

## **LGBTQ+ Inclusive Education:**

### **Developing a National Program for Kindergarten through 12<sup>th</sup> Grade Students**

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#### **I. INTRODUCTION**

Currently, numerous states around the country are proposing and passing legislation commonly referred to as “Don’t Say Gay/Trans” bills.<sup>1</sup> These bills often restrict kindergarten through twelfth grade school curriculum, prohibit the discussion of LGBTQ+ topics in the classroom, and mandate that a school notify parents if a student is dealing with their gender or sexual identity.<sup>2</sup> State legislatures justify these actions by stating they are giving parents more control and authority over their children’s education, which they have the right to as the parents of these students.<sup>3</sup> To the contrary, some states have done just the opposite and instead have passed LGBTQ+ inclusive curricular legislation that requires instruction of LGBTQ+ topics

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<sup>1</sup> Trudy Ring, *16 States Pushing 'Don't Say Gay' Bills and Censorship Laws Right Now*, ADVOCATE (Mar. 29, 2022), <https://www.advocate.com/law/2022/3/29/16-states-pushing-dont-say-gay-bills-and-censorship-laws-right-now#media-gallery-media-1>; Dustin Jones & Jonathan Franklin, *Not Just Florida. More Than a Dozen States Propose So-Called 'Don't Say Gay' Bills*, NPR (Apr. 10, 2022),

<https://www.npr.org/2022/04/10/1091543359/15-states-dont-say-gay-anti-transgender-bills>.

<sup>2</sup> Matt Lavietes, *As Florida's 'Don't Say Gay' Law Takes Effect, Schools Roll Out LGBTQ Restrictions*, NBC NEWS (June 30, 2022), <https://www.nbcnews.com/nbc-out/out-news/floridas-dont-say-gay-law-takes-effect-schools-roll-lgbtq-restrictions-rcna36143>; Graciela Gonzales, *Lambda Legal Condemns Passage of Florida's "Don't Say Gay" Bill*, LAMBDA LEGAL (Mar. 8, 2022), [https://www.lambdalegal.org/news/fl\\_20220308\\_ll-condemns-passage-of-fl-dont-say-gay-bill?gclid=EAIaIQobChMI3Ybn-KOt-QIV445bCh3SJAi0EAAYBCAAEgJM7PD\\_BwE](https://www.lambdalegal.org/news/fl_20220308_ll-condemns-passage-of-fl-dont-say-gay-bill?gclid=EAIaIQobChMI3Ybn-KOt-QIV445bCh3SJAi0EAAYBCAAEgJM7PD_BwE).

<sup>3</sup> Emilie Kao, *3 Reasons Parents Are Absolutely Right To Demand Informed Consent To What Schools Do To Their Kids*, THE FEDERALIST (Mar. 10, 2022), <https://thefederalist.com/2022/03/10/3-reasons-parents-are-absolutely-right-to-demand-informed-consent-to-what-schools-do-to-their-kids/>; Maggie Hroncich, *More States Move to Affirm Parental Rights in Education*, THE DAILY SIGNAL (Apr. 19, 2022), <https://www.dailysignal.com/2022/04/19/more-states-move-to-affirm-parental-rights-in-education/>.

in classroom education.<sup>4</sup> These education policies have become a hotly contested partisan issue, driving Red states and Blue states further apart in classroom education.<sup>5</sup>

This paper argues for requiring schools to implement an LGBTQ+ inclusive curriculum. An LGBTQ+ inclusive education allows for all students to learn and understand gender identity<sup>6</sup> and sexual orientation.<sup>7</sup> This model is not only beneficial to students' educational experience, but it is a public health imperative that helps combat the staggering rates of LGBTQ+ youth homelessness, mental illness, and suicide.<sup>8</sup> The current health disparities are stark. LGBTQ+ youth are far more likely than their cisgender and heterosexual peers to experience these negative health conditions due to the discrimination and rejection they face.<sup>9</sup> The latest data shows that nearly half of LGBTQ+ youth in school have considered suicide.<sup>10</sup> It is imperative to do everything we can to address this mental health crisis.

The first section of this article outlines the history of anti-LGBTQ+ curriculum, the current push by states to pass “Don’t Say Gay/Trans” bills, and explores actions taken at the federal level so far. The second section of this article explores the current

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<sup>4</sup> Sabia Prescott, *Six States Have Now Passed LGBTQ+ Inclusive Curriculum Legislation—Each with a Different Definition of Inclusion*, NEW AM. (June 17, 2021), <https://www.newamerica.org/education-policy/edcentral/six-states-have-now-passed-lgbtq-inclusive-curriculum-legislation-each-with-a-different-definition-of-inclusion/>.

<sup>5</sup> *Presidential Results*, CNN, <https://www.cnn.com/election/2020/results/president> (states that have anti-LGBT curriculum laws voted Republican in the 2020 presidential elections and states with inclusive LGBT curriculum laws voted Democrat).

<sup>6</sup> Gender Identity is an individual’s inner sense of being male, female or another gender. Gender identity is not necessarily the same as sex assigned or presumed at birth. Everyone has a gender identity. *Glossary of LGBTQ Terms*, LAMBDA LEGAL, [https://www.lambdalegal.org/know-your-rights/article/youth-glossary-lgbtq-terms?gclid=EAIaIQobChMlrNeM9Pnm-AIVGuTjBx2liQxfEAAYASAAEgL80fD\\_BwE](https://www.lambdalegal.org/know-your-rights/article/youth-glossary-lgbtq-terms?gclid=EAIaIQobChMlrNeM9Pnm-AIVGuTjBx2liQxfEAAYASAAEgL80fD_BwE).

<sup>7</sup> Sexual Orientation is an inherent or immutable enduring emotional, romantic, or sexual attraction to other people. An individual’s sexual orientation is independent of their gender identity. *Glossary of Terms*, HRC FOUND., <https://www.hrc.org/resources/glossary-of-terms>.

<sup>8</sup> Bobbi M. Bittker, *LGBTQ-Inclusive Curriculum as a Path to Better Public Health*, AM. BAR ASS’N (July 5, 2022), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/intersection-of-lgbtq-rights-and-religious-freedom/lgbtq-inclusive-curriculum-as-a-path-to-better-public-health/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/lgbtq-inclusive-curriculum-as-a-path-to-better-public-health/).

<sup>9</sup> *Health Disparities Among LGBTQ Youth*, CDC, <https://www.cdc.gov/healthyyouth/disparities/health-disparities-among-lgbtq-youth.htm>.

<sup>10</sup> *2022 National Survey on LGBTQ Youth Mental Health*, TREVOR PROJECT (2022), <https://www.thetrevorproject.org/survey-2022/>.

state of LGBTQ+ youth in the United States and the negative impact of anti-LGBTQ+ curriculum. The final section of this article explores the LGBTQ+ inclusive curriculum mandated by some states and proposes federal legislation to mandate an LGBTQ+ curriculum that will allow all students to see themselves and their families reflected in a respectful and inclusive way.

## II. ANTI-LGBTQ+ CURRICULUM- FROM “NO PROMO HOMO” TO “DON’T SAY GAY”

Anti-LGBTQ+ curriculum is not a new phenomenon. The first push for exclusionary curriculum laws were the “No Promo Homo” laws of the 1980s and 1990s.<sup>11</sup> These laws arose in response to the HIV/AIDS epidemic and state sanctioned homophobia.<sup>12</sup> States passed “No Promo Homo” laws in fear that any education surrounding LGBTQ+ topics constituted the promotion of homosexuality.<sup>13</sup> In the late 1970s, anti-LGBT advocates, such as Anita Bryant and John Briggs, pushed for “Save Our Children” campaigns.<sup>14</sup> These campaigns claimed that “homosexual schoolteachers” presented a danger to children and were “dangerous role models” who would impose their lifestyle onto innocent children.<sup>15</sup> These efforts by Bryant and Briggs have led to a public focus on keeping

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<sup>11</sup> Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. SIDEBAR 6 (2017), <https://columbialawreview.org/content/anti-gay-curriculum-laws/>.

<sup>12</sup> “No Promo Homo” Laws: Harmful and Outdated, EQUAL. TEX., <https://www.equalitytexas.org/no-promo-homo-laws/>; #DontEraseUs: FAQ About Anti-LGBT Curriculum Laws, LAMBDA LEGAL, <https://www.lambdalegal.org/dont-erase-us/faq#Q1>; Andrew Steinberg, *Over the Rainbow: The Future of No Promo Homo Laws in Public Education*, BROWN POL. REV., Apr. 6, 2021, <https://brownpoliticalreview.org/2021/04/over-the-rainbow/#:~:text=No%20promo%20homo%20laws%20proliferated%20in%20two%20distinct,conservative%20lobbied%20for%20anti-gay%20provisions%20in%20the%20curricula> (state sanctioned homophobia included the Defense of Marriage Act).

<sup>13</sup> #DontEraseUs: FAQ About Anti-LGBT Curriculum Laws, *supra* note 12.

<sup>14</sup> Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1477-8 (2017), <https://columbialawreview.org/content/anti-gay-curriculum-laws/>.

<sup>15</sup> *Id.* at 1478.

homosexuality out of schools.<sup>16</sup> Some states have repealed their “No Promo Homo” laws since their implementation.<sup>17</sup> Yet, several still remain on the books.<sup>18</sup> States that currently have active and effective “No Promo Homo” laws are Texas, Oklahoma, Louisiana, and Mississippi.<sup>19</sup>

The “No Promo Homo” laws can restrict any representation of homosexuality, restrict positive representation of homosexuality, or affirmatively require instruction that portrays homosexuality in a negative light.<sup>20</sup> In general these exclusionary curriculum laws only exclude the inclusion of LGBTQ+ topics in sexual health education.<sup>21</sup> However, a consequence of these laws is that educators may avoid including LGBTQ+ topics in other classes as well out of fear of violating these laws.<sup>22</sup> Unfortunately, in the more insidious case of Texas, the law prohibits the instruction of LGBTQ+ topics in both general education programs and in sexual education.<sup>23</sup>

These anti-LGBTQ+ curriculum laws are not a thing of the past. After two decades of advocacy work to repeal state “No Promo Homo” laws, there is a new rise

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<sup>16</sup> *Id.*

<sup>17</sup> “No Promo Homo” Laws: Harmful and Outdated, EQUAL. TEX., <https://www.equalitytexas.org/no-promo-homo-laws/> (states that repealed their “No Promo Homo” laws are Alabama, Arizona, North Carolina, and Utah).

<sup>18</sup> *Id.* (states that still have their “No Promo Homo” laws are Louisiana, Mississippi, Oklahoma, and Texas).

