



To: North Carolina Department of Public Instruction
North Carolina State and Local Boards of Education
North Carolina Public School Administrators, Educators, and Staff

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RE: **S.B. 49, North Carolina’s “Don’t Say LGBTQ” law, and Title IX**

The recently adopted Senate Bill 49 (“S.B. 49”), better known as North Carolina’s “Don’t Say LGBTQ” law, seeks to radically remake public education in our state. Where public schools have traditionally been places where young people can explore, learn about themselves and the topics that interest them, and begin to find their place as citizens of an increasingly diverse world, S.B. 49 seeks to impose a pall of orthodoxy.

First, the law mandates the creation of a school surveillance infrastructure. Students are no longer free to express themselves in ways challenging gender norms or check out a library book without the risk of educators reporting their activities to their parents. Second, the law prohibits critical instruction by forbidding students, including those who are part of LGBTQ families, from learning about or even seeing examples of role models or families who are not straight and cisgender, or who, like Amelia Earhart, are remarkable in part because of their gender identity. Third, the law empowers schools to punish teachers and administrators who support LGBTQ students.

These provisions, especially when taken together, imperil the well-being and lives of LGBTQ students. In so doing, they foster a hostile educational environment for LGBTQ students in violation of Title IX.¹ North Carolina public schools, as a consequence, cannot follow these provisions of the “Don’t Say LGBTQ” law without risking their federal educational funding.

¹ Though not the focus of this memo, S.B. 49 also raises serious constitutional issues relating to students’ rights to self-expression, access information, and privacy. *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“[S]tudents must always remain free to inquire, to study, to and evaluate, to gain new maturity and understanding.”); *C.N. v. Wolf*, 410 F.Supp.2d 894, 900 (C.D. Cal. Nov. 28, 2005) (holding student plaintiff alleged a viable claim school violated her constitutional right to privacy by disclosing her sexual orientation to mother). And any law that prevents elementary school teachers from saying or sharing materials that contain the words “boys” or “girls”—as S.B. 49 does by barring “[i]nstruction on gender identity[.]” N.C. Gen. Stat. § 115C-76.55—is constitutionally suspect as an overbroad restraint on academic freedom. *Keyishian*, 385 U.S. at 603 (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”).

Title IX Prohibits Creating Hostile Educational Environments for LGBTQ Students

Few laws are better known and have done more to promote equality in our country than Title IX. Its essential guarantee is now well-known in educational communities: “No person in the United States shall, on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]” 20 U.S.C. § 1681(a).

What is less well understood is the breadth of Title IX’s anti-discrimination mandate. When considering whether and how to comply with state laws like S.B. 49 that aim to radically remake educational environments, appreciating the scope of Title IX’s protections is imperative.

First, and most straightforwardly, Title IX trumps state laws with contrary mandates. The federal constitution establishes the supremacy of federal laws over conflicting state laws. U.S. Const. art. VI § 2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land[.]”).

Second, Title IX aims to eliminate discrimination, root and branch. Accordingly, it defines discrimination capaciously to include any “disparate provision of programs, aid, benefits, or services or inequitable application of rules or sanctions.” *Crandell v. N.Y. Coll. of Osteopathic Med.*, 87 F.Supp.2d 304, 314 (S.D.N.Y. Mar. 10, 2000) (citing 45 C.F.R. § 86.31 (2000)).

Third, Title IX and its prohibition on discrimination “on the basis of sex” is interpreted in light of case law from the Title VII workplace discrimination context. *See, e.g., Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (2007) (“We look to case law interpreting Title VII . . . in evaluating a claim brought under Title IX.”). Though focused on the workplace instead of the schoolhouse, Title VII also forbids discrimination “on the basis of . . . sex[.]” 42 U.S.C. § 2000e-2(b).

