides that "[n]o 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."¹⁶ The vital protections enshrined in Title IX protect members of the LGBTQ community from exclusion, discrimination, and

¹¹ Vermont Department of Public Health. (2020). *2019 Vermont Youth Risk Behavior Survey: Statewide Results*. Vermont: Department of Public Health and Agency of Education.

¹² Rhode Island Department of Health. *Youth Risk Behavior Survey Results: 2017*.

¹³ Poteat, V.P., Scheer, J.R., and Mereish, E.H. (2014). Factors affecting academic achievement among sexual minority and gender-variant youth. *Advances in Child Development and Behavior*, 47, 261-300.

¹⁴ National Academies of Sciences, Engineering, and Medicine 2020. *Understanding the Well-Being of LGBTQI+ Populations*, pg. 234. Washington, DC: The National Academies Press.

¹⁵ Schmidt, C.K., Miles, J.R., and Welsh, A.C. (2011). Perceived discrimination and social support: The influences on career development and college adjustment of LGBT college students. *Journal of Career Development*.

¹⁶ 20 U.S.C. § 1681(a).

harassment because of sexual orientation or gender identity, as confirmed by every Federal Court of Appeals to have considered the issue.¹⁷

Just last year, the Supreme Court of the United States foreclosed arguments to the contrary when it issued its landmark ruling in *Bostock v. Clayton County*, which held that sex discrimination, by definition, encompasses discrimination against the LGBTQ community.¹⁸ Applying *Bostock*'s holding, courts nationwide have consistently held that Federal laws prohibiting sex discrimination necessarily guard against discrimination based on sexual orientation and gender identity, including Title VII,¹⁹ the Fair Housing Act,²⁰ and the Affordable Care Act.²¹

Indeed, litigants and legislatures persist in arguing that Federal law not only tolerates exclusion and discrimination against LGBTQ students, but goes further to compel what Title IX prohibits. For example, a Federal court in Connecticut recently dismissed a lawsuit brought against various public school districts and the Connecticut Interscholastic Athletic Conference, which alleged, *inter alia*, that a transgender-inclusive sports policy violates Title IX.²² In another case, a Federal court enjoined a statute enacted in Idaho in 2020 that mandated the exclusion of transgender students from sports programs on the grounds that the statute violates the Fourteenth Amendment of the United States Constitution.²³ Courts have guarded against the *de jure* exclusion of transgender students from educational programs, but the voice of the Department of Education is necessary to push back against the onslaught of cynical efforts to deprive LGBTQ students of equal opportunity.

The need for DOE guidance is underscored by the guidance document issued by the National School Boards Association in 2020. The document acknowledges the ruling in *Bostock* but urges school boards to look to state law when confronting issues related to the needs of

¹⁷ See, e.g., *Doe v. Boyertown Area School District*, 897 F. 3d 518, 535 (3d Cir. 2018); *Grimm v. Gloucester County School Board*, 972 F.3d 586, 618 (4th Cir. 2020), petition for cert. pending, No. 20-1163 (Feb. 19, 2021); *Dodds v. United States Department of Education*, 845 F.3d 217, 221 (6th Cir. 2016); *Whitaker v. Kenosha Unified School District Number 1 Board of Education*, 858 F.3d 1034, 1050 (7th Cir. 2017); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1229 (9th Cir. 2020); *Adams v. School Board*, 968 F.3d 1286, 1304 (11th Cir. 2020).

¹⁸ 140 S. Ct. 1731, 1741 (2020) (“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

¹⁹ See, e.g., *Hannah v. Westrock Services*, 2020 U.S. Dist. LEXIS 130492, 18-cv-00160-MR-WCM (W.D.N.C. July 23, 2020) (reversing pre-*Bostock* ruling which allowed motion to dismiss against plaintiff’s complaint of workplace discrimination based on sexual orientation, as directed by Court of Appeals, 2020 U.S. App. LEXIS 20678, No. 19-1396 (4th Cir. July 1, 2020)).

²⁰ See, e.g., *Walsh v. Friendship Village of South County*, 2020 U.S. App. LEXIS 28609, No. 19-1395 (8th Cir. July 2, 2020) (vacating prior decision, 352 F. Supp. 3d 920 (E.D. Mo. 2019), dismissing housing discrimination claim by same-sex couple, remanding in light of *Bostock*).

²¹ See, e.g., *Walker v. Azar*, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2021) (enjoining HHS rules that would exclude transgender people from the protections of § 1557 of the Affordable Care Act).

²² *Soule v. Connecticut Association of Schools*, 2021 U.S. Dist. LEXIS 78919, No. 3:20-cv-00201 (RNC) (D. Ct. Apr. 25, 2021) (appeal pending) (dismissing under Rule 12(b)(1) on mootness and standing grounds without reaching the merits of the case).

²³ *Hecox v. Little*, 479 F. Supp. 3d 930, 988 (D. Ida. 2020) (appeal argued before 9th Cir. panel on May 3, 2021, decision pending).

LGBTQ students.²⁴ The policy statement of the National Association of Secondary School Principals is clear in its directive that every “principal must provide an affirming school environment where each student is treated fairly, respectfully, and with an understanding of each student’s culture and context,” recommending that school administrators fight back against efforts to exclude or otherwise harm LGBTQ students.²⁵ A piecemeal approach to protecting LGBTQ rights in schools is untenable and clear guidance from the DOE is necessary.

In conclusion, GLAD thanks President Biden and the Department for pledging to fully enforce Title IX. In recognition that harassment against young people based on sexual orientation and gender identity negatively affects the school climate and threatens opportunities for all students, we urge the Department to revise its Title IX regulations to accord with the logic of *Bostock* and to take other necessary steps—as outlined by our colleagues at the Family Equality Council, GLSEN, and the National Women’s Law Center—to ensure equal opportunities through guidance, enforcement, reporting, and best practices.

Respectfully submitted,

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²⁴ NSBA: Protections for LGBTQ Employees and Students After *Bostock v. Clayton County*, A New Era in Employment Law and Student Rights (2020), available at <https://ed311.com/wp-content/uploads/2020/12/nsba-protections-for-lgbtq-employees-and-students-guide-2020-1.pdf>.

²⁵ NAASP Policy & Advocacy Center Position Statement: Transgender Students (2020), available at https://www.nassp.org/wp-content/uploads/2020/06/Transgender_Students.pdf.