<sup>19</sup> *Id.* (recently, South Carolina law overturned by courts for failing judicial review under the equal protection clause, Utah repealed their state “No Promo Homo” law in 2017, and Arizona repealed their “No Promo Homo” law in 2019); *Inclusive Curricular Standards: Representation of LGBTQ+ and Other Marginalized Communities Promotes Student Achievement and Wellbeing*, GLSEN, 3, <https://www.glsen.org/activity/inclusive-curricular-standards>; ; Oliver Haug, *Alabama Will No Longer Teach Students That “Homosexual Conduct” Is “Not Acceptable”*, THEM, Apr. 28, 2021, <https://www.them.us/story/alabama-no-longer-teach-students-homosexual-conduct-unacceptable> (Alabama repealed their state “No Promo Homo” law in 2021).

<sup>20</sup> #DontEraseUs: *FAQ About Anti-LGBT Curriculum Laws*, *supra* note 12 (Alabama and Texas require that students be taught that being gay “is not a lifestyle acceptable to the general public”); *Laws that Prohibit the “Promotion of Homosexuality”: Impacts and Implications*, GLSEN (2018), [https://www.glsen.org/sites/default/files/2019-12/No\\_Promo\\_Homo\\_2018.pdf](https://www.glsen.org/sites/default/files/2019-12/No_Promo_Homo_2018.pdf).

<sup>21</sup> #DontEraseUs: *FAQ About Anti-LGBT Curriculum Laws*, *supra* note 12.

<sup>22</sup> *Laws that Prohibit the “Promotion of Homosexuality”: Impacts and Implications*, GLSEN (2018), [https://www.glsen.org/sites/default/files/2019-12/No\\_Promo\\_Homo\\_2018.pdf](https://www.glsen.org/sites/default/files/2019-12/No_Promo_Homo_2018.pdf).

<sup>23</sup> “No Promo Homo” Laws: Harmful and Outdated, Equality Texas, <https://www.equalitytexas.org/no-promo-homo-laws/>.

LGBTQ+ discriminatory legislation being introduced across the country.<sup>24</sup>

Opponents of LGBTQ+ equality are using exclusionary curriculum bills to push their political agenda.<sup>25</sup> These new efforts by state legislatures to exclude LGBTQ+ topics from the classroom are commonly referred to as the “Don’t Say Gay/Trans” bills by their opponents. Legislatures in Florida, Alabama, and South Dakota have already successfully passed their bills, and they will become law in the upcoming 2022-2023 school year.<sup>26</sup> The “Don’t Say Gay/Trans” bills are not going to stop here. Many other states have similar bills sitting in state legislatures. “Don’t Say Gay/Trans” bills are erupting across the country, all with the intent to censor curriculum.<sup>27</sup>

The “Don’t Say Gay/Trans” bills are all unique, each carrying different provisions to restrict education on LGBTQ+ topics. The most common provision prohibits classroom instruction on sexual orientation or gender identity.<sup>28</sup> These bills state that instruction on LGBTQ+ topics is not age appropriate for children in certain grades and, therefore, should not be included in their education. Florida and Alabama’s laws specifically state that in certain grades there can be no instruction on LGBTQ+

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<sup>24</sup> Wyatt Ronan, *2021 Slated to Become Worst Year for LGBTQ State Legislative Attacks as Unprecedented Number of States Poised to Enact Record-Shattering Number of Anti-LGBTQ Measures Into Law*, HRC (Apr. 22, 2021), <https://www.hrc.org/press-releases/2021-slated-to-become-worst-year-for-lgbtq-state-legislative-attacks>.

<sup>25</sup> Kate Sosin, *“Don’t Say Gay” Bills Aren’t New. They’ve Just Been Revived*, THEM (Apr. 20, 2022), <https://www.them.us/story/history-of-dont-say-gay-bills-lgbtq-education-discrimination> (“Don’t Say Gay/Trans” bills along with anti-trans sports legislations are being used to oppress LGBTQ youth at school).

<sup>26</sup> H.R. 1557, 2022 Sess. (Fla. 2022); H.R. 322, 2022 Reg. Sess. (Ala. 2022); H.R. 1012, 97th Leg. (S.D. 2022); Delphine Luneau, *Setting the Record Straight as Extremist Politicians in Florida, Alabama and Other States Attempt to Reignite Culture War Attacking LGBTQ+ Youth*, HRC (Apr. 14, 2022), <https://www.hrc.org/press-releases/education-censorship-book-bans-and-attacking-free-speech-setting-the-record-straight-as-extremist-politicians-in-florida-alabama-and-other-states-attempt-to-reignite-culture-war-attacking-lgbtq-youth> (Florida’s law prevents instruction on sexual orientation and gender identity in K-3<sup>rd</sup> grade and prevents instruction in a manner that is not age appropriate, Alabama’s law is a transgender bathroom ban that also prevents instruction on sexual orientation and gender identity in K-5<sup>th</sup> grade in a manner that is not age appropriate, and South Dakota’s law censors school curriculum).

<sup>27</sup> S. 613, 2022 Reg. Sess. (Ga. 2022); S. 2024, 2022 Reg. Sess. (Iowa 2022); H.R. 837, 2022 Reg. Sess. (La. 2022); H.R. 1067, 2022 Reg. Sess. (N.C. 2022); H.R. 755, 2022 Reg. Sess. (N.C. 2022); H.R. 616, 134th Gen. Assemb., Reg. Sess. (Ohio 2022); S. 1142, 58th Leg, 2nd Sess. (Okla. 2022); S. 1278, 2022 Reg. Sess. (Pa. 2022); H.R. 800, 112th Gen. Assemb., Reg. Sess. (Tenn. 2022).

<sup>28</sup> Some bills that include this provision are H.R. 322, 2022 Reg. Sess. (Ala. 2022); H.R. 1557, 2022 Sess. (Fla. 2022); S. 1278, 2022 Reg. Sess. (Pa. 2022); H.R. 755, 2022 Reg. Sess. (N.C. 2022).

topics.<sup>29</sup> Students, like Kate from Illinois, worry that placing an age restriction on LGBTQ+ topics “makes it seem as though gender expression and sexuality are issues reserved for ‘adults,’ while there are many students at the school who identify with the LGBTQ+ community.”<sup>30</sup>

Another common provision allows for parents to review the educational materials included in their child’s classes and object or withhold consent to the use of them in the classroom.<sup>31</sup> This provision does not directly or exclusively target LGBTQ+ topics, but it allows for parents to assert more control over the instruction occurring in their child’s classroom and ensure that their children are not exposed to unapproved content. Parents can use this provision to weed out materials with controversial topics, such as critical-race theory or LGBTQ+ education. Supporters of states’ “Don’t Say Gay or Trans” bills want to prevent teachers from pushing their political views or “trying to indoctrinate kids into being gay.”<sup>32</sup> Meanwhile teachers, like Clinton from Florida, are clear that they are “not teaching kids how to be gay in [the] classroom” but instead are trying “to teach kids to be OK with who they are.”<sup>33</sup>

While these censorship rules are the most common across the numerous “Don’t Say Gay/Trans” bills, other provisions exist that create a hostile school environment by discriminating against LGBTQ+ students. For example, some of these bills include

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<sup>29</sup> H.R. 322, 2022 Reg. Sess. (Ala. 2022); H.R. 1557, 2022 Sess. (Fla. 2022).

<sup>30</sup> Delphine Luneau, *Education Censorship, Book Bans, and Attacking Free Speech: Setting the Record Straight as Extremist Politicians in Florida, Alabama and Other States Attempt to Reignite Culture War Attacking LGBTQ+ Youth*, HRC (Apr. 14, 2022), <https://www.hrc.org/press-releases/education-censorship-book-bans-and-attacking-free-speech-setting-the-record-straight-as-extremist-politicians-in-florida-alabama-and-other-states-attempt-to-reignite-culture-war-attacking-lgbtq-youth>.

<sup>31</sup> Some bills that include this provision are H.R. 755, 2022 Reg. Sess. (N.C. 2022); H.R. 1431, 2022 Re. Sess. (N.H. 2022); H.R. 4555, 124th Gen. Assemb., 2022 Reg. Sess. (S.C. 2022) and H.R. 1557, 2022 Sess. (Fla. 2022).

<sup>32</sup> Matt Laviertes, *From Book Bans to 'Don't Say Gay' Bill, LGBTQ Kids Feel 'Erased' in the Classroom*, NBC NEWS (Feb. 20, 2022), <https://www.nbcnews.com/nbc-out/out-news/book-bans-dont-say-gay-bill-lgbtq-kids-feel-erased-classroom-rcna15819>.

<sup>33</sup>Luneau, o, *supra* note 30.

the forced outing<sup>34</sup> of student’s sexual orientation or gender identity to their parents.<sup>35</sup> Louisiana’s bill specifically states that teachers cannot discuss their own sexual orientation or gender identity with students in kindergarten through twelfth grades.<sup>36</sup> Along with the provisions regulating school curriculum and conduct, most of these “Don’t Say Gay/Trans” bills provide a private right of action for parents to sue schools who violate their rights as parents by not adhering to provisions laid out in these bills.<sup>37</sup> This means parents in these states can sue schools and teachers for providing inclusive LGBTQ+ education to their children, potentially chilling the free speech rights of educators in the classroom.

### **A. Title IX and Anti-LGBTQ+ Curriculum**

Courts might decide that the “No Promo Homo” laws and “Don’t Say Gay/Trans” bills violate Title IX. Title IX states that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education programing or activity receiving federal financial assistance.”<sup>38</sup> No case has ruled yet that Title IX covers discrimination based on sexual orientation or gender identity. However, a recent case, *Bostock v. Clayton County*, held that sex discrimination under Title VII included discrimination based on sexual orientation or gender identity.<sup>39</sup> Historically, Title VII and Title IX have been closely linked, so many are inclined to believe that the holding of *Bostock* would extend to Title IX as well.<sup>40</sup>

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<sup>34</sup> Coming out is the process of disclosing one’s sexual orientation or gender identity to other people. *Glossary of Terms*, HRC FOUND., <https://www.hrc.org/resources/glossary-of-terms>.

<sup>35</sup> Some bills that include this provision are H.R. 755, 2022 Reg. Sess. (N.C. 2022) (bill requires notice to parents of a change in student’s name or pronouns); S. 1278, 2022 Reg. Sess. (Pa. 2022); S. 1045, 55th Leg, 2nd Reg. Sess. (Ariz. 2021).

<sup>36</sup> H.R. 837, 2022 Reg. Sess. (La. 2022).

<sup>37</sup> Some bills that include this provision are H.R. 755, 2022 Reg. Sess. (N.C. 2022); H.R. 1557, 2022 Sess. (Fla. 2022); S. 1278, 2022 Reg. Sess. (Pa. 2022).