Fourth, as part of prohibiting sex discrimination, Title IX bars discrimination against LGBTQ students. The Supreme Court held in *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020) that Title VII’s prohibition on sex discrimination in the workplace also forbade discrimination on LGBTQ status. Writing for a six-justice majority, Justice Neil Gorsuch reasoned that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.* By the same logic, discrimination against LGBTQ students is impermissible pursuant to Title IX. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). North Carolina public school regulations embrace this framework by expressly including any sexual harassment under Title VII or discrimination under Titles VII or IX in their definition of “school violence.” 16 NCAC .0107(a)(29-30).

Fifth, contributing to a hostile educational environment for LGBTQ students constitutes sex discrimination in violation of Title IX. Courts and the Department of Education consider the following in assessing whether there is a hostile educational environment:

- The degree the complained of conduct affects a complainant’s ability to access an educational program or activity. *See, e.g.*, 87 Fed. Reg. 41416. Conduct causing student anxiety or humiliation is pertinent to whether they can fully avail themselves of education programs and activities. *See, e.g., id.; see also Peltier v. Charter Day School, Inc.*, 37 F.4th 104, 129 (4th Cir. 2022) (en banc) (noting actionable Title IX harm includes “emotional and dignitary harm”) (quoting *Grimm*, 972 F.3d at 616).

- The type, frequency, and duration of the complained of conduct. 87 Fed. Reg. 41416.
- The ages of and relationship between the complaining and complained of party. *Id.* As one might expect, offending conduct from an administrator or teacher towards a student is more likely to deny access to educational programs and activities given the “unequal power relationship” between the two. *See, e.g., Crandell*, 87 F.Supp.2d at 319.
- The location of the complained of conduct and the control the school has over the student in that location. 87 Fed. Reg. 41416. Offending conduct occurring in a public space, again intuitively, is more likely to humiliate students. 87 Fed. Reg. 41417. And, because this conduct occurs at school, it is more likely to impact student access to educational programs and activities.

A final note on the assessment of allegedly hostile educational environments: These factors and corresponding instances of offending conduct are not considered in isolation. Instead, “courts have adopted a ‘totality of the circumstances’ approach that rejects the disaggregation of the allegations and requires only that the alleged incidents cumulatively have resulted in the creation of a hostile environment.” *Crandell*, 87 F.Supp.2d at 319.

Sixth, schools violating Title IX not only risk litigation challenging their illegal conduct but also losing their federal educational funding. 42 U.S.C. § 2000d-1. Further, in North Carolina, any educator’s willful violation of a student’s civil rights is an express breach of the Standards of Professional Conduct, and such a finding of illegal or unethical conduct—or failure to report such conduct when an educator observes it—provides a basis for revoking an individual educator’s teaching license. 16 NCAC 06C.0372(a)(8-9), .0602(b)(7).²

In sum, North Carolina schools receiving federal educational funding are bound to follow Title IX over any conflicting state law. Title IX broadly protects LGBTQ students from hostile educational environments. Schools fostering such environments risk their federal educational funding, and individual educators who contribute to Title IX violations risk losing their licenses.

S.B. 49 Exacerbates Pre-Existing Challenges for LGBTQ Students, Creating a Hostile Educational Environment in Violation of Title IX

Even before measures like S.B. 49, LGBTQ students faced challenges at school. Per the 2021 *National School Climate Survey* from the Gay, Lesbian and Straight Education Network

² School counselors, social workers, nurses, and librarians also have stringent ethical guidelines to adhere to. Am. Sch. Counselor Assoc., *Ethical Standard for School Counselors* (2022) (“Advocate with and on behalf of students to ensure they remain safe at home, in their communities and at school. A high standard of care includes determining what information is shared with parents/guardians and when information creates an unsafe environment[.]”); Nat’l Ass. of Soc. Workers, *Social Workers’ Ethical Responsibilities to Clients* (2021) (“Social workers should act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, or mental or physical ability.”); Nat’l Assoc. of School Nurses, *Code of Ethics* (2021) (“School nurses promote equitable treatment of all students, regardless of health, race, gender, socio-economic status, culture, age, sexual orientation, gender identity, ability, or religion.”); Am. Library Assoc., *Code of Ethics* (2021) (“We uphold the principles of intellectual freedom and resist all efforts to censor library resources” and “protect each library’s users right to privacy and confidentiality with respect to information sought and received and resources consulted, borrowed, acquired or transmitted.”).

