# A NEW SEX EDUCATION: THE TITLE IX DEFENSE AGAINST "DON'T SAY GAY"

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ABSTRACT

*Sex education in American public schools has long been the subject of controversy. Although debates over the inclusion of sex education in schools now focus on students' access to comprehensive curricula that includes the experiences of queer and transgender students, sex education in the United States has long maintained its roots in the institutional promotion of "sexual purity." Through an exploration of the latest attacks on comprehensive sex education, particularly in the context of reinvigorated "Don't Say Gay and Trans" legislation, this Article postulates that a novel interpretation of Title IX of the Education Amendments of 1972 is needed that requires education policymakers to incorporate the experiences and needs of queer and transgender students in sex education curricula. This Article examines the application of the Supreme Court's* Bostock v. Clayton County *decision to Title IX and argues that the prohibition against discrimination in education on the basis of sexual orientation and gender identity raises a plausible Title IX challenge to non-inclusive sex education curricula.*

*By first offering a brief historical overview of public sex education curricula in the United States, this Article contextualizes the present need for comprehensive sex education as an impactful resource for students, as well as the unique sexual health challenges faced by queer and trans adolescents. This Article then outlines the important changes to Title IX in the wake of the* Bostock *decision, President Biden's 2021 Executive Order implementing* Bostock*, and subsequent appellate case law. Most importantly, this Article will highlight the potential for Title IX claims to be brought against public schools, districts, and states that offer non-comprehensive sex education curricula that excludes content relating to the unique needs of queer and trans students. This Article concludes by addressing potential challenges to such an interpretation of Title IX in the context of sex education curricula and will underscore the important policy ramifications of incorporating the experiences and needs of queer and trans students in educational dialogues surrounding sexual health.*

## INTRODUCTION

For those removed from the grasp of adolescence, the generational increase in sex education curricular requirements may appear as another box to check on the long list of obligatory courses for children. But for many of those students, sex education offers a lifeline to informational resources that drastically influence

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their long-term well-being. This understanding of sex education not merely as a "curricular requirement" but as a tangible wellness resource is precisely why Title IX of the Education Amendments of 1972 should be interpreted by policymakers and courts alike to encompass sex education curricula that are crucial to adolescents' sexual development.[1] This novel and broadened interpretation of Title IX—in light of the United States Supreme Court's *Bostock v. Clayton County* decision—would guarantee queer, trans, and straight cisgender students alike a sex education curriculum that fully encompasses their needs.[2]

## I. NO NEW CONTROVERSY

Where dialogues surrounding sex education are permitted, quarrels are abundant.[3] Sex education is no new controversy. Rather, it has transformed from a campaign to control what some perceived as a "loosening of sexual morals" to passionate debates over the content and scope of curricula pertaining to sex, sexuality, and gender identity.[4]

The contemporary campaign for sex education in American public schools was initiated in tandem with what is now known as the "social hygiene movement" during the turn of the twentieth century.[5] With the social hygiene movement came the intention of many education activists to insert eugenics as well as race and sex stereotyping into dialogues surrounding sex.[6] Despite their racist and sexist influences, these growing campaigns to steer the sexual lives of youth nonetheless contributed to the widespread promulgation of sex education programs in public schools across the country.[7] Following the Chicago public school system's implementation of formal sex education programs in 1913, disagreements about the scope and content of sex education in schools would enter a new era of prominence in policy-making and politics.[8]

While conversations surrounding queer and trans inclusion in sex education curricula were not yet widely discussed when such programs were first implemented in public schools, it was not long until these debates were a central component of the sex education controversy. The debate over whether schools should incorporate the unique needs of queer and trans students into their sex education curricula has been made a defining issue in contemporary politics, but it is rooted in decades-old fights over the scope of sex education as it relates to

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1. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

2. 140 S. Ct. 1731, 1753 (2020).

3. SIECUS, HISTORY OF SEX EDUCATION 6 (2021), https://siecus.org/wp-content/uploads/2021/03/2021-SIECUS-History-of-Sex-Ed_Final.pdf [https://perma.cc/N924-MUP4].

4. *Id*.

5. *Id.* at 13.

6. *Id.* at 10-11.

7. JEFFREY P. MORAN, TEACHING SEX: THE SHAPING OF ADOLESCENCE IN THE 20TH CENTURY 41-52 (Harvard Univ. Press 2000).

8. *Id.* at 50; *see also* GORDAN V. DRAKE, IS THE SCHOOL HOUSE THE PROPER PLACE TO TEACH RAW SEX? (1968).

"non-traditional" sexual relations.[9] The latest developments in Title IX regulations and related jurisprudence foster a compelling case that inclusive sexual education is an obligation on the part of public schools that offer such curricula as a wellness resource to their students.[10]

## II. THE REINCARNATION OF "DON'T SAY GAY OR TRANS"

Contemporary disputes over sex education—and education curricula more broadly—hotly center on whether discussions of sexual orientation and gender identity should be permitted in classrooms or left to the confines of the familial home.[11] Across the United States, dozens of state governments have introduced and passed what have been colloquially named "Don't Say Gay or Trans" legislation.[12] These pieces of legislation generally ban discussions of topics surrounding sexual orientation and gender identity—namely discussions pertaining to queer and trans identities—with legal consequences for teachers and school officials that violate such provisions.[13] For example, in Kentucky, the state legislature passed legislation that bans any children from receiving instruction that has the "goal or purpose" of studying "gender identity, gender expression, or sexual orientation."[14] Similar regulations in other states have already resulted in allegations by teachers that they were fired due to discussing topics surrounding queer and trans identities in the classroom.[15] While some have argued these bills protect children from discussions that are not "age appropriate" or that should be had at home with parents or guardians, the laws have also prompted opposition from students, parents, and teachers who claim that the legislation singles out queer and trans children in the classroom and sends a message that their identities are not welcome in schools.[16]

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9. *See Mapping Attacks on LGBTQ Rights in U.S. State Legislatures,* ACLU (Sept. 15, 2023), https://www.aclu.org/legislative-attacks-on-lgbtq-rights [https://perma.cc/U4PR-UMMC], *and* Drake, *supra* note 8.