<sup>38</sup> Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

<sup>39</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

<sup>40</sup> 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,

Under the previous administration, Secretary of Education Betsy DeVos rolled back Title IX protections.<sup>41</sup> President Biden has taken a different approach to Title IX and is exploring broadening its scope to protect LGBTQ+ students.<sup>42</sup> Currently, the Department of Education has opened up for public comment a notice of proposed rulemaking to include discrimination based on sexual orientation or gender identity to Title IX's sex discrimination.<sup>43</sup> If Title IX includes discrimination based on sexual orientation or gender identity, it is possible then that Title IX would protect students from anti-LGBT curriculum laws. However, a Tennessee federal judge temporarily blocked the Biden administration's guidance on Title IX.<sup>44</sup> Given the connection of *Bostock* and Title IX, the decision to block the guidance made this judge seem all the more partisan and political.<sup>45</sup> If conservative federal judges continue acting in this manner, it is unlikely that LGBTQ+ students will find protection from anti-LGBT curriculum laws with the courts.

### **B. Broader Impact of Anti-LGBTQ+ Curriculum**

Since the courts have not yet fully responded to the issue of anti-LGBT curriculum laws, the “No Promo Homo” and “Don't Say Gay/Trans” laws will continue to negatively impact students across America. Many of these laws and bills

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2021), <https://www.federalregister.gov/documents/2021/06/22/2021-13058/enforcement-of-title-ix-of-the-education-amendments-of-1972-with-respect-to-discrimination-based-on>; Memorandum from Principal Deputy Assistant Attorney Gen. Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021) <https://www.justice.gov/crt/page/file/1383026/download>.

<sup>41</sup> *The State of Title IX*, KNOW YOUR IX, <https://www.knowyourix.org/college-resources/hands-off-ix/>.

<sup>42</sup> Dustin Jones, *Biden's Title IX Reforms Would Roll Back Trump-Era Rules, Expand Victim Protections*, NPR (June 23, 2022), <https://www.npr.org/2022/06/23/1107045291/title-ix-9-biden-expand-victim-protections-discrimination>.

<sup>43</sup> *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, DEP'T OF EDUC. (July 12, 2022) <https://www.regulations.gov/document/ED-2021-OCR-0166-0001> (public comment is open for sixty days from July 12, 2022, to September 9, 2022).

<sup>44</sup> Trudy Ring, *Judge Blocks Biden Admin's Guidance on Anti-LGBTQ+ Discrimination*, THE ADVOCATE (July 16, 2022), <https://www.advocate.com/law/2022/7/16/judge-blocks-biden-admins-guidance-anti-lgbtq-discrimination>.

<sup>45</sup> *Id.*



have purposefully vague language so they end up having further consequences.<sup>46</sup>

Vague language means that teachers are unsure as to what is safe to teach, and that parents can sue over a wider range of issues. Schools and teachers are using this wave of discrimination in school to exclude LGBTQ+ topics from instruction even without a state law mandating them to do so, either out of fear or discriminatory animus.<sup>47</sup> Now there are trends of removing “Pride flags and other LGBTQ-affirming symbols from classrooms,”<sup>48</sup> trends of teachers resigning “in protest of anti-LGBTQ policies,”<sup>49</sup> and trends of banning LGBTQ+ books from classrooms and school libraries across the country.<sup>50</sup>

Parents are also using this moment to bully Gay Straight Alliances (GSA) and other comparable clubs, with the purpose of getting them to shut down.<sup>51</sup> GSA creates a safe space for students of all sexualities and gender identities.<sup>52</sup> The Equal Access Act (EAA) guarantees that students at public schools have the right to form

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<sup>46</sup> Sara Singer, *What is Age-Appropriate LGBTQ+ Education*, TRUTH FOR TEACHERS (May 4, 2022), <https://truthforteachers.com/age-appropriate-lgbtqia-education/> (Don't Say Gay/Trans bills use language saying that any instruction on sexual orientation or gender identity that is not age appropriate is not allowed under the parent's bill of rights. Teachers are worried that this broad and vague language increases what they can be sued for teaching or including in the classroom); Matt Lavietes, *Here's What Florida's 'Don't Say Gay' Bill Would Do and What It Wouldn't Do*, NBC NEWS (Mar. 16, 2022), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/floridas-dont-say-gay-bill-actually-says-rcna19929> (provisions in Florida's Don't Say Gay/Trans law “could open districts and educators to lawsuits from parents who believe any conversation about LGBTQ people or issues to be inappropriate, regardless of their child's age.”).

<sup>47</sup> #DontEraseUs: FAQ About Anti-LGBT Curriculum Laws, *supra* note 12; Elinor Aspegren, *Kids Aren't Learning LGBTQ History. The Equality Act Might Change That.*, USA TODAY (Mar. 6, 2021), <https://www.usatoday.com/story/news/education/2021/03/06/lgbtq-history-equality-education-act-teachers/6648601002/>.

<sup>48</sup> Lavietes, *supra* note 32.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*; Leila Rafei, *How LGBTQ Voices are Being Erased in Classrooms*, ACLU (June 27, 2022), <https://www.aclu.org/news/lgbtq-rights/how-lgbtq-voices-are-being-erased-in-classrooms-censorship>.

<sup>51</sup> Hannah Natanson, *LGBTQ Clubs Were Havens for Students. Now They're Under Attack.*, WASH. POST (June 28 2022), <https://www.washingtonpost.com/education/2022/06/28/gay-straight-alliance-indoctrination-school-club/>.

<sup>52</sup> *What is a GSA Club*, GSA NETWORK, <https://gsanetwork.org/what-is-a-gsa/>

GSAs, and GSAs are not allowed to be treated differently from other clubs.<sup>53</sup> The EAA states that

it shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.<sup>54</sup>

In 2011, U.S. Secretary of Education Arne Duncan wrote a “Dear Colleague” letter clarifying that GSAs are protected under the Equal Access Act.<sup>55</sup>

There are no laws or school rules preventing students from running or establishing GSAs, but some schools are making it a requirement to notify and obtain parental consent for students to participate in school clubs and extracurricular activities.<sup>56</sup> This added requirement means students cannot join a GSA without potentially outing themselves to their parents. There have been vitriolic attacks by parents against GSAs stating they indoctrinate students and are run by predators.<sup>57</sup> With GSAs under attack, students are scared.<sup>58</sup> Leif, a student from Washington, has friends who are “very worried about their parents finding out about them doing Safe Place or diversity clubs—they are scared of their parents and having to tell them before they’re ready, then maybe getting kicked out.”<sup>59</sup> Another student, Landon from Minnesota, says the one place he feels at home is his schools GSA club.<sup>60</sup> Unfortunately, with the complaints and hostility directed toward GSA club,, along with the lack of support

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<sup>53</sup> *Know Your Rights – Federal Laws Protecting GSAs and LGBTQ Students*, GSAFE, <https://gsafe.org/resources/for-youth-gsas/legal-rights/federal-laws-that-protect-gsas-and-lgbtq-youth/>; *GSA Court Victories: A Guide for LGBTQ High School Students*, ACLU, <https://www.aclu.org/other/gsa-court-victories-guide-lgbtq-high-school-students>.

<sup>54</sup> Equal Access Act, 20 U.S.C. § 4071 (1984).

<sup>55</sup> Arne Duncan, *Key Policy Letters from the Education Secretary and Deputy Secretary*, U.S. DEP’T OF EDUC. (June 14, 2011), <https://www2.ed.gov/policy/elsec/guid/secletter/110607.html>.

<sup>56</sup> Jason Ruiter, *ACLU Slams Lake Policy Requiring Permission Slips for Middle-School Clubs*, ORLANDO SENT. (Oct. 8, 2017), <https://www.orlandosentinel.com/news/lake/os-gay-straight-alliance-free-speech-lake-county-schools-aclu-20171003-story.html>; Natanson, *supra* note 51.

<sup>57</sup> Natanson, *supra* note 51.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

from the school superintendent, he feels that it is “so much harder to want to wake up and go to school.”<sup>61</sup>

Landon, and many students like him, face bullying as a result of their real or perceived sexuality and gender identity.<sup>62</sup> Landon said he has been pushed, punched, and called homophobic slurs at school.<sup>63</sup> Anti-LGBTQ+ curriculum laws are harmful because they “stigmatize and discriminate against LGBT students” and “create an official climate of discrimination.”<sup>64</sup> This leads to an increase of bullying directed towards LGBTQ+ students and increases the homophobic remarks made by school faculty and staff.<sup>65</sup> In schools with exclusionary curriculum, LGBTQ+ students are less likely to report incidents of harassment.<sup>66</sup> Already, “86% of LGBTQ+ youth report they have been targets of bullying, harassment or assault at school.”<sup>67</sup> While this alone is horrific, these rates of bullying and harassment also “contribute to high rates of absenteeism, dropout, adverse health consequences and academic underachievement.”<sup>68</sup> Children are bullied when they do not present as heterosexual or cisgender to other students.<sup>69</sup> Spencer from Tennessee has a near constant fear of being attacked at school because of his identity.<sup>70</sup> No child should feel this way at school. These fears are only being amplified by exclusionary curriculum laws. When a queer book was banned from his school, Jack, a student from Florida, felt like his “community was under attack, that they were trying to silence LGBTQ+ experiences

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> #DontEraseUs: *FAQ About Anti-LGBT Curriculum Laws*, *supra* note 12.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> HRC Staff, *Summer of Outrage: Fight Censorship*, HRC (July 7, 2022), <https://www.hrc.org/news/summer-of-outrage-fight-censorship>.

<sup>68</sup> *Id.*

<sup>69</sup> Madeleine Roberts, *New CDC Data Shows LGBTQ Youth are More Likely to be Bullied Than Straight Cisgender Youth*, HRC (Aug. 26, 2020), <https://www.hrc.org/news/new-cdc-data-shows-lgbtq-youth-are-more-likely-to-be-bullied-than-straight-cisgender-youth>.

<sup>70</sup> Laviertes, *supra* note 32.

and voices within our community.”<sup>71</sup> The “No Promo Homo” and “Don’t Say Gay/Trans” laws will increase the bullying LGBTQ+ youth experience.<sup>72</sup> Marcel, a nonbinary high school student from Florida, says that students should not have to be “terrified that you’re going to be harassed and have photos taken of you and be embarrassed and assaulted just because you’re trying to be who you are.”<sup>73</sup> These exclusionary curriculum laws work to push LGBTQ+ youth to the margins of the education system, and this has dangerous consequences.<sup>74</sup>

### **III. THE PUBLIC HEALTH IMPACT FOR LGBTQ+ YOUTH**

LGBTQ+ youth in America are facing a public health crisis.<sup>75</sup> These youth experience increased rates of homelessness, mental illness, and suicide as compared to their peers.<sup>76</sup> LGBTQ+ youth have these health disparities not due to their sexual orientation or gender identity, but due to how they are treated based on their sexual orientation or gender identity.<sup>77</sup> The statistics and stories of LGBTQ+ youth experiencing homelessness, mental illness, and suicide paint a horrifying picture of what growing up LGBTQ+ can look like.