(“GLSEN”), LGBTQ students in North Carolina and nationwide have overwhelmingly negative experiences at school, even when anti-LGBTQ laws like S.B. 49 are not in place. A staggering 74.2% of transgender students in the U.S. reported feeling unsafe at school based on their gender. Relatedly, an overwhelming majority (77.9%) of transgender students experienced anti-LGBTQ discrimination at school, which correlated with 1) a nearly threefold increase in absences due to feeling unsafe or uncomfortable, 2) decreased feelings of school belonging, lower self-esteem, higher levels of depression, and 3) a more than twofold increase in students reporting that they seriously considered suicide in the past year. *Id.* Of the LGBTQ students considering dropping out of school, more than half (51.5%) indicated that they were doing so because of a hostile school climate, including issues with harassment, unsupportive peers or educators, and discriminatory school policies and practices. *Id.*

The situation is even more dire here in North Carolina. GLSEN’s *National School Climate Survey* report on North Carolina shows that most LGBTQ students in North Carolina experienced anti-LGBTQ harassment in 2021. 72% of respondents experienced harassment on the basis of their sexual orientation, while 55% experienced harassment on the basis of their gender expression. Research from CSE bears this out as well. Nearly half (47%) of LGBTQ North Carolinians who participated in CSE’s 2021 *Coming of Age as an LGBTQ Southerner* survey reported experiencing physical violence at school and 55% reported experiencing verbal or emotional violence due to their LGBTQ identity. No surprise, then, that nearly half (47.7%) of LGBTQ Southerners reported missing school days because they felt unsafe or uncomfortable. *Id.*

Moreover, LGBTQ students facing challenges at school often find no respite at home. Only one in three transgender and non-binary youth say their home affirms their identity. The Trevor Project, *National Survey on LGBTQ Youth Mental Health* (2023). This can have harsh consequences; family abuse and abandonment are a leading cause for why LGBTQ youth comprise 40% of all homeless youth in the United States. Soon Kyu Choi, Bianca D.M. Wilson, Jama Shelton, Gary Gates, *Serving Our Youth 2015: The Needs and Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness* (2015).

Fortunately, we know ways to mitigate these harms. Eliminating the four main types of stress on LGBTQ youth—including discrimination and physical violence in schools—would decrease suicide attempts among this population by a factor of 12. The Trevor Project, *National Survey on LGBTQ Youth Mental Health* (2023). LGBTQ youth are 40% less likely to attempt suicide if they have *even one* accepting adult in their life. The Trevor Project, *Accepting Adults Reduce Suicide Attempts Among LGBTQ Youth* (2019). More broadly, feeling cared for by teachers significantly decreases negative mental health outcomes for LGBTQ youth. The Trevor Project, *The Relationship Between Caring Teachers and the Mental Health of LGBTQ Students* (2023).

Unfortunately, S.B. 49 attacks these pillars of a safe, strong educational environment. The law contains multiple provisions that require school staff to communicate on a daily basis to LGBTQ students that they are inferior to and require more scrutiny than their straight and cisgender peers. These provisions include:

- Requiring schools to “out” gender non-conforming students, regardless of whether the student objects or doing so imperils the student.³ N.C. Gen. Stat. § 115C-76.45(a)(5).
- Mandating school surveillance of student library selections. N.C. Gen. Stat. § 115C-76.25(a)(12).
- Barring instruction on sexual orientation and gender identity through fourth grade.⁴ N.C. Gen. Stat. § 115C-76.55.
- Permitting increased surveillance of textbooks and other instructional materials to target LGBTQ-affirming content. N.C. Gen. Stat. § 115C-76.35(b)(3-4).
- Threatening educators with punishment for supporting LGBTQ students. N.C. Gen. Stat. § 114A-20.