10. *Fact Sheet: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams*, U.S. DEP'T OF EDUC. (Apr. 6, 2023), https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams [https://perma.cc/FR27-JT8G], *and* Drake, *supra* note 8.

11. Laurel Wamsley, *What's in the So-Called Don't Say Gay Bill that Could Impact the Whole Country,* NPR (Oct. 21, 2022, 5:00 AM), https://www.npr.org/2022/10/21/1130297123/national-don't-say-gay-stop-children-sexualization-bill [https://perma.cc/ZMY7-7L7R].

12. *LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws [https://perma.cc/B2XX-YL4E] (last visited June 16, 2023).

13. *Id*.

14. KY. REV. STAT. § 158.1415 (2023).

15. Matt Lavietes, *Florida Teacher Allegedly Fired After Discussing Sexuality with Students*, NBC NEWS (May 6, 2022, 1:49 PM), https://www.nbcnews.com/nbc-out/out-news/florida-teacher-allegedly-fired-discussing-sexuality-students-rcna27656 [https://perma.cc/74NZ-XAK6].

16. Glenna Milberg, *Amid Protests and Pushback, Controversial So-Called Don't Say Gay Bill Poised to Land on Desantis' Desk*, WPLG (Mar. 6, 2022, 6:18 PM), https://www.local10.com/news/

Although "Don't Say Gay or Trans" bills have recently reentered mainstream political, legal, and educational dialogues, these bills are nothing new.[17] Only a year prior to enacting Alabama's 2022 "Don't Say Gay or Trans" bill, Governor Kay Ivey signed a repeal of a similar 1992 law mandating teachers present homosexuality as not acceptable to the general public.[18] Similarly, Texas lawmakers have pursued a "Don't Say Gay or Trans" bill despite Texas already having a regulation from 1991 that stipulates that educational materials must "state that homosexual conduct is not an acceptable lifestyle and is a criminal offense."[19] Even before Texas's 1991 regulation, other states maintained bills pertaining to censorship of queer and trans experiences in the classroom.[20] As Kate Sosin summarily points out:

> Oklahoma passed the nation's first bill banning teachers from talking about homosexuality in an AIDS sex ed measure in April 1987, and Louisiana followed suit that July. South Carolina passed a "Don't Say Gay" bill in 1988. Texas and Arizona passed their own in 1991. In total, nine states passed laws banning schools from teaching about "homosexuality" from 1987 to 2001, when Utah adopted its version.[21]

With state legislatures censoring discussions of topics relating to gender and sexuality in classrooms, sex education classes remain one of the few opportunities to include critical informational resources for queer and trans students who are particularly in need of such resources.

## III. THE FAILURE OF NON-INCLUSIVE SEX EDUCATION

The failure of state governments and school districts in responding to the ongoing sexual health crisis among queer and trans adolescents has contributed to disparate health impacts for the community. Queer and trans youth are significantly more likely than their straight cisgender peers to engage in sexual risk behaviors.[22] Queer men who have sex with men (MSM) are particularly

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local/2022/03/06/amid-protests-and-pushback-controversial-so-called-dont-say-gay-bill-poised-to-land-on-desantis-desk/ [https://perma.cc/7U72-797E].

17. *See LGBTQ Curricular Laws*, *supra* note 12.

18. *See* Olafimihan Oshin, *Alabama Governor Signs Bill to Remove Anti-LGBTQ Language from Sex Education Curriculum*, THE HILL (Apr. 29, 2021, 5:00 PM), https://thehill.com/homenews/state-watch/551046-alabama-gov-signs-bill-to-remove-anti-lgtbq-language-from-sex-education/ [https://perma.cc/624D-FHX7].

19. H.B. 949, 72nd Leg., Reg. Sess. (Tex. 1991), https://lrl.texas.gov/LASDOCS/72R/HB949/HB949_72R.pdf [https://perma.cc/JCL5-HPEU].

20. *See* Kate Sosin, "*Don't Say Gay" Bills Aren't New. They've Just Been Revived,* CT MIRROR (Apr. 24, 2022, 4:30 AM), https://ctmirror.org/2022/04/24/don't-say-gay-bills-arent-new-theyve-just-been-revived [https://perma.cc/9MKH-2WKJ].

21. *Id.*

22. Catherine N. Rasberry et al., *Sexual Risk Behavior Differences Among Sexual Minority High School Students – United States, 2015 and 2017,* 67 MORBIDITY & MORTALITY WKLY. REP.

affected by negative sexual health outcomes from sexually transmitted infections (STIs), with over two-thirds of new HIV infections among people aged 13 to 29 being MSM.[23] Queer and trans people also experience alarmingly high rates of sexual violence, with queer people of color being particularly impacted.[24] Importantly, queer and trans youth are also more likely to engage in sexual activity much earlier than their straight cisgender counterparts.[25]