#### **A. Homelessness and LGBTQ+ Youth**

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<sup>71</sup> *Id.*

<sup>72</sup> Brian Mastroianni, *Why Florida’s ‘Don’t Say Gay’ Bill Is So Dangerous*, HEALTHLINE (Mar. 16, 2022), <https://www.healthline.com/health-news/why-floridas-dont-say-gay-bill-is-so-dangerous>; Melissa Hellmann, *A lifeline for Florida students amid ‘Don’t Say Gay’ law*, The Center for Public Integrity (Apr. 1, 2022), <https://publicintegrity.org/inside-publici/newsletters/watchdog-newsletter/lifeline-florida-students-dont-say-gay/>.

<sup>73</sup> Laviertes, *supra* note 32.

<sup>74</sup> Mastroianni, *supra* note 72.

<sup>75</sup> Mary Ellen Flannery, *New Survey Data Shows LGBTQ+ Youth Mental Health Crisis*, NAT’L EDUC. ASS’N (May 25, 2022), <https://www.nea.org/advocating-for-change/new-from-nea/new-survey-data-shows-lgbtq-youth-mental-health-crisis>.

<sup>76</sup> *Health Disparities Among LGBTQ Youth*, *supra* note 9; M.H. Morton, et al., *Missed Opportunities: LGBTQ Youth Homelessness in America*, CHAPIN HALL AT THE UNIV. OF CHICAGO (2018), <https://www.chapinhall.org/wp-content/uploads/VoYC-LGBTQ-Brief-FINAL.pdf>.

<sup>77</sup> *2022 National Survey on LGBTQ Youth Mental Health*, *supra* note 10.

LGBTQ+ youth experience homelessness at rates more than two times that of their peers, and Black LGBTQ+ youth have the highest rates of homelessness.<sup>78</sup> LGBTQ+ homeless youth are more susceptible to abuse, violence, and trauma than non-LGBTQ+ youth who are homeless.<sup>79</sup> Homeless LGBTQ+ youth are more likely to harm themselves or be physically harmed by others, are more likely to be exposed to discrimination or stigma, and are more likely to be forced to have sex or exchange sex for basic needs than non-LGBTQ+ homeless youth.<sup>80</sup> Young LGBTQ+ people become homeless when they experience a lack of support from their families and communities.<sup>81</sup> This lack of support is shown in JoJo's story.<sup>82</sup> JoJo is a transgender woman, and her family did not accept her when she came out to them.<sup>83</sup> JoJo left home at seventeen and has been homeless ever since.<sup>84</sup> JoJo has been kidnapped, raped, gay bashed, and abused while on the streets homeless.<sup>85</sup> In the years since she has been homeless, JoJo has made efforts to seek employment and get off the streets; however, once employers learn she is transgender and homeless, they are reluctant to hire her.<sup>86</sup> These circumstances have kept JoJo homeless for over five years.<sup>87</sup> JoJo's story is not unique. Many LGBTQ+ youth have their own similar stories with homelessness.<sup>88</sup>

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<sup>78</sup> Morton, et al., *supra* note 76.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Lisa Davis, *Why Florida has Such a High Rate of LGBT Homeless Youth*, FAMILY RES., INC. (Jan. 15, 2019), <https://familyresourcesinc.org/2019/01/florida-high-rate-lgbt-homeless-youth/> (looking at the state of Florida for example, where LGBT students make up 40 percent of the homeless population, "almost half of LGBT youth run away from home because they were outright rejected by their families, 43 percent because their parents forced them out, and 32 percent to escape physical, emotional, and mental abuse.").

<sup>82</sup> *JoJo*, INVISIBLE PEOPLE, <https://invisiblepeople.tv/videos/jojo-transgender-homeless-woman-in-hollywood/>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> James Michael Nichols, *6 Homeless LGBTQ Youths Share Their Stories*, HUFFPOST (June 14, 2018), [https://www.huffpost.com/entry/homeless-lgbtq-youth\\_n\\_5b228f53e4b09d7a3d7b22e0](https://www.huffpost.com/entry/homeless-lgbtq-youth_n_5b228f53e4b09d7a3d7b22e0); SAMHSA, *Larkin*

Evidence shows that “most LGBTQ youth experiencing homelessness have withstood discrimination, bullying, exploitation, and/or violence in their grueling journeys into and through homelessness.”<sup>89</sup> While schools can have services in place to support homeless students, “LGBTQ youth are often hesitant to take added risks by engaging services that are not demonstrably safe and affirming for young people like them.”<sup>90</sup> The more outward support schools can show their LGBTQ+ students, the more likely LGBTQ+ youth will seek out their schools for support when facing homelessness, or other serious health issues.<sup>91</sup>

### **B. Suicide and LGBTQ+ Youth**

Homelessness is not the only health issue LGBTQ+ youth face. Many LGBTQ+ youth also struggle with issues of mental health and suicide.<sup>92</sup> The Trevor Project conducts a national survey yearly on the mental health of LGBTQ+ youth in the United States.<sup>93</sup> The Trevor Project’s 2022 national survey captured the experiences of 34,000 LGBTQ+ youth ages thirteen-twenty-four years old.<sup>94</sup> This survey strived to be inclusive of the individuals’ identities and was the most diverse of The Trevor Projects annual national surveys.<sup>95</sup> As a result, forty-five percent of respondents were

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*Street Stories: LGBT Youth Homelessness*, U.S. Department of Health & Human Services (2011), <https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/larkin-street-stories-lgbt-youth>.

<sup>89</sup> Morton, et al., *supra* note 76.

<sup>90</sup> *Id.*

<sup>91</sup> Davis, *supra* note 81; Ana L. Olivera & Jeanne B. Mullgrav, *All Our Children: Strategies to Prevent Homelessness, Strengthen Services and Build Support for LGBTQ Youth*, NYC COMM’N ON LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING RUNAWAY AND HOMELESS YOUTH (June 2010), [http://www.nyc.gov/html/om/pdf/2010/pr267\\_10\\_report.pdf](http://www.nyc.gov/html/om/pdf/2010/pr267_10_report.pdf).

<sup>92</sup> *2022 National Survey on LGBTQ Youth Mental Health*, *supra* note 10.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

LGBTQ+ youth of color, and forty-eight percent were transgender<sup>96</sup> or nonbinary<sup>97</sup> youth.<sup>98</sup> Unfortunately, the report shows that rates of suicidal thoughts have trended upward among LGBTQ+ young people over the last three years.<sup>99</sup> LGBTQ+ youth are more than four times as likely to attempt suicide than their peers.<sup>100</sup> For those ages eighteen-twenty-four years old, thirty-seven percent considered suicide and eight percent attempted suicide.<sup>101</sup> For those ages thirteen-seventeen years old, fifty percent considered suicide and eighteen percent attempted suicide.<sup>102</sup> LGBTQ+ youth are not inherently prone to suicide risk because of their sexual orientation or gender identity but rather placed at higher risk because of how they are mistreated and stigmatized in society.<sup>103</sup>

LGBTQ+ students who reported being bullied in the past year also had three times greater odds of attempting suicide.<sup>104</sup> In a round table discussion of LGBTQ+ youth, many spoke out about their experiences of discrimination and mental health struggles.<sup>105</sup> One girl said of her experience, “we were living in Tennessee and you’re like in seventh grade, you’re not sexual or anything. But you want to hold your

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<sup>96</sup> Transgender is a term that refers to people whose gender identity, differs from their assigned or presumed sex at birth. *Glossary of LGBTQ Terms*, Lambda Legal, [https://www.lambdalegal.org/know-your-rights/article/youth-glossary-lgbtq-terms?gclid=EAIaIQobChMIrNeM9Pnm-AIVGuTjBx2liQxfEAAAYASAAEgL80fD\\_BwE](https://www.lambdalegal.org/know-your-rights/article/youth-glossary-lgbtq-terms?gclid=EAIaIQobChMIrNeM9Pnm-AIVGuTjBx2liQxfEAAAYASAAEgL80fD_BwE). Meanwhile, Cisgender is a term used to describe a person whose gender identity aligns with those typically associated with the sex assigned to them at birth. *Glossary of Terms*, HRC FOUND., <https://www.hrc.org/resources/glossary-of-terms>.

<sup>97</sup> Nonbinary is an adjective describing a person who does not identify exclusively as a man or a woman. Non-binary people may identify as being both a man and a woman, somewhere in between, or as falling completely outside these categories. *Glossary of Terms*, HRC FOUND., <https://www.hrc.org/resources/glossary-of-terms>.

<sup>98</sup> *2022 National Survey on LGBTQ Youth Mental Health*, *supra* note 10.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Natalia Deeb-Sossa, et al., *Building Partnerships: Conversations with LGBTQ Youth About Mental Health Needs and Community Strengths*, UC DAVIS CTR. FOR REDUCING HEALTH Disparities (June 2009), <https://health.ucdavis.edu/media-resources/crhd/documents/pdfs/building-partnerships-05-lgbtq-youth.pdf>.

girlfriend's hand. ...We got complaints from parents about us. ...We were called dykes by teachers. ...My girlfriend actually ended up committing suicide...."<sup>106</sup>

Children committing suicide due to the intense bullying they experience is, unfortunately, not uncommon.<sup>107</sup> A story that gained national attention was that of Nigel Shelby, who was fifteen when he committed suicide.<sup>108</sup> He experienced ruthless bullying at school because of his sexuality, which led to his depression and his suicide.<sup>109</sup> In the wake of his death, several celebrities spoke out against the hatred Nigel experienced. Still, some in Nigel's local community posted horrific derogatory comments online regarding Nigel's sexuality.<sup>110</sup> This attitude highlights how ever-present the hatred towards LGBTQ+ youth can be.

### **C. Mental Health and LGBTQ+ Youth**

Outside of the risk of suicide LGBTQ+ youth face, there are many other mental health problems LGBTQ+ youth are dealing with. Some of the most prominent mental illnesses LGBTQ+ youth experience are anxiety, depression, and substance abuse.<sup>111</sup>

Anxiety is often a normal part of everyday life, but for many it goes beyond temporary worry or fear and interferes with their daily activities.<sup>112</sup> From 2020 to 2022 there has been a five percent increase in LGBTQ+ youth reporting they experience symptoms of anxiety, so that now seventy-three percent of LGBTQ+ young people

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<sup>106</sup> *Id.*

<sup>107</sup> *2022 National Survey on LGBTQ Youth Mental Health*, *supra* note 10.