These provisions further marginalize already vulnerable students. They discriminate against transgender and nonbinary students who change their name or pronouns by outing them to their parents rather than allowing them to come out on their own terms, as is their right.⁵ They subject LGBTQ students to hostility inside and outside of the schoolhouse. They bar thorough, affirming education on everything from different types of families to stories about girls overcoming challenges. They cut students off from support, whether it be an affirming book, teacher, or administrator. And, perniciously, S.B. 49 realizes these ends by conscripting teachers and administrators into carrying out its harmful dictates.

We know this will have devastating consequences for LGBTQ student mental health. As discussed above, a more stressful, less supportive environment correlates with a rise in LGBTQ youth school absenteeism, depression, and suicide. The Trevor Project, *National Survey on LGBTQ Youth Mental Health* (2023). Recent data suggests LGBTQ North Carolinians experience such mental health challenges at even higher rates than their peers in other southern states. CSE, *North Carolina State Report, Southern LGBTQ Health Survey* (2019). If there was any doubt, LGBTQ students have spoken loud and clear about how measures like S.B. 49 make them feel. Asked about legislation requiring the outing of LGBTQ students, 56% of transgender and nonbinary youth felt angry, 47% felt nervous and/or scared, 45% felt stressed, and more than

³ S.B. 49 makes no exception to the requirements that schools both (1) notify a student’s parents and (2) actively facilitate discussion with the student’s parents when the student requests to change their name or pronoun, N.C. Gen. Stat. § 115C-76.45(a)(5), (b)(2), even in the case of foreseeable child abuse or neglect. *See* N.C. Gen. Stat. § 115C-76.45(c)(2) (applying only to “education and health records”). Nor does it make any provision for protecting students from the harm of being outed or from abuse by their peers.

⁴ Instruction is not defined by S.B. 49. But, in addition to barring teaching about “boys” and “girls,” *supra* n.1, it also surely (and equally absurdly) bars schools from teaching age-appropriate, inclusive materials like *Red: A Crayon’s Story*, which simply celebrates the beauty of being yourself. T. Keung Hui, *State Education Board Says It Won’t Hear Appeals on Book Challenges. Here’s Why.*, NEWS AND OBSERVER, Oct. 4, 2023 (noting Charlotte-Mecklenburg schools pulled book from elementary schools in response to complaint it violated S.B. 49).

⁵ Indeed, disclosure of private information about an employee’s transgender status establishes a cognizable claim for a hostile work environment under Title VII’s analogous prohibition on sex discrimination. *Roberts v. Clary Cty. Sch. Dist.*, 215 F.Supp.3d 1001, 1016-17 (D. Nev. Oct. 4, 2016). In the public school context, North Carolina law expressly states that educators may disclose such private personal information about students only in situations where disclosure “is necessary for the personal safety of the student or others” and/or complies with all applicable laws and professional standards, *see* 16 NCAC 06C.0602(b)(6); neither condition is met here.

a third felt sad. The Trevor Project, *New Poll Illustrates the Impacts of Social & Political Issues on LGBTQ Youth* (2022).

These consequences make plain that S.B. 49 fosters the hostile educational environment for LGBTQ students that Title IX forbids. It does so daily; for instance, reminding transgender and nonbinary students they are not welcome every day when roll is taken and their correct name and pronouns are not used. The cumulative impact of these measures is to frustrate schools' educational mission and LGBTQ students' ability to learn. This means schools cannot comply with Title IX while following the portions of S.B. 49 gratuitously harming LGBTQ students. The choice between Title IX and S.B. 49 is no choice at all; schools must follow Title IX.

Conclusion

Title IX protects LGBTQ students from hostile educational environments. The harmful provisions of S.B. 49 discussed above make it harder for educators to teach and for students to learn by casting a pall over the schoolhouse. In doing so, these provisions violate Title IX. Accordingly, schools receiving federal educational funding in North Carolina cannot comply with these pernicious and dangerous portions of S.B. 49.