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FEDERALLY FUNDED AND RELIGIOUSLY EXEMPT: EXPLORING TITLE IX EXEMPTIONS AND THEIR DISCRIMINATORY EFFECT ON LGBT STUDENTS

Andrew T. Bell*

INTRODUCTION

In the fifty years since the revolutionary acts at the Stonewall Inn, the LGBT community has experienced a swell of recognition.[1] LGBT individuals are able to openly pursue employment in most states,[2] they are no longer at risk for discrimination in terms of housing, and most recently have been extended the legal right to marry.[3] However, the rights won for the LGBT community have not been

* Candidate for J.D., May 2020, University of Pittsburgh School of Law. The author would like to thank his mother for her support and listening ear during the writing and editing of this Note. Secondly, the author would like to thank G. Clint Kelley, Esq. and his son, Christopher Kelley, for the inspiration for this Note. Finally, the author would like to thank all his fellow LGBT students for their continued persistence and fight in the battle for equal rights.

[1] Mathew S. Nosanchuk, *Response: No Substitutions, Please*, 100 GEO. L.J. 1989, 1996 (2012).

[2] *Employment*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/state-maps/employment (last updated Apr. 15, 2020). Additionally, the Supreme Court granted certiorari in *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 Fed. Appx. 964 (11th Cir. 2018), *cert. granted*, *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019) and *Altitude Express Inc. v. Zarda*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019), cases which address whether sexual orientation is included in Title VII's prohibition of discrimination on the basis of sex, and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019), a case that addresses whether gender identity is included in the same provision of Title VII.

[3] Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

universal. Notably, LGBT individuals are still lacking in concrete educational protections.[4]

Since the Supreme Court recognized the effects of racially discriminatory educational practices on students in *Brown v. Board of Education*,[5] the Court has frequently been called upon to extend these protections beyond racial classifications.[6] To this extent, many other classes have gained educational protections by the hand of the Court.[7] To date, many states and educational institutions have been prevented from discriminating against students based on gender, race, national origin, disability status, and religious belief.[8] While these protections have benefitted a wide swathe of the American student population, equally comprehensive case law or legislation has not come about for LGBT individuals. The closest victory to achieving such protections came when Title IX of the Education Amendments was signed into law by President Richard Nixon.[9] This Title explicitly conditioned the receipt of federal funds on non-discriminatory practices by educational institutions.[10]

Since its inception, Title IX has been unequally applied and its effect has been weakened through a number of exemptions, many of which created loopholes—or as they are known within the Title, exceptions[11]—which circumvent the purpose of the statute for certain parties.[12] One such loophole created exceptions for an

[4] *Education*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/state-maps/education (last updated Jan. 2, 2020).

[5] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[6] Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL'Y 1, 9–35 (2007) (examining the expansion of educational protections beyond race following *Brown v. Bd. of Educ. II*, 349 U.S. 294 (1955)).

[7] *See, e.g.*, *School Anti-Bullying*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/state-maps/anti-bullying (last updated Jan. 23, 2020) (identifying various statewide protections against bullying).

[8] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2018).

[9] *Overview of Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1681 et seq.*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq (last updated Aug. 7, 2015).

[10] *Id.*

[11] 20 U.S.C. § 1681(a) (2018).

[12] *See generally* Amanda Bryk, Note, *Title IX Giveth and the Religious Exemption Taketh Away: How the Religious Exemption Eviscerates the Protection Afforded Transgender Students Under Title IX*, 37

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

"educational institution which is controlled by a religious organization."[13] In order to gain such an exception, the "highest ranking official" at the educational institution must submit a request to the Department of Education "identifying the provisions of Title IX that conflict with a specific tenet of the religious organization."[14] If the Department of Education determines that this specific tenet is in conflict with the provision of Title IX, then the institution is granted an exemption and is allowed to continue discriminating against students while still receiving federal funding.[15] These exemptions create the opportunity for institutions to be allocated taxpayer dollars and then discriminate against those same citizens. While these exemptions are controversial due to their use of federal tax dollars, they become even more problematic in the light of discriminatory actions against students and the absence of any effective channels for recovery for such discrimination.

Once freed from the constraints of Title IX, educational institutions are allowed to implement discriminatory policies so long as they do not conflict with other established legislation. Unfortunately for LGBT students, Title IX is one of the only legislative acts which has been interpreted to cover LGBT students, and thus if a LGBT student—knowingly or otherwise—enrolls at a religiously exempt university or college, that same university can discriminate against the student with little to no recourse.[16]

Such policies, and their obvious inequality, have become a larger part of the higher education narrative under the guidance of Education Secretary Betsy Devos. In 2017, Betsy Devos, as one of her first acts in her new official capacity, publicly revoked the previous administration's guidelines regarding the treatment of transgender students, while revealing concerns about the protections that her administration would provide.[17] This Note seeks to address the inherent injustice in

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CARDOZO L. REV. 751, 752–53, 785 (2015) (explaining how the religious exemption under Title IX has affected transgender students unequally).

[13] 20 U.S.C. § 1681(a)(3).

[14] *Exemptions from Title IX*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T. OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html (last modified Jan. 15, 2020).

[15] *Id.*

[16] Sam Hotchkiss, Comment, *Disputes Between Christian Schools and LGBT Students: Should the Law Get Involved?*, 81 UMKC L. REV. 701, 705 (2013).