Because of the early and risky exposure to sexual activity encountered by many queer and trans adolescents, it is crucial that sex education courses incorporate the experiences and needs of these students in the informational resources they offer. Despite available data pointing toward a continued sexual health crisis within the queer and trans community, states that do require, encourage, or permit sex education in public schools do not universally incorporate the experiences and needs of the queer and trans community.[26] As of 2023, only thirty-eight states and the District of Columbia require any sex education and/or HIV education, with Kansas and Mississippi only mandating sex education, and eleven states solely requiring HIV education.[27] Of the thirty-eight states that mandate some form of sex education, only thirteen and the District of Columbia require inclusive content with regard to sexual orientation, while three require that negative information be provided on queer and trans relationships.[28]

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1007, 1008 (Sept. 14, 2018), https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6736a3-H.pdf [https://perma.cc/8SKH-9BKB] ("Identity-based sexual minority youth subgroups were more likely than were heterosexual students to engage in sexual risk behaviors (Table 2). Bisexual females were more likely than were heterosexual females to report having had sexual intercourse (APR = 1.41), early sexual debut (APR = 2.43), ≥4 sex partners (APR = 1.69), no condom use (APR = 1.17), no pregnancy prevention method use (APR = 1.49), and alcohol/drug use before sex (APR = 1.36). Males who were not sure about their sexual identity were more likely than were heterosexual males to report early sexual debut (APR = 2.33), ≥4 sex partners (APR = 1.47), no pregnancy prevention method use (APR = 2.03), and alcohol/drug use before sex (APR = 1.73). Lesbian or bisexual females were more likely than were females who were not sure about their sexual identity to report having had sexual intercourse, no condom use, and no pregnancy prevention method use. Gay or bisexual males were more likely than were males who were not sure to report having had sexual intercourse and not using pregnancy prevention. Gay/lesbian students were more likely than were bisexual students to report not using pregnancy prevention, and among females, not using condoms.").

23. *HIV and Gay and Bisexual Men: HIV Diagnoses*, CTRS. FOR DISEASE CONTROL & Prevention (Sept. 9, 2022), https://www.cdc.gov/hiv/group/msm/msm-content/diagnoses.html [https://perma.cc/2MVF-4D4U].

24. NATIONAL SEXUAL VIOLENCE RESOURCE CENTER & PENNSYLVANIA COALITION AGAINST RAPE, SEXUAL VIOLENCE & INDIVIDUALS WHO IDENTIFY AS LGBTQ 5 (2012), https://nsvrc.org/sites/default/files/Publications_NSVRC_Research-Brief_Sexual-Violence-LGBTQ.pdf [https://perma.cc/HR7S-QUAS] (last visited June 16, 2023).

25. Raspberry, *supra* note 22, at 1008.

26. *Id*.

27. *Sex and HIV Education*, GUTTMACHER INST. (Aug. 1, 2023), https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education [https://perma.cc/45LS-6ZD2].

28. *Id.*

In some cases, states ban discussions of LGBTQ-inclusive sex education altogether.[29]

The striking number of states that require sex education but do not mandate inclusive sex education curricula results in the frequent exclusion of queer and trans youth from informational resources that are critical to their long-term sexual well-being. Because of this disparity between sex education requirements amidst a new wave of "Don't Say Gay or Trans" legislation and the needs of queer and trans youth, novel legal arguments should be explored to ensure queer and trans students receive a comprehensive sex education comparable to their straight cisgender peers.

## IV. A POST-*BOSTOCK* TITLE IX

The Supreme Court's *Bostock v. Clayton County* decision in 2020 broadened the definition of "sex" to include "sexual orientation" and "gender identity" in the context of Title VII of the Civil Rights Act of 1964.[30] The *Bostock* decision has been interpreted through President Joseph Biden's 2021 Executive Order and various appellate decisions to apply to all federal laws and regulations prohibiting discrimination on the basis of sex.[31] This includes discrimination prohibitions in public education in the context of Title IX of the Education Amendments of 1972.[32] Title IX 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."[33] The interpretation of Title IX that prohibits discrimination on the basis of sex, sexual orientation, and gender identity existed in appellate jurisprudence and Department of Education guidance prior to the *Bostock* decision.[34] Title IX also serves as a broad prohibition on sex discrimination in educational programs, including in the classroom and academics:

> Title IX prohibits sex discrimination in the education programs and activities of entities that receive federal financial assistance. These programs and activities include 'all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education.' 20 U.S.C. § 1687(2)(A); *see also* 45 C.F.R. § 86.2(h). Therefore, Title IX's nondiscrimination protections apply to student recruitment, admissions, educational programs (including individual courses), research, housing, counseling, financial and employment

29. *Id.*

30. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020).

31. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

32. *Id*.

33. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

34. *See* Letter from Pamela S. Karlan, Principal Deputy Assistant Attorney General for the Civil Rights Division, to Federal Civil Rights Directors and General Counsels (Mar. 26, 2021), www.justice.gov/crt/page/file/1383026/download [https://perma.cc/D8DU-Z4UY].

assistance, health and insurance benefits and health services.[35]

Prior to the *Bostock* decision, Title IX was generally interpreted by federal agencies as prohibiting schools from "providing unequal educational resources to students of one sex compared to another."[36] Following the *Bostock* decision and President Biden's Executive Order implementing *Bostock* by *de facto* incorporating "sexual orientation" and "gender identity" into the language of Title IX, the federal statute can now be interpreted to assert that no person on the basis of sex, sexual orientation, or gender identity shall "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."[37]

Equally influential to *Bostock*'s impact on public education is the work of queer and trans advocates and youth in promoting their inclusion in all aspects of public educational opportunities and resources.[38] These efforts have led scholars to point out that, "[w]hile long consigned to the margins of the debate, questions concerning the educational interests and needs of [queer, trans, and] gender-nonconforming students have been gaining visibility in recent years."[39] Conflicts surrounding gender and sexuality—namely their relationship with school curricular decisions—have become front-and-center in "Don't Say Gay or Trans" legislation and attacks that erase the experiences of queer and trans youth.[40]