<sup>108</sup> Robyn Merrett, *Alabama Ninth-Grader Dies by Suicide After He Was Bullied for Being Gay: 'He Was Full of Light'*, PEOPLE (Apr. 24, 2019), <https://people.com/human-interest/alabama-teen-nigel-shelby-suicide-bullied-for-being-gay/>.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Lesbian, Gay, Bisexual, and Transgender Health*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 21, 2017), <https://www.cdc.gov/lgbthealth/youth.htm>; *2022 National Survey on LGBTQ Youth Mental Health*, *supra* note 10.

<sup>112</sup> *Anxiety Disorders*, NAT'L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/topics/anxiety-disorders>.



state they experience symptoms of anxiety.<sup>113</sup> Since school may become a place that causes increased anxiety for students, children may avoid school in an attempt to reduce their anxiety.<sup>114</sup> Low attendance has a range of adverse outcomes, such as social isolation and poor academic performance.<sup>115</sup> Anxiety, like other mental health problems, can lead to further struggles for LGBTQ+ youth.<sup>116</sup>

Depression is a serious mood disorder that “causes severe symptoms that affect how you feel, think, and handle daily activities, such as sleeping, eating, or working.”<sup>117</sup> In 2022, fifty-eight percent of LGBTQ+ youth reported experiencing depressive symptoms.<sup>118</sup> Depressive symptoms can include feelings of hopelessness and pessimism or difficulty concentrating, remembering, and making decisions.<sup>119</sup> Lesbian, gay, and bisexual youth are more than twice as likely to experience depressive symptoms than their heterosexual peers,<sup>120</sup> and transgender youth are four times as likely to experience depressive symptoms as their cisgender and heterosexual peers.<sup>121</sup> It is important to take symptoms of depression seriously, as depression can often lead to thoughts and attempts of suicide.<sup>122</sup>

Substance abuse refers to the excessive use of drugs in a way that is detrimental to the self, society, or both.<sup>123</sup> Substances that LGBTQ+ youth experiment with include

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<sup>113</sup> 2022 *National Survey on LGBTQ Youth Mental Health*, *supra* note 10..

<sup>114</sup> Kate Finning, *The Association Between Anxiety and Poor School Attendance*, THE ASS’N FOR CHILD AND ADOLESCENT MENTAL HEALTH (Aug. 24, 2020), <https://www.acamh.org/research-digest/the-association-between-anxiety-and-poor-school-attendance/>.

<sup>115</sup> *Id.*

<sup>116</sup> *Anxiety Disorders*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/anxiety/symptoms-causes/syc-20350961> (anxiety disorders can lead to depression, substance misuse, problems functioning at school, suicide, and more).

<sup>117</sup> *Depression*, NAT’L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/topics/depression>.

<sup>118</sup> 2022 *National Survey on LGBTQ Youth Mental Health*, *supra* note 10..

<sup>119</sup> *Depression*, *supra* note 117.

<sup>120</sup> *LGBTQI*, National Alliance on Mental Illness, <https://www.nami.org/Your-Journey/Identity-and-Cultural-Dimensions/LGBTQI>.

<sup>121</sup> *Id.*

<sup>122</sup> *Depression*, *supra* note 117.

<sup>123</sup> John B. Griffin, *Substance Abuse*, CLINICAL METHODS: THE HISTORY, PHYSICAL, AND LABORATORY EXAMINATIONS 3rd ED. (1990), <https://www.ncbi.nlm.nih.gov/books/NBK319/>.

alcohol, marijuana, prescription drugs like Adderall and Xanax, and club drugs like Ecstasy and Methamphetamine.<sup>124</sup> As they cope with stigma, harassment, and even rejection by their families, LGBTQ+ teens are more likely than their non-LGBTQ+ peers to abuse drugs and alcohol.<sup>125</sup> The lack of a support system increases the risk of LGBTQ+ youth facing the challenges of addiction.<sup>126</sup> Like with other health problems, being LGBTQ+ does not cause substance abuse.<sup>127</sup> Instead it is outside factors related to being LGBTQ+, like bullying and rejection, that lead to substance abuse being so prevalent in the community.<sup>128</sup> One LGBTQ+ youth has said that “substances make it easier to forget LGBT teens’ differences...they use them to feel more normal.”<sup>129</sup> Another LGBTQ+ young person said that “I use alcohol in an attempt to briefly forget the self-consciousness that I feel as a part of the gay community. It loosens me up a bit so I am not so worried about things like my appearance [or] what other people think of me.”<sup>130</sup> These attitudes are expressed by many young LGBTQ+ people and have led to substance abuse becoming a public health problem.<sup>131</sup>

Problems of homelessness, suicide, anxiety, depression, and substance abuse can become interrelated.<sup>132</sup> Studies have shown that homelessness and poor mental health

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<sup>124</sup> *Preventing Substance Abuse Among LGBTQ Teens*, HRC FOUND. (2012), [https://assets2.hrc.org/files/assets/resources/YouthSubstanceAbuse-IssueBrief.pdf?\\_ga=2.221416344.166593971.1658929438-1757735563.1657130116&\\_gac=1.149053698.1658951491.EAIAIQobChMIhPD27uuZ-QIVgoflCh1MBQVXEAAAYAiAAEgKkjPD\\_BwE](https://assets2.hrc.org/files/assets/resources/YouthSubstanceAbuse-IssueBrief.pdf?_ga=2.221416344.166593971.1658929438-1757735563.1657130116&_gac=1.149053698.1658951491.EAIAIQobChMIhPD27uuZ-QIVgoflCh1MBQVXEAAAYAiAAEgKkjPD_BwE).

<sup>125</sup> *Preventing Substance Abuse Among LGBTQ Teens*, *supra* note 124.

<sup>126</sup> *LGBTQ Youth and Addiction*, ADDICTION CTR. <https://www.addictioncenter.com/addiction/lgbtq/lgbtq-youth-addiction/>.

<sup>127</sup> *Preventing Substance Abuse Among LGBTQ Teens*, *supra* note 124.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Kristina Ackermann, *Why American LGBTQ Teens Are More Likely to Abuse Drugs*, AM. ADDICTION CENTERS (Oct. 26, 2021), <https://americanaddictioncenters.org/lgbtqiapk-addiction/drug-abuse-in-the-lgbtq-teen-community>.

<sup>132</sup> *Suicide and Homelessness: Data Trends in Suicide and Mental Health Among Homeless Populations*, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL (May 2018), <https://nhchc.org/wp-content/uploads/2019/08/suicide-fact-sheet.pdf>.

are linked for LGBTQ+ youth.<sup>133</sup> This problem is compounded because of the inadequate mental healthcare that exists for LGBTQ+ youth.<sup>134</sup> Members of the LGBTQ+ community may face harassment or lack of cultural competency from mental health care providers.<sup>135</sup> The Trevor Project's national survey found that sixty percent of LGBTQ+ youth who wanted mental health care in the last year were not able to obtain it.<sup>136</sup> The top three reasons LGBTQ+ youth said they could not access mental health care were due to fear of discussing mental health concerns, concerns with obtaining parental permission, and fear of not being taken seriously.<sup>137</sup> Actions need to be taken to combat these health struggles that LGBTQ+ youth are facing, because the current systems in place are not doing enough.

#### **D. Rejection vs. Acceptance for LGBTQ+ Youth**

The main risk factor for all of these health problems is rejection.<sup>138</sup> Rejection can be emotional or physical, from coming out in an unsupportive environment to the bullying and harassment LGBTQ+ youth experience at school.<sup>139</sup> Rejection, from family and community, has harmful effects on LGBTQ+ youth.<sup>140</sup> Anti-LGBTQ+ curriculum laws create an environment of rejection. The bills that mandate teachers to

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<sup>133</sup> Tat Bellamy-Walker, *Homelessness Linked to Poor Mental Health Among LGBTQ Youth, Report Finds*, NBC NEWS (Feb. 3, 2022), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/homelessness-linked-poor-mental-health-lgbtq-youth-report-finds-rcna14660>.

<sup>134</sup> *Breaking Barriers to Quality Mental Health Care for LGBTQ Youth*, TREVOR PROJECT (Aug. 18, 2020), <https://www.thetrevorproject.org/research-briefs/breaking-barriers-to-quality-mental-health-care-for-lgbtq-youth/>.

<sup>135</sup> *LGBTQI*, NAT'L ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/Your-Journey/Identity-and-Cultural-Dimensions/LGBTQI>.

<sup>136</sup> *2022 National Survey on LGBTQ Youth Mental Health*, *supra* note 10..

<sup>137</sup> *Id.*

<sup>138</sup> *Parents' Rejection of a Child's Sexual Orientation Fuels Mental Health Problems*, AM. PSYCHOL. ASS'N (Mar. 2009), <https://www.apa.org/monitor/2009/03/orientation>.

<sup>139</sup> *LGBTQI*, NAT'L ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/Your-Journey/Identity-and-Cultural-Dimensions/LGBTQI>.

<sup>140</sup> Caitlin Ryan, *Family Behaviors that Increase Your LGBTQ Child's Health & Well-Being*, FAMILY ACCEPTANCE PROJECT (2019), [https://familyproject.sfsu.edu/sites/default/files/FAP\\_English%20General%20Acceptance%20Poster\\_with%20crop%20marks\\_24x36.pdf](https://familyproject.sfsu.edu/sites/default/files/FAP_English%20General%20Acceptance%20Poster_with%20crop%20marks_24x36.pdf).

out students' sexual orientation or gender identity leads to students coming out before they are ready and in an unsupportive environment.<sup>141</sup> Anti-LGBTQ+ curriculum creates schools where the bullying, harassment, and assault of LGBTQ+ students becomes more acceptable.<sup>142</sup>

The only way to combat this public health crisis and prevent children from dying is through acceptance. The more LGBTQ+ youth feel accepted, the less likely they are to suffer from homelessness, suicide, and mental illness.<sup>143</sup> Acceptance for LGBTQ+ youth leads to them being less likely to be depressed, three times less likely to attempt suicide, and less likely to have substance abuse problems.<sup>144</sup> Acceptance can come from LGBTQ+ youths' families, but community acceptance is also critical<sup>145</sup> The CDC found that, "having a school that creates a safe and supportive learning environment for all students" is important.<sup>146</sup> "For youth to thrive in schools and communities, they need to feel socially, emotionally, and physically safe and supported. A positive school climate has been associated with decreased depression, suicidal feelings, substance use, and unexcused school absences among LGB students."<sup>147</sup> Schools need to become an institution of acceptance through inclusive education.