As questions surrounding the intersection of queer visibility and educational activities arise, scholars and policymakers remain inquisitive as to how *Bostock*'s application to Title IX might affect queer and trans students' experiences in public schools.[41] Title IX has long been used to protect students from discrimination on the basis of sex in educational activities.[42] In academic and classroom settings, Title IX has protected the rights of men and women seeking equal access to academic and curricular resources.[43] When schools permissibly discriminate on the basis of sex—sex-segregated instruction, bathrooms, or sport

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35. Office for Civil Rights, *Title IX Education Amendments*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Oct. 27, 2021), https://www.hhs.gov/civil-rights/for-individuals/sex-discrimination/title-ix-education-amendments/index.html [https://perma.cc/6A3R-UHAP].

36. *Id.*

37. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

38. JULIET WILLIAMS, THE SEPARATION SOLUTION?: SINGLE-SEX EDUCATION AND THE NEW POLITICS OF GENDER EQUALITY 160 (2016).

39. *Id.*

40. Amber Phillips, *Florida's Law Limiting LGBTQ Discussion in Schools, Explained,* WASH. POST (Apr. 1, 2022, 10:28 AM), https://www.washingtonpost.com/politics/2022/04/01/what-is-florida-don't-say-gay-bill [https://perma.cc/8A7C-HT4W].

41. Brenda Alvarez, *Title IX At 50: Where We've Been, Where We're Headed, and Why It Still Matters*, NEA TODAY (July 7, 2022), https://www.nea.org/nea-today/all-news-articles/title-ix-50-where-weve-been-where-were-headed-and-why-it-still-matters [https://perma.cc/LR3N-ZLKZ].

42. *Id.*

43. *See* Robert Blake Watson, *Applying* Bostock*: The Queer Case against Public Single-Sex Schooling*, 51 J.L. & EDUC. 185 (2022).

teams, for example—Title IX claims have been raised by plaintiffs to reaffirm that schools must nonetheless offer substantially equal opportunities to all students.[44] In *Doe v. Wood County Board of Education*, the American Civil Liberties Union (ACLU) filed a lawsuit on behalf of a mother and her daughters who attended Van Devender Middle School claiming the school's practice of separating boys and girls on the basis of sex was unlawful because it was rooted in discredited theories of sex stereotyping and impaired the daughters' education.[45] Importantly, the complaint successfully alleged that the board of education relied on "faulty research, including numerous articles espousing the view that hard-wired differences between boys and girls necessitate the use of different teaching methods in single-sex classrooms"; it also alleged that the stark differences in gender-segregated learning environments harm children who do not conform to prescribed gender stereotypes, including students with learning disabilities, boys who prefer to discuss literary characters' emotions, or girls who need or prefer to move around in classrooms.[46] Years prior, in 2006, the Department of Education revised its Title IX regulations to similarly emphasize that, while sex-segregated instruction is permitted in some instances, participation in sex-segregated classes must be completely voluntary and there must be a "substantially equal" coeducational class offered in the same subject.[47] Such guidelines affirm that even where students are permitted to be instructed separately on the basis of sex, curricula must remain equal regardless of students' sex.

Various government agencies and courts have also consistently interpreted Title IX to include trans and queer students in protections from discrimination on the basis of sex. In 2013, the Department of Education's Office for Civil Rights entered into a resolution agreement with the Arcadia Unified School District to resolve an investigation into allegations of discrimination against a transgender student based on the student's sex.[48] Additionally, in 2015, the Department of Justice and the Department of Education filed a statement of interest supporting this argument with the U.S. District Court for the Eastern District of Virginia in *G.G. v. Gloucester County School Board*.[49] In this case, the plaintiff, a transgender boy, successfully alleged that the Gloucester County School Board unlawfully discriminated against him and denied him equal treatment and benefits based on his sex when it passed a policy that prohibited transgender students from using facilities matching their gender identity.[50]

Following the *Bostock* decision, numerous cases have affirmed that Title IX

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44. *See* Alvarez, *supra* note 41.

45. *See generally* Complaint, Doe v. Wood Cnty. Bd. of Educ., 888 F. Supp. 2d 771 (S.D. W. Va. 2012) (No. 6:12-4355).

46. *Id.* ¶¶ 36, 66.

47. 34 C.F.R. §§ 106.34(b)(1)(iii)-(iv) (2023).

48. *Case Summaries*, U.S. DEP'T OF JUST. C.R. DIV., https://www.justice.gov/crt/case-summaries [https://perma.cc/7DHP-6M5S] (last visited June 15, 2023).

49. *Id.*

50. *Id.*

protections apply to queer and trans students in educational and academic settings. On June 15, 2020, the Supreme Court held in *Bostock* that sex discrimination under Title VII of the Civil Rights Act of 1964 encompasses discrimination on the basis of sexual orientation and transgender status.[51] Though Title VII and Title IX are distinct statutes, their statutory prohibitions against sex discrimination in employment and educational contexts are similar such that Title VII jurisprudence is frequently used as a guide to inform Title IX.[52] Indeed, in the months following the *Bostock* decision, several federal courts and federal agencies have expressly applied the *Bostock* decision to Title IX, holding that Title IX protects transgender students from discrimination on the basis of gender identity.[53]

In March of 2021, the Principal Deputy Assistant Attorney General for the Civil Rights Division issued a memorandum to federal civil rights offices and general counsels addressing the application of *Bostock* to Title IX, determining that Title IX's prohibition on discrimination "on the basis of sex" includes discrimination on the basis of gender identity and sexual orientation.[54] On June 22, 2021, the Department of Education also issued a notice of interpretation clarifying that "[c]onsistent with the Supreme Court's ruling and analysis in *Bostock*, the Department [of Education] interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity."[55]

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51. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020).

52. *See, e.g.*, U.S. DEP'T OF JUST. C.R. DIV., TITLE IX LEGAL MANUAL ch. I, IV (2021), https://www.justice.gov/crt/title-ix, [https://perma.cc/85EB-4M89].

53. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020) ("Although *Bostock* interprets [Title VII], it guides our evaluation of claims under Title IX."); B. P. J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347, 356-57 (S.D.W. Va. 2021); Koenke v. Saint Joseph's Univ., No. CV 19-4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); Doe v. Univ. of Scranton, No. 3:19-CV-01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020). Other circuits reached this conclusion before *Bostock*, relying on their own Title VII jurisprudence. *See, e.g.*, Whitaker *ex rel* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049-50 (7th Cir. 2017) (transgender boy was likely to succeed on his claim that school district violated Title IX by excluding him from the boys' restroom); Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221-22 (6th Cir. 2016) (school district that sought to exclude transgender girl from girls' restroom was not likely to succeed on the claim because Title IX prohibits discrimination based on sex stereotyping and gender nonconformity).

54. Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen. for the U.S. Dep't of Just. C.R. Div., to Federal Civil Rights Directors and General Counsels (Mar. 26, 2021), www.justice.gov/crt/page/file/1383026/download [https://perma.cc/TK72-26XT].

55. *See* 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 County, 86 Fed. Reg. 32,637 (June 22, 2021); *see also* Letter from Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights at the Department of Education, to Educators (June 23, 2021). The reasoning in these interpretations applies with equal force to discrimination against intersex people. "Intersex" refers to people born with variations in physical sex characteristics—including

In *Adams v. School Board of St. John's City,* the Eleventh Circuit extended the *Bostock* decision to protect transgender students from discrimination under Title IX.[56] There, Drew Adams, a transgender student, was prohibited from using the boys' bathroom at his school despite his identification as a boy.[57] The school district maintained that it had an unwritten bathroom policy requiring students to use restrooms that conform to their "biological sex."[58] The Eleventh Circuit, relying on *Bostock*, determined that the district's policy was impermissible discrimination on the basis of gender identity.[59] The Eleventh Circuit held that under Title IX, the policy excluded Adams from the boy's restroom on the basis of his gender identity, which constituted impermissible discrimination on the basis of sex.[60] The court found that "[B]ecause Mr. Adams is a transgender boy, the School Board singled him out for different treatment. By the very terms of the bathroom policy, the Board refused to allow Adams, 'a transgender student[,] access to the restroom corresponding to [his] consistently asserted transgender identity.'"[61] The court concluded that Adams suffered substantial harm from the discriminatory treatment he faced, which violated Title IX's prohibition on sex discrimination.[62]

Most recently, in *Grabowski v. Arizona Board of Regents*, the Ninth Circuit confirmed that Title IX prohibits discrimination both on the basis of sexual orientation and perceived sexual orientation.[63] In *Grabowski*, plaintiff Michael Grabowski, a former student at the University of Arizona, accused the university and its cross-country and track team of harassment and retaliation based on his perceived sexual orientation.[64] Grabowski also alleged that the university

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genitals, gonads, chromosomes, and hormonal factors—who do not fit typical definitions of male or female bodies. The Bostock Court addressed discrimination against "persons with one sex identified at birth and another today." *Bostock,* 140 S. Ct. at 1746. Discrimination against intersex individuals is similarly motivated by perceived differences between an individual's specific sex characteristics and their sex category (either as identified at birth or some subsequent time). Additionally, discrimination based on anatomical or physiological sex characteristics (such as genitals, gonads, chromosomes, and hormone function) is inherently sex-based. Intersex traits, like gender identity and sexual orientation, are "inextricably bound up with sex." *See id.* at 1742. In other words, it is impossible to discuss intersex status without also referring to sex. *Cf. Grimm*, 972 F.3d at 609. Lastly, discrimination based on intersex traits may also involve sex stereotypes, as intersex people by definition have traits that do not conform to stereotypes about male or female bodies. *Cf. Whitaker ex rel Whitaker*, 858 F.3d at 1048 ("[A] transgender individual does not conform to the sex-based stereotypes of the sex that [they were] assigned at birth.").

56. *See generally* Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286 (11th Cir. 2020).
57. *Id.* at 1291.
58. *Id.* at 1293.
59. *Id.* at 1305.
60. *Id.*
61. *Id.* at 1306 (emphasis omitted).
62. *Id.*
63. Grabowski v. Ariz. Bd. of Regents, 69 F.4th 1110 (9th Cir. 2023).
64. *Id.*

defendants responded with deliberate indifference to the "severe, pervasive, and objectively offensive" harassment in violation of Title IX.[65] In concluding that discrimination based on perceived sexual orientation constitutes discrimination based on sex for the purposes of Title IX, the Ninth Circuit relied on *Bostock*, noting that courts frequently look to Title VII case law for guidance on Title IX cases.[66] Specifically, the court directly referenced *Bostock's* principal proposition that harassment "because of" sexual orientation—including "perceived" sexual orientation—is a form of sex discrimination.[67]

While many of these Title IX developments reveal the breadth of the statute's protections as it relates queer and trans students, successful challenges to non-inclusive sex education curricula have yet to be raised that rely on the Supreme Court's reasoning found in *Bostock*. *Bostock*'s application to Title IX presents a unique opportunity to challenge existing sex education programs that do not include informational resources that are tailored to the unique needs and experiences of queer and trans students.[68] As such, disparate resources offered on the basis of a students' sex, sexual orientation, or gender identity should be found to violate Title IX.