The Trevor Project's latest national survey found that forty-five percent of LGBTQ+ youth considered suicide in the past year.<sup>148</sup> However, youth who found

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<sup>141</sup> Jim Rosica, *Lawmaker Behind Florida's 'Don't Say Gay' Bill Pulls Amendment Requiring Schools to Out Students*, USA TODAY (Feb. 22, 2022), <https://www.usatoday.com/story/news/politics/2022/02/22/dont-say-gay-bill-florida-schools-out-students/6894516001/>; *Coming Out: A Resource for LGBTQ Students*, GLSEN (2021), <https://www.glsen.org/activity/coming-out-resource-lgbtq-students>.

<sup>142</sup> HRC Staff, *Human Rights Campaign on DeSantis's "Don't Say Gay or Trans" Law Going into Effect, Targeting LGBTQ+ Youth and Turning Back the Clock on Equality*, HRC (June 30, 2022), <https://www.hrc.org/press-releases/human-rights-campaign-on-desantiss-dont-say-gay-or-trans-law-going-into-effect-targeting-lgbtq-youth-and-turning-back-the-clock-on-equality>.

<sup>143</sup> Sarah L. Katz-Wise, et al., *LGBT Youth and Family Acceptance*, NIH (Dec. 1, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5127283/>.

<sup>144</sup> Ryan, *supra* note 140.

<sup>145</sup> *2022 National Survey on LGBTQ Youth Mental Health*, *supra* note 10..

<sup>146</sup> *Lesbian, Gay, Bisexual, and Transgender Health*, *supra* note 111.

<sup>147</sup> *Id.*

<sup>148</sup> *2022 National Survey on LGBTQ Youth Mental Health*, *supra* note 10..

their school to be LGBTQ-affirming reported lower rates of attempting suicide.<sup>149</sup> Unfortunately, only half of LGBTQ+ youth find their schools to be LGBTQ affirming.<sup>150</sup> One LGBTQ+ youth told her story of not being accepted at school and her lack of acceptance; she said “ I was known as the lesbian and I got death threats, and they had stickers on every door saying that this was a safe place, yet I confronted many teachers and nothing was done until like they started stalking me, and even then, I like hid out. So, I just think that there’s not a lot of support in the school systems.”<sup>151</sup>

There are, however, stories of acceptance. One mom, Lizette Trujillo, drives three hours a day back and forth to her fourteen-year-old transgender son’s school in Tucson, Arizona.<sup>152</sup> Sending Daniel to a school where he is “not ‘othered’” has made him happier.<sup>153</sup> While many parents are pushing for exclusionary curriculum laws, many others recognize just how dangerous these laws are for children. Jen, a mother of a nonbinary sixth grader in Florida, talked about having access to LGBTQ+ materials in school.<sup>154</sup> She said, “[i]t is suicide prevention, in my view. You know, a lot of LGBTQ+ kids aren’t comfortable coming out to their parents, they’re scared. And so having a book like this in the school library is giving them a lifeline.”<sup>155</sup>

#### **IV. INCLUSIVE LGBTQ+ EDUCATION AND POLICY PROPOSAL FOR A NATIONAL LGBTQ+ INCLUSIVE EDUCATION**

LGBTQ+ inclusive curriculum legislation has been passed by six states so far.<sup>156</sup> The most recent state to pass LGBTQ+ inclusive curriculum laws is Nevada, and

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Deeb-Sossa, *supra* note 105.

<sup>152</sup> Lavietes, *supra* note 32.

<sup>153</sup> *Id.*

<sup>154</sup> Luneau, , *supra* note 30.

<sup>155</sup> *Id.*

<sup>156</sup> Prescott, *supra* note 4.

previous states to pass LGBTQ+ inclusive curriculum laws are California, Oregon, Illinois, Colorado, New Jersey.<sup>157</sup> For younger students, inclusive content can look like lessons about different family structures and acceptance of others who are different from us.<sup>158</sup> Meanwhile, for students in later grades, their curriculum can be more obviously inclusive, such as lessons about LGBTQ+ historical figures or reading books through an LGBTQ+ lens.<sup>159</sup> The states that have already passed LGBTQ+ inclusive curriculum can be a model for what LGBTQ+ inclusive curriculum can look like in other states, and should be used as a model for the federal government to establish national LGBTQ+ inclusive curriculum in kindergarten through twelfth grade education.<sup>160</sup>

### **A. Models of LGBTQ+ Inclusive Education**

California was the first state to pass LGBTQ+ inclusive curriculum legislation.<sup>161</sup> California's Fair Education Act "requires that California public schools provide Fair, Accurate, Inclusive and Respectful representations of our diverse ethnic and cultural population in the K-12 grade history and social studies curriculum."<sup>162</sup> The act specifically states that instruction in social sciences shall include lesbian, gay, bisexual, and transgender Americans, "with a particular emphasis on portraying the role of these groups in contemporary society."<sup>163</sup> This act strives to ensure that important stories from history are not missing in children's education.<sup>164</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *California Fair Education Act*, OUR PRIDE (July 1, 2017), <https://www.ourpride.org/fair-education-act.html>.

<sup>162</sup> *Fair, Accurate, Inclusive, and Respectful Education Act (FAIR)*, SACRAMENTO CITY UNIFIED SCHOOL DIST., [https://www.scusd.edu/fair-education-act#:~:text=The%20FAIR%20Education%20Act%20\(also,history%20and%20social%20studies%20curriculum.](https://www.scusd.edu/fair-education-act#:~:text=The%20FAIR%20Education%20Act%20(also,history%20and%20social%20studies%20curriculum.)

<sup>163</sup> Fair Education Act, S. 48, Reg. Sess. (Cal. 2011).

<sup>164</sup> *About the Fair Education Act*, TEACHING LGBTQ HISTORY, <https://www.lgbtqhistory.org/about-fair-education-act/>.

Nevada passed its LGBTQ+ inclusive curriculum law in 2021. The law “ensures that instruction is provided to pupils enrolled in kindergarten through grade 12 in each public school...on the history and contributions to science, the arts and humanities of... persons of marginalized sexual orientation or gender identity.”<sup>165</sup> Nevada’s law also says that instructional materials used in the classroom must be in line with their LGBTQ+ inclusive policy.<sup>166</sup> The current research shows that “only 15% of LGBTQ+ students in Nevada have access to LGBTQ+-inclusive curriculum” so this law will allow so many more students to see themselves represented in the classroom.<sup>167</sup>

An inclusive classroom is a space where all students feel seen and respected.<sup>168</sup> From using the correct names and pronouns of students to stopping the use of slurs in the classroom, much of it falls on teachers’ efforts to provide an inclusive education.<sup>169</sup> Support for schools and teachers comes from providing faculty and staff with proper training and creating a curriculum standard that is LGBTQ+ inclusive.<sup>170</sup>

One way to have an LGBTQ+ inclusive curriculum is through diversifying books read in the classroom.<sup>171</sup> One reason behind the creation of the “Don’t Say Gay or Trans” laws is that LGBTQ+ topics are not age appropriate for school children.<sup>172</sup>

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<sup>165</sup> A.B. 261, 81st Leg. (Nev. 2021).

<sup>166</sup>*Id.*

<sup>167</sup> *School Climate for LGBTQ Students in Nevada*, GLSEN (2021), <https://www.glsen.org/sites/default/files/2021-01/Nevada-Snapshot-2019.pdf>.

<sup>168</sup> Poorvu Center for Teaching and Learning, *Inclusive Classroom Climate*, YALE, <https://poorvucenter.yale.edu/ClassClimates>.

<sup>169</sup> *A Checklist for a Welcoming and Inclusive School Environment*, HRC FOUND., <https://welcomingschools.org/resources/checklist-for-a-welcoming-and-inclusive-school-environment>.

<sup>170</sup> *Professional Development*, GLSEN, <https://www.glsen.org/professional-development>; HRC Staff, *Resources for Creating LGBTQ-Inclusive Schools*, HRC (Sept. 3, 2019), <https://www.hrc.org/news/resources-for-creating-lgbtq-inclusive-schools>; Prescott, *supra* note 4.

<sup>171</sup> Tracy Flores & Sandra Osoria, *Why Diverse Books Matter: Mirrors and Windows*, COLORIN COLORADO (2021), <https://www.colorincolorado.org/article/why-diverse-books-matter-mirrors-and-windows>.

<sup>172</sup> Singer, *supra* note 46 (there is a belief that teaching about the LGBTQ community means talking about sex or letting children “choose” their gender).

However, there are age-appropriate reading materials for students in all grades.<sup>173</sup> Students in kindergarten and first grade can read picture books like “All Are Welcome”<sup>174</sup> and “Love Makes a Family,”<sup>175</sup> which are books with simple lessons about inclusion.<sup>176</sup> Students in fourth-eighth grade can read chapter books like “Rick”<sup>177</sup> and “Hurricane Child,”<sup>178</sup> which feature LGBTQ+ characters around their own age.<sup>179</sup> It is important at this age for children to see themselves reflected in the books they read in order to foster a love of reading.<sup>180</sup> Including books that feature LGBTQ+ characters shows students that they are not alone and that different sexual orientations and gender orientations are normal.<sup>181</sup> As students enter high school, the books they read for class develop their critical reading skills.<sup>182</sup> Some non-fiction books suitable for high schoolers are “All Boy’s Aren’t Blue”<sup>183</sup> and “We Have Always Been Here,”<sup>184</sup> which are both memoirs from different LGBTQ+ voices.<sup>185</sup>

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<sup>173</sup> Caitlin Giddings, *15 LGBTQ Books for Kids and Teens Recommended by Queer Librarians, Educators, and Independent Booksellers*, N.Y. TIMES (Apr. 20, 2022), <https://www.nytimes.com/wirecutter/reviews/15-lgbtq-books-for-kids-and-teens/>.

<sup>174</sup> Alexandra Penfold & Suzanne K. Kauffman, *ALL ARE WELCOME* (2018) (a bestselling picture book, celebrating diversity and inclusivity).

<sup>175</sup> Sophie Beer, *LOVE MAKES A FAMILY* (2018) (a fun, inclusive board book celebrates the one thing that makes every family a family- love).

<sup>176</sup> *Great LGBTQ+ Inclusive Picture & Middle Grade Books*, HRC FOUND., <https://welcomingschools.org/resources/childrens-books-lgbtq-inclusive>.

<sup>177</sup> Alex Gino, *RICK* (2020) (a powerful coming of age story about a boy questioning his sexuality, conquering middle school, outgrowing an old friend and gaining new friends).

<sup>178</sup> Kacen Callender, *HURRICANE CHILD* (2018) (a story about a queer girl finding her place, first love, and her mother's love).

<sup>179</sup> *Great LGBTQ+ Inclusive Picture & Middle Grade Books*, HRC FOUND., <https://welcomingschools.org/resources/childrens-books-lgbtq-inclusive>.

<sup>180</sup> Gemma Alexander, *Why School Libraries Need LGBTQ Books*, PARENT MAP (Mar. 28, 2022), <https://www.parentmap.com/article/why-school-libraries-need-lgbtq-books>.

<sup>181</sup> *Id.*; *Why LGBTQ+ Children’s Books are so Important*, THE LGBT SENT. (Feb. 12, 2019), <http://www.thelgbtsentinel.com/lgbtq-childrens-books-important/>.

<sup>182</sup> Norma Decker Collins, *Teaching Critical Reading Through Literature*, ERIC DIGEST (1993), <http://ericae.net/edo/ed363869.htm>.

<sup>183</sup> George M. Johnson, *ALL BOY’S AREN’T BLUE* (2020) (this young-adult memoir weaves together the trials and triumphs faced by Black queer boys).

<sup>184</sup> Samra Habib, *WE HAVE ALWAYS BEEN HERE: A QUEER MUSLIM MEMOIR* (2019) (an exploration of faith, art, love, and queer sexuality, this memoir is about forgiveness and family, both chosen and not).

<sup>185</sup> Margaret Kingsbury, *21 LGBTQ Memoirs You Need To Listen To*, BUZZFEED NEWS (June 11, 2021), <https://www.buzzfeednews.com/article/margaretkingsbury/lgbtq-memoirs-audiobooks-pride-month>.



Classics that can also be included in high school literature classes are “The Color Purple”<sup>186</sup> and “The Picture of Dorian Grey.”<sup>187</sup> These pieces of classic literature have many themes to be explored in the classroom and teachers should be allowed to emphasize the LGBTQ+ themes presented in these books.<sup>188</sup>

LGBTQ+ topics in the classroom can also be incorporated into social studies and history courses. There are many historical LGBTQ+ topics that can be included to give a more detailed and inclusive picture of history.<sup>189</sup> American history classes can teach about the history of the gay rights movement.<sup>190</sup> Students should learn about Stonewall, which is said to be the birth of the gay rights movement.<sup>191</sup> Classes need to discuss Harvey Milk, one of the first openly gay elected officials from San Francisco in the 1970s, as well as the White Night Riots, which erupted after his assassination.<sup>192</sup> Teachers should have lessons on the HIV/AIDS epidemic, which destroyed the LGBTQ+ community because of discrimination and inaction from the government.<sup>193</sup> Students also need to hear about the fight for marriage equality, to

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<sup>186</sup> Alice Walker, *THE COLOR PURPLE* (1982).

<sup>187</sup> Oscar Wilde, *THE PICTURE OF DORIAN GRAY* (1890).

<sup>188</sup> Mollie Blackburn & Mary Catherine Miller, *Equity by Design: Teaching LGBTQ Themed Literature in English Language Arts Classrooms*, MIDWEST & PLAINS EQUITY ASSISTANCE CENTER (2017), [https://www.academia.edu/35309905/Teaching\\_LGBTQ\\_Themed\\_Literature\\_in\\_English\\_Language\\_Arts\\_Classrooms](https://www.academia.edu/35309905/Teaching_LGBTQ_Themed_Literature_in_English_Language_Arts_Classrooms).

<sup>189</sup> *Gay Rights*, HISTORY (June 15, 2022), [https://www.history.com/topics/gay-rights/history-of-gay-rights#:~:text=The%20gay%20rights%20movement%20saw,about%20homosexuality%2C%20called%20The%20Rejected.](https://www.history.com/topics/gay-rights/history-of-gay-rights#:~:text=The%20gay%20rights%20movement%20saw,about%20homosexuality%2C%20called%20The%20Rejected.;); *Milestones in the American Gay Rights Movement*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/stonewall-milestones-american-gay-rights-movement/>.

<sup>190</sup> *Id.*

<sup>191</sup> *Stonewall Riots: The Beginning of the LGBT Movement*, THE LEADERSHIP CONFERENCE OF CIVIL AND HUMAN RIGHTS (June 22, 2009), <https://civilrights.org/2009/06/22/stonewall-riots-the-beginning-of-the-lgbt-movement/>.

<sup>192</sup> *The Official Harvey Milk Biography*, MILK FOUND., <https://milkfoundation.org/about/harvey-milk-biography/>; Bill Van Niekerken, *SF's White Night Riots' 40th Anniversary: Long-Buried Photos Show a City Torn Apart*, S.F. CHRON. (May 20, 2019), [https://www.sfchronicle.com/chronicle\\_vault/article/SF-s-White-Night-riots-40th-anniversary-13865164.php](https://www.sfchronicle.com/chronicle_vault/article/SF-s-White-Night-riots-40th-anniversary-13865164.php); Cleve Jones, *When We Rise* (2016).

<sup>193</sup> *The AIDS Epidemic in the United States, 1981-Early 1990s*, DAVID J. SENCER CDC MUSEUM, <https://www.cdc.gov/museum/online/story-of-cdc/aids/index.html>; Miller, AIDS, [https://www.pbs.org/outofthepast/past/p6/1981\\_1.html](https://www.pbs.org/outofthepast/past/p6/1981_1.html); *The History of the Quilt*, NAT'L AIDS MEM'L, <https://www.aidsmemorial.org/quilt-history>.

show how decades of fighting for equal rights can create meaningful change.<sup>194</sup>

LGBTQ+ people have existed throughout history and need to be included in history lessons.<sup>195</sup>

Lastly, it is crucial that LGBTQ+ topics are included in sexual education. While sex education in the United States is a wider issue than LGBTQ+ inclusive education, it is important to design sexual education courses to be LGBTQ+ inclusive.<sup>196</sup>

LGBTQ+ inclusive sex education is not available for most youth.<sup>197</sup> It is important to have inclusive sex education that provide age appropriate and medically accurate information regarding sexual orientation and gender identity.<sup>198</sup> Inclusive programs can also “incorporate positive examples of LGBTQ individuals, romantic relationships and families” and “emphasize the need for protection during sex for people of all identities.”<sup>199</sup> Sexual education is an vital part of education for young people and needs to be considered when designing LGBTQ+ inclusive curriculum programs.<sup>200</sup>

## B. Education Policy in America

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<sup>194</sup> John F. Kowal, *The Improbable Victory of Marriage Equality*, BRENNAN CTR. FOR JUSTICE (Sept. 29, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/improbable-victory-marriage-equality>.

<sup>195</sup> *Gay Rights*, *supra* note 189; *Milestones in the American Gay Rights Movement*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/stonewall-milestones-american-gay-rights-movement/>.

<sup>196</sup> *A Call to Action: LGBTQ Youth Need Inclusive Sex Education*, HRC FOUND., <https://www.hrc.org/resources/a-call-to-action-lgbtq-youth-need-inclusive-sex-education>; *Get the Facts: Improve School Climate to Increase LGBT Students' Well-Being and Reduce HIV/AIDS Risk*, GLSEN AND AIDS UNITED (2015), <https://www.glsen.org/sexed>.

<sup>197</sup> *A Call to Action: LGBTQ Youth Need Inclusive Sex Education*, HRC FOUND., <https://www.hrc.org/resources/a-call-to-action-lgbtq-youth-need-inclusive-sex-education>

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> The Education Team, *Why Sex Education Is Important [Podcast]*, PLANNED PARENTHOOD (Aug. 25, 2020), <https://www.plannedparenthood.org/planned-parenthood-st-louis-region-southwest-missouri/blog/why-sex-education-is-important-podcast>; Zipi Diamond, *Why We Need Inclusive Sex Education*, GLAAD (Mar. 28, 2018), [https://www.glaad.org/amp/why-we-need-inclusive-sex-ed?gclid=EAIaIQobChMI-rno-Nmy-QIVi43ICh12BwUBEAAYAAAEgKdevD\\_BwE](https://www.glaad.org/amp/why-we-need-inclusive-sex-ed?gclid=EAIaIQobChMI-rno-Nmy-QIVi43ICh12BwUBEAAYAAAEgKdevD_BwE).

Education in America is mostly controlled by the states, as education is not enumerated in the Constitution.<sup>201</sup> Since regulating education is not within congressional power, it primarily falls to state and local governments.<sup>202</sup> State governments typically set overall education standards for their state.<sup>203</sup> Local officials operate schools and implement and enforce state laws and policies.<sup>204</sup> Much of the control over schools and education policy happens at the state and local level.<sup>205</sup> However, the federal government can exercise some influence over educational policy as well.<sup>206</sup>

The bulk of funding for education comes from state and local governments.<sup>207</sup> Federal, state, and local governments provide \$764.7 billion to fund K-12 public education, but the federal government provides only 7.9% of the funding.<sup>208</sup> Still, states rely on federal funding for education, so Congress uses its funding of education to enforce laws pertaining to education.<sup>209</sup> The Spending Clause gives Congress the power to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and

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<sup>201</sup> U.S. Const. art. I § 8 (education not listed in Congress’s enumerated powers); U.S. Const. amend. X (since education is not a power given to the federal government by the Constitution it is a power reserved for the states).

<sup>202</sup> *The Federal Role in Education*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/overview/fed/role.html>.

<sup>203</sup> *Why Does Every State in The U.S. Have A Different Educational Curriculum*, TECHNOLOGY, [https://www.teach-nology.com/teachers/government\\_agencies/](https://www.teach-nology.com/teachers/government_agencies/).

<sup>204</sup> *Organization of U.S. Education: The Local Role*, International Affairs Office, U.S. DEP’T OF EDUC. (Feb. 2008), <http://www.ed.gov/international/usnei/edlite-index.html>.

<sup>205</sup> *Laws & Guidance*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/landing.jhtml?src=ft>; U.S. Const. amend. X.

<sup>206</sup> Brendan Pelsue, *When it Comes to Education, the Federal Government is in Charge of ... Um, What*, HARVARD ED. MAGAZINE (2017), <https://www.gse.harvard.edu/news/ed/17/08/when-it-comes-education-federal-government-charge-um-what> (“federal government uses a complex system of funding mechanisms, policy directives, and the soft but considerable power of the presidential bully pulpit to shape what, how, and where students learn”).

<sup>207</sup> *The Federal Role in Education*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/overview/fed/role.html> (about 92 percent of funder for K-12 education comes from non-federal sources).