## V. A NEW TITLE IX RIGHT TO COMPREHENSIVE SEX EDUCATION

Title IX has not yet been utilized to challenge classroom curricula that informationally discriminates on the basis of sexual orientation and gender identity in its content, although this may be attributed to the relatively neutral content of other standardized courses.[69] Conversely, sex education courses often promote a curriculum that is inherently gendered and heteronormative.[70] Sex education courses also stand out as distinct in their purpose when compared to other traditional courses. Sex education courses are intended to provide informational resources that are vital to students' health and well-being.[71] Because of this, it is crucial to think of sex education courses not as a general curricular requirement, but as an important resource offered to students that directly influences their health, safety, and wellness. Through this framing, sex education curricula should be examined for anti-discrimination violations more closely than other "neutral" and non-resourceful curricula that frequently avoid topics of sex, sexual orientation, and gender identity altogether.

If courts examined sex education courses not as a non-impactful course requirements but as a resource offered by schools to students, students, parents,

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Courses such as mathematics, English, science, government, and foreign language courses are generally not primarily focused on issues pertaining to sex, gender identity, or sexual orientation.

70. *See* Sage Burdge, *Queering Sex Ed: The Need for Inclusivity in Sexual Education Curricula*, 1 COMPASS 24, 25 (2019).

71. *Id.*

and teachers could utilize Title IX protections to ensure that such resources are not being offered via curricula that inherently excludes the needs of queer and trans students. Simply put, if a state or local school district receiving Title IX funding requires sex education as part of its curricula, the state and school district cannot discriminate via that curriculum on the basis of sex, sexual orientation, or gender identity without implicating Title IX's prohibitions against denying benefits to students on the basis of these protected traits.

When such curricular discrimination is imagined through a purely "sex-based" lens, the numerous moral and practical problems are easily observable. Imagine that a state legislature or a school district adopted a formal policy that their sex education curriculum would only offer information pertinent to the male body and only as it relates to heterosexual sex and male health concerns. Imagine also that the state or school district explained the policy by stating their moral view that only male sexuality and bodies should be discussed in a public or institutional setting and that female sexuality and bodies should be dealt with privately with parents in the home. In this hypothetical, it is clear that such a policy is not merely an unbiased decision about the content of the curriculum, but rather a withholding of informational resources from girls that are being provided to boys.

Now imagine that such a policy exists for the same purposes as the prior hypothetical, but, in this instance, it is permissible to discuss all topics surrounding cisgender heterosexual identities, but not permissible to discuss queer sexuality and trans identities in the context of sex education. To many, this second hypothetical falls under a "gray area" of moral and practical acceptability. This distinction in reactions between hypothetical one and two may be due to a few underlying assumptions that skew their respective acceptability.

Hypothetical one—where girls are excluded from the curriculum but not boys—may appear more unworkable because one can reasonably assume that girls will always be present in the classroom, and thus should receive equal educational and curricular offerings compared to boys. For many, such an assumption does not translate to queer and trans children, whose identities are not assumed to be ever-present in classrooms, despite recent data indicating the rapidly-growing number of openly-queer youth.[72] Such an attitude that distinguishes between girls and queer children may persist because queer children have yet to fully and openly identify themselves as being distinct from "traditional" cisgender heterosexual identities.[73] More compellingly, though, is the explanation that the difference is rooted in the outdated notion that queer identities are something that is "learned by" or "impressed upon" malleable children susceptible to "queer ideologies."[74] Under this framework, while it is

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72. Erin Doherty, *The Number of LGBTQ-identifying Adults is Soaring,* AXIOS (Feb. 19, 2022), https://www.axios.com/2022/02/17/lgbtq-generation-z-gallup [perma.cc/QCB6-SEW4].

73. Lisa Davis, *At What Age do Kids Identify as Gay?,* FAM. RES. (May 20, 2021), https://familyresourcesinc.org/2021/05/at-what-age-do-kids-identify-as-gay/ [https://perma.cc/KM9R-FWW7].

74. CATHY RUSE, FAM. RSCH. COUNCIL, SEX EDUCATION IN PUBLIC SCHOOLS:

morally impermissible to exclude girls from sex education curricula because heterosexual girls and boys are simply following the "biologically-predetermined" norm that is viewed as immutable, a queer-inclusive curriculum impermissibly raises discussions about sexuality and gender that some view as having the ability to "influence" children.[75] Such a framework fails to recognize that children may simply be exposed to concepts that relate to their existing identities rather than being improperly influenced or coerced to conform to specific notions of gender and sexuality. Therefore, the varied reactions between the two hypotheticals may fundamentally stem from the idea that while conversations surrounding heteronormative sexual experiences are acceptable and typical dialogues to have in schools, those relating to queer and trans experiences are considered taboo, politically charged, or having religious implications, and are therefore inappropriate for the classroom.

What the aforementioned hypotheticals reveal is the believed impermissibility of inclusive sex education curriculum is centrally rooted either in outdated or inaccurate perceptions of sexuality, including that queer identities are not present in the classroom, are "malleable" or used to "indoctrinate" children, or are simply too political or inappropriate to discuss in educational forums. Because of these pervasive perceptions of sexuality and gender in the classroom, it is no wonder that a majority of states do not require or outright preclude schools from discussing queer and trans identities in sex education curriculum.

Following *Bostock*, courts have remained ambiguous as to the precise breadth of Title IX's protections in the context of discriminatory course curricula that harms queer and trans students. Cases such as *Doe v. Wood County Board of Education* and *Grimm v. Gloucester County School Board* underscore that although Title IX has been used to combat discrimination within classrooms and against students on the basis of gender identity, courts have not yet fully explored the combination of discriminatory curricula in sex education courses that result in queer and trans students being excluded from valuable informational resources tailored to their straight cisgender peers.[76]

In *Doe v. Wood County Board of Education,* the West Virginia school district agreed in settlement to abandon single-sex schooling following the ACLU's lawsuit claiming that the district's single-sex classrooms were teaching boys and girls differently based on outdated sex stereotypes.[77] Although the case was ultimately settled, *Doe* illustrates that any discrimination against boys and girls—even "permissive" discrimination—does not entail that a school district is

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SEXUALIZATION OF CHILDREN AND LGBT INDOCTRINATION (2020); Stephen Sawchuk, *What's Driving the Push to Restrict Schools on LGBTQ Issues?*, EDUC. WK. (Apr. 19, 2022), https://www.edweek.org/leadership/whats-driving-the-push-to-restrict-schools-on-lgbtq-issues/2022/04 [https://perma.cc/JH4W-PMUW].

75. *Id.*

76. Grimm v. Gloucester Cnty. Sch. Bd., 400 F. Supp. 3d 444 (E.D. Va. 2019), *aff'd* 972 F.3d 586 (4th Cir. 2020); Doe v. Wood Cnty. Bd. of Educ., 888 F. Supp. 2d 771 (S.D.W. Va. 2012).

77. *Doe v. Wood County Board of Education*, AM. C.L. UNION (Aug. 30, 2012), https://www.aclu.org/cases/doe-v-wood-county-board-education [https://perma.cc/C3N2-WCTF].

free to offer an unequal and stereotype-based educational curriculum to students.[78] Title IX is explicit and broad in its prohibition on discrimination that results in children being treated differently on the basis of their sex, and following *Bostock* the same principle is undoubtedly applicable as it relates to sexual orientation and gender identity.

More significantly, in *Grimm,* a federal district court outlined how school policies and practices singling out queer and trans students fundamentally violate Title IX.[79] Judge Arenda L. Wright Allen ruled in favor on a motion for summary judgment by plaintiff Gavin Grimm, a transgender man who encountered explicit instances of discrimination by his high school, including being forced to use a separate bathroom from his peers.[80] In ruling that the school board's bathroom policies violated Title IX, Judge Allen wrote:

> In sum, there is no question that the Board's policy discriminates against transgender students on the basis of their gender noncomformity [sic]. Under the policy, all students except for transgender students may use restrooms corresponding with their gender identity. Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go.[81]

While distinct from the bathroom controversy in *Grimm*, Judge Allen's analysis can be used to illustrate that transgender and queer students who are excluded from the informational resources offered in sex education courses are also "singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go."[82] The primary distinction between the facts in *Grimm* and those experienced by queer students in non-inclusive sex education courses is that while Grimm was physically banned from using either "male" or "female" restrooms, queer and trans students are physically "welcomed" into a sex education class yet *de facto* excluded from many of the heteronormative informational resources offered within them.[83]

In the twenty-eight states that require some form of sex education, but do not require it to include the needs and experiences of queer and trans students, potential classes of plaintiff queer and trans students could raise plausible Title IX challenges against such laws and curriculum.[84] These plaintiff students could allege such state laws and curricula exclude queer and trans students from meaningful sex education informational resources and deny them the benefits of such resources offered to straight cisgender students. For such a suit to succeed, plaintiffs would need to demonstrate: "(1) [H]e or she was excluded from participation in an education program because of his or her sex; (2) the

78. *See id.*
79. *Grimm*, 400 F. Supp. 3d at 444.
80. *Id.*
81. *Id.* at 456.
82. *Id.* at 457.
83. *See id.*
84. *See LGBTQ Curricular Laws*, *supra* note12.

educational institution was receiving federal financial assistance at the time of his or her exclusion; and (3) the improper discrimination caused the plaintiff harm."[85]

First, plaintiff students could plausibly show that, while physically allowed to attend sex education courses offered in their school, they were nonetheless excluded from participation due to the non-inclusion of their experiences in the curriculum because of their status as queer or trans. Such a showing could come in the form of the state or district policy excluding topics relating to sexual or gender identity, or evidence within the curriculum itself that reveals its tailoring toward straight cisgender students. Here, to rebut any defense arguing that such sex education curricula is protected government free speech and therefore permissible, plaintiffs would need to persuade courts to view curricula in the context of sex education not as protected curricular speech, but as an important informational resource more akin to counseling services offered by schools. Given the tangible day-to-day and long-term benefits proffered by inclusive sex education curricula, plaintiffs will likely have a more persuasive argument in framing sex education curricula as a resource rather than merely as protected government speech in the form of traditional curricular standards.

For the second prong, schools receiving Title IX funding would be covered by the statute's protections. This includes nearly all public schools.[86] Finally, as demonstrated throughout this paper, plaintiff students and their parents could demonstrate both individual and systemic harm resulting from the exclusion of their needs and experiences in their school's sex education curriculum. These harms include both the mental and sexual health ramifications that stem from the absence of an inclusive and comprehensive sex education to the harm of being singled out in a classroom by not receiving the same benefits of instruction as the student's straight cisgender peers.[87]

## VI. CHALLENGES

Although the *Bostock* decision significantly broadens the scope of Title IX protections as they relate to queer and trans students in schools, Title IX's direct application to classroom instruction and curricula has been limited. Skeptics of a Title IX challenge to non-comprehensive sex education curriculum will likely argue that Title IX's reach does not extend to complex and ever-evolving curricular decisions.[88] Additionally, government freedom of speech concerns may

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85. *Grimm*, 822 F.3d at 718 (citing Preston v. Virginia *ex rel*. New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir. 1994)).