<sup>208</sup> Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE (June 15, 2022), <https://educationdata.org/public-education-spending-statistics#:~:text=Federal%2C%20state%2C%20and%20local%20governments,for%20public%20K%2D12%20education>.

<sup>209</sup> Pelsue, *supra* note 206 (states receive funding for education programming on a conditional basis, provided they met the requirements outlined in certain sections, or titles, of the act).



students.<sup>218</sup> Federal action needs to be taken to regulate education across the country and ensure that all students, no matter their zip code, are afforded inclusive LGBTQ+ education.

Federal action can start with the Executive Office of the President and actions his administration can take. When Governor DeSantis of Florida signed the state's 'Don't Say Gay/Trans' bill into law, the White House and the Biden Administration made it clear that they do not support the "Don't Say Gay/Trans" laws.<sup>219</sup> In a tweet, President Biden said that his "Administration will continue to fight for the protections and safety [LGBTQI+ kids] deserve."<sup>220</sup> Presidential support is a nice gesture, but more action needs to be taken to create change.

This summer, President Biden signed Executive Order #14075, Advancing LGBTQI+ Equality.<sup>221</sup> The executive order directed the Department of Education to address "the impacts of state laws that target LGBTQI+ students," and "charged the department with releasing a sample school policy for achieving full inclusion for LGBTQI+ students."<sup>222</sup> In the executive order, the President also directed the Department of Education "to establish a new Working Group on LGBTQI+ Students and Families, which will advance policies for states, school districts, and other educational institutions to promote safe and inclusive learning environments in

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<sup>218</sup> Deliso, *supra* note 212 ("poll found that Republicans are more likely to support legislation that would prohibit classroom lessons about sexual orientation or gender identity in elementary school, with 61% of GOP identifiers supporting it compared to only 20% of Democrats and 35% of independents"); *Presidential Results, supra* note 5 (states that have anti-LGBT curriculum laws voted Republican in the 2020 presidential elections and states with inclusive LGBT curriculum laws voted Democrat); Study International Staff, *The Benefits of an Inclusive Curriculum*, STUDY INT'L (Aug. 22, 2019), <https://www.studyinternational.com/news/benefits-inclusive-curriculum/>.

<sup>219</sup> President Biden (@POTUS) Twitter (Feb. 8, 2022, 6:07 PM), <https://twitter.com/POTUS/status/1491186973511458818>.

<sup>220</sup> *Id.*

<sup>221</sup> Exec. Order No. 14075 (2022).

<sup>222</sup> *FACT SHEET: President Biden to Sign Historic Executive Order Advancing LGBTQI+ Equality During Pride Month*, The White House (June 15, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact-sheet-president-biden-to-sign-historic-executive-order-advancing-lgbtqi-equality-during-pride-month/>.

which all students thrive.”<sup>223</sup> With the Department of Education’s swift action for Title IX’s proposed rulemaking, it is clear the Biden Administration sees inclusive education as a serious issue affecting the country.<sup>224</sup> Nevertheless, there is only so much the President can do under his scope of authority, and therefore, there also needs to be congressional action regarding inclusive LGBTQ+ education.

In the past, Congress has used its Spending Clause power to direct educational policy, and it should use it once again to regulate LGBTQ+ inclusive curriculum nationwide.<sup>225</sup> Under the Bush Administration, Congress passed the “No Child Left Behind” program.<sup>226</sup> No Child Left Behind (NCLB) was the main law for K–12 general education in the United States from 2002–2015.<sup>227</sup> The law held schools accountable for how kids learned and achieved, through annual testing, reporting, and improving targets.<sup>228</sup> States were not required to comply, but would lose their Title I<sup>229</sup> federal funding if they did not implement the standards laid out in the NCLB act.<sup>230</sup> This forced schools to focus on providing high quality education to disadvantaged kids, particularly English-learners, students in special education, racial minorities, and children from low-income families.<sup>231</sup> Improving kindergarten through twelfth grade

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<sup>223</sup> *Id.*

<sup>224</sup> Jones, *supra* note 42.

<sup>225</sup> *Constitutional Requirements Governing American Education*, STATE UNIV., <https://education.stateuniversity.com/pages/1882/Constitutional-Requirements-Governing-American-Education.html>.

<sup>226</sup> *No Child Left Behind Act of 2001*, LEGAL INFO. INST. (July 2020), [https://www.law.cornell.edu/wex/no\\_child\\_left\\_behind\\_act\\_of\\_2001](https://www.law.cornell.edu/wex/no_child_left_behind_act_of_2001).

<sup>227</sup> Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WEEK (Apr. 10, 2015), <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04>.

<sup>228</sup> Andrew M.I. Lee, *What is No Child Left Behind (NCLB)*, UNDERSTOOD, <https://www.understood.org/en/articles/no-child-left-behind-nclb-what-you-need-to-know> (last visited May 19, 2023).

<sup>229</sup> Title I “provides financial assistance to local educational agencies (LEAs) and schools with high numbers or high percentages of children from low-income families to help ensure that all children meet challenging state academic standards.” *Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A)*, U.S. DEPT OF EDUC. (Oct. 24, 2018), <https://www2.ed.gov/programs/titleiparta/index.html>.

<sup>230</sup> Klein, *supra* note 227.

<sup>231</sup> Lee, *supra* note 228; Klein, *supra* note 227.

education in America was a bipartisan effort than many found crucial in preventing students from falling behind in school and dropping out.<sup>232</sup>

Later, during the Obama administration, the “Race to the Top” initiative was created.<sup>233</sup> The Race to the Top (RTT) program’s goal was to invest money in schools to create new models to personalize learning for students, so they can engage their interests and take responsibility for their success.<sup>234</sup> The RTT program awarded grants to states that created drastic changes in their education systems through innovation and reform.<sup>235</sup> The aims of RTT were to “achieve significant improvement in student achievements and outcomes, close achievement gaps, and improve high school graduation rates.”<sup>236</sup> To qualify for the grant money, states submitted education plans to the U.S. Department of Education, and several states reform plans have been accepted.<sup>237</sup> Those states have received funding based off their plans.<sup>238</sup> The funding states received goes “directly to implementing the reforms outlined in each state’s plans.”<sup>239</sup>

### C. Proposal for LGBTQ+ Inclusive Education

Congress should pass an LGBTQ+ inclusive curriculum program that provides funding to states that implement its standards. The conditional funding used in the

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<sup>232</sup> *No Child Left Behind: Expanding the Promise*, U.S. DEP’T OF EDUC. (Mar. 2005), <https://www2.ed.gov/about/overview/budget/budget06/nclb/expanding-promise.pdf>.

<sup>233</sup> *Race to the Top*, THE WHITE HOUSE, <https://obamawhitehouse.archives.gov/issues/education/k-12/race-to-the-top>.

<sup>234</sup> *Id.*

<sup>235</sup> *Race To the Top (RTT): Reforming Education in Key American States*, CTR. FOR PUBLIC IMPACT (Apr. 15, 2016), <https://www.centreforpublicimpact.org/case-study/race-to-the-top-education-competitive-grant-in-the-us>.

<sup>236</sup> *Id.*

<sup>237</sup> Grace Chen, *What is Race to the Top and How will it Benefit Public Schools*, PUB. SCHOOL REV. (May 19, 2022), <https://www.publicschoolreview.com/blog/what-is-race-to-the-top-and-how-will-it-benefit-public-schools>.

<sup>238</sup> William G. Howell, *Results of President Obama’s Race to the Top*, EDUC. NEXT (July 14, 2015), <https://www.educationnext.org/results-president-obama-race-to-the-top-reform/>; *Race to the Top Policy Map 2015*, EDUC. NEXT (July 10, 2015), <https://www.educationnext.org/race-top-policy-map-2015/> (States that have won PTT grants are Colorado, Arizona, Louisiana, Florida, Georgia, Tennessee, North Carolina, Illinois, DC, Maryland, Delaware, New Jersey, Pennsylvania, Ohio, Kentucky, New York, Rhode Island, Massachusetts).

<sup>239</sup> Chen, *supra* note 237.

No Child Left Behind and Race to the Top programs demonstrate a model for how funding should be implemented.<sup>240</sup> For an LGBTQ+ inclusive education plan to be effective, money would need to be spent on teacher and staff training and on inclusive instructional materials.<sup>241</sup> It is important that teachers, as well as other school faculty and staff, are trained on how to talk and teach about LGBTQ+ topics with a respectful and inclusive lens.<sup>242</sup> It is also necessary to update instructional materials to reflect an LGBTQ+ inclusive attitude, particularly since LGBTQ+ topics have been left out of textbooks for so long.<sup>243</sup> States should need to create plans of reform that would demonstrate how they plan on implementing inclusive LGBTQ+ curriculum in Kindergarten through twelfth grade. Federal funding would be conditional on schools demonstrating that they were meeting LGBTQ+ curriculum targets. Through congressional funding, LGBTQ+ inclusive education can be implemented nationally.

## V. CONCLUSION

There is a current push by states for exclusionary curriculum laws, called the “Don’t Say Gay/Trans” laws. These laws focus on restricting the instruction of LGBTQ+ topics in kindergarten through twelfth grade education and harken back to the “No Promo Homo” laws of the late 20<sup>th</sup> century. These laws further harm LGBTQ+ youth, who are already facing issues of homelessness, mental illness, and suicide. In order to care for the health and well-being of LGBTQ+ children, there needs to be more acceptance in our communities, starting in our schools. Since the

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<sup>240</sup> Klein, *supra* note 227 (states received Title I federal funding if they complied with the requirements of the No Child Left Behind Act, like annual standardized testing and reporting); Chen, *supra* note 237 (In order to receive a federal grant each competing state had to present its case to the Department of Education and there was a continuous monitoring process of each state’s progress, through annual performance reports, accountability protocols, and site visits by the Department of Education).

<sup>241</sup> Prescott, *supra* note 4.

<sup>242</sup> *Professional Development*, GLESEN, <https://www.glsen.org/professional-development>; HRC Staff, *Resources for Creating LGBTQ-Inclusive Schools*, HRC (Sept. 3, 2019), <https://www.hrc.org/news/resources-for-creating-lgbtq-inclusive-schools>.

<sup>243</sup> *Educators Shape First LGBTQ Inclusive Textbooks in the Country*, NAT’L EDUC. ASS’N (Feb. 12, 2018), <https://neadjustice.org/2018/02/12/educators-shape-first-lgbtq-inclusive-textbooks-country/>.



states have deemed this a partisan issue and the courts are stalling progressive change, inclusive LGBTQ+ education is an issue that needs to be handled at the federal level. Inclusive LGBTQ+ curriculum legislation needs to be passed to combat this public health crisis and ensure a bright future for LGBTQ+ youth.