86. *See* Office for Civil Rights, *Sex Discrimination Frequently Asked Questions*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html [https://perma.cc/RQT3-ACXR] (last visited Sept. 20, 2023).

87. Jo Yurcaba, *Sex Ed That Excludes LGBTQ+ People Is Tied To Worse Health Outcomes*, FORBES (Oct. 14, 2020, 9:00 AM), https://www.forbes.com/sites/joyurcaba/2020/10/14/sex-ed-that-excludes-lgbtq-people-is-tied-to-worse-health-outcomes/?sh=66ace84a13cb [https://perma.cc/675C-B94A].

88. *See, e.g.,* U.S. Dep't of Educ., Office of the General Counsel, Memorandum for Kimberly

be implicated in Title IX's reach into controlling the content of sex education courses that some may argue should be left to state governments to delineate.[89] These concerns should be further explored in future literature pertaining to this subject, but they may nonetheless be inapplicable to state and school district policies that require heteronormative or negative sex education curricula that may fall under the purview of Title IX as a denial of informational resources to queer and trans students.[90] This would likely be especially applicable to the three states that require negative curricula surrounding queer and trans-inclusive sex education, given that such policies expressly deny queer and trans students educational benefits provided to other students in school via sex education curriculum.[91] Despite these concerns, the Department of Education has noted that stark distinctions in curricula can violate Title IX even when students are lawfully segregated into separate classrooms, bathrooms, sports teams, or other environments on the basis of sex.[92]

Opponents may also argue that sex education courses need not delve into detailed discussions of the differences in sexual experiences and encounters between straight cisgender and queer and trans individuals. Indeed, such explanations that exploit parents' fears of their children's exposure to graphic sexual content are already offered by conservative commentators as a justification for "Don't Say Gay or Trans" bills.[93] Contrary to these scare tactics, sex education curricula in most states still broadly focuses on abstaining from sex outside of marriage, and relatedly may avoid detailed discussions surrounding safe sex practices entirely.[94] As such, state and local policymakers could argue their sex education curricula is already "neutral" as it relates to the information and resources provided to straight cisgender and queer and trans students. Such arguments instead reveal the lacking nature of contemporary sex education curricula that frequently avoids or censors discussions and information surrounding safe-sex practices that would prove to be impactful to straight cisgender and queer and trans students alike. Additionally, those who argue that sex education curricula is already content-neutral ignore the reality that

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M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (Jan. 8, 2021).

89. DAVID MILLER SADKER & ELLEN S. SILBER, GENDER IN THE CLASSROOM: FOUNDATIONS, SKILLS, METHODS, AND STRATEGIES ACROSS THE CURRICULUM (L. Erlbaum Assocs,2007).

90. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

91. *See id., and see* discussion *supra* Part II.

92. *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, U.S. DEP'T OF EDUC. (Dec. 1, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf [https://perma.cc/XQX7-UYY8].

93. Justine Ang Fonte & Leah Carey, *How Can We Protect Kids? By Knowing that Sex Education and Grooming are Not the Same*, NBC NEWS (May 11, 2022, 5:09 PM), https://www.nbcnews.com/think/opinion/learning-sex-education-can-save-kids-from-groomers-rcna26931 [https://perma.cc/Q8VM-S6PH] (last visited Sept. 28, 2023).

94. *Sex and HIV Education*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education [https://perma.cc/5ENH-GP8D] (last visited June 15, 2023).

information offered in many sex education courses is riddled with implicitly heteronormative content that minimizes or erases the experiences of queer and trans students, even if the information is "neutral" on its face.

## CONCLUSION

As sweeping "Don't Say Gay or Trans" laws seeking to censor discussions relating to gender and sexuality appear in state legislatures across the country, feasible pathways to expand existing sex education curricula to be both comprehensive and inclusive are indeed sparse. Even so, the Supreme Court's *Bostock* decision presents opportunities for expanded protections against sex discrimination. The Supreme Court's *Bostock* decision that expands Title VII's prohibition against discrimination "on the basis of sex" to include discrimination on the basis of gender identity and sexual orientation has already been interpreted to apply to Title IX's prohibition against sex discrimination in public schools.[95]

With an expanded Title IX, education activists should revisit the policies of states where sex education is a curricular requirement but where the curriculum is non-inclusive of queer and trans students' needs, or outright incorporates negative information regarding queer and trans identities into teachings. Although Title IX's applicability to curricular standards is in need of further elaboration by the judiciary, attempts to apply a newly bolstered Title IX to sex education courses offering impactful informational resources to students should remain a priority for those who seek to improve the disparate health outcomes of queer and trans adolescents. Combating the curricular standards of states that already maintain some form of non-comprehensive sex education in their curricula is merely a first step in the larger dispute over queer and trans inclusiveness in schools. Such a novel resource-based approach to combating non-comprehensive sex education courses has the potential to improve the livelihoods of queer and trans youth who have rarely had their experiences accounted for in the classroom.

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95. 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 County*, 86 Fed. Reg. 32637 (June 22, 2021); *see also U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity*, U.S. DEP'T OF EDUC. (June 16, 2021), https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity [https://perma.cc/VWJ8-N9E4].