[17] Jeremy W. Peters et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html (explaining the repel of the Obama executive order on transgender bathroom rules and Devos's requirement that institutions afford protections from bullying to transgender students).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

allowing these exceptions, which allow for federal funds to be administered to exempt institutions, and the lack of pathways for recovery for LGBT students who have experienced discrimination while enrolled at Title IX exempt colleges and universities.

I. AMERICAN EDUCATIONAL STRUCTURE

In order to understand the challenges facing LGBT students, it is important first to understand the demographics and landscape of American higher education. This requires an analysis of public, private, for-profit, and community colleges, and the outside forces which shape and inform their operations. While all institution types are certainly important, this Note will focus primarily on private institutions, contrasting them with the treatment of similarly situated public institutions.

According to a study by the National Center for Education Statistics, approximately 19.9 million students are projected to attend American colleges and universities in Fall 2020.[18] Of those 19.9 million, 14.7 million will enroll in public schools and 5.2 million in private degree-granting post-secondary institutions.[19] Unfortunately there are no means for surveying the LGBT student population comprehensively, both due to the requirement that students would need to self-disclose and also because a number of states would not permit their youth to be surveyed about their sexual orientation.[20] Of those high school students who were allowed to be surveyed and were comfortable disclosing their sexual identity, 2.4% of respondents identified as gay or lesbian, 8% as bisexual, and 4.2% unsure of their sexual orientation.[21] This CDC study of American youth shows a higher LGBT population than the more conservative poll conducted by Gallup which only purports that 4.5% of the population identify as LGBT.[22] However, when focusing on only those born between 1980–1999, the number rises to 8.1%.[23] Using the lower Gallup

[18] *Fast Facts: Back to School Statistics*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/fastfacts/display.asp?id=372 (last visited Oct. 26, 2019).

[19] *Id.*

[20] Laura Kann et al., *Youth Risk Behavior Surveillance—United States, 2017*, 67 CTRS. FOR DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WKLY. REP. 1, 3 (2018), https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2017/ss6708.pdf.

[21] *Id.* at 8.

[22] Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx.

[23] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

estimate of 8%, with an estimated 19.9 million students entering college, the number of LGBT students entering college would be substantial, at around 1.5 million students.

II. TIMELINE OF HIGHER EDUCATION FUNDING

The concept of a private university is not inherent to the American college system. Therefore, it is important to flesh out what qualifies as a "public college," what constitutes a "private college," and how these differences can greatly impact the application of legislation and availability of funding. During the early years of American education, the use of the words "public" and "private" were not readily utilized as classifications for colleges and universities, and the date of their official application to higher education is debated.[24] In order to appreciate the implications of federal funding and educational autonomy, we must survey the history of educational support and examine how the modern funding framework developed.

A. Higher Education Funding

1. Early American Universities

Public universities, by their nature are controlled by a number of laws. The initial requirements for public institutions were instilled by the university's royal or religious charter[25]—many of which restricted conduct based on religious observance[26]—but these charters were altered following the American revolution.[27] As the United States established itself as a sovereign nation, its fledgling universities developed clearer guidance from the laws of the states which housed them.[28] While these early universities were not true "public institutions" in the way they are understood today,[29] their operations aligned closely with many modern public institutions.

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[24] John S. Whitehead & Jurgen Herbst, *How to Think About the* Dartmouth College *Case*, 26 HIST. EDUC. Q. 333, 333 (1986).

[25] JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 11 (2d ed. 2011).

[26] *Id.* at 15.

[27] *Id.* at 43 ("The most obvious significant change was that the chartering of colleges and other educational and literary institutions now fell under the auspices of state governments, not a national or federal domain.").

[28] *Id.* at 42–43.

[29] *Id.* at 43.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

As the demand for educational institutions began to grow, each state began to develop its own educational institutions, which required the review of the state legislature.[30] Though these colleges and universities were chartered by the state, "there is reasonable doubt that anyone in the early nineteenth century made a substantive distinction between 'public' and 'private' colleges in the United States."[31] During this time the chartering state directly funded the institution, but the chartering state was not always intimately involved in university governance.[32] States not only provided direct legislative grants, but the universities also received public subsidies from the state.[33] Despite receiving public funds, earlier colonial colleges did not consider themselves public, but more akin to "private foundations" that never "surrendered control over policy formation."[34]

The state's involvement in the governance of the university, and the reluctance by the university to surrender control, led to one of the major cases in education law: *Dartmouth College v. Woodward*.[35] For legal and higher education scholars, *Dartmouth College* was not only a windfall case, but also signaled the birth of the modern private university.[36] While this is certainly a prevalent view, it is not held by all legal historians, many of whom cite the lack of university administrators' adoption of the term "private" and Dartmouth's reluctance to comply as signs that this was less than a landmark moment.[37]

During this post-*Dartmouth College* period, there was growing unrest regarding the financial support of various institutions, specifically the support

[30] *Id.* at 70.

[31] *Id.* at 71.

[32] *Id.*

[33] JOHN S. BRUBACHER & WILLIS RUDY, HIGHER EDUCATION IN TRANSITION, A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES 35–36 (4th ed., Transaction Publishers 1997) (1958) ("In addition to outright legislative grants Massachusetts early assigned to Harvard the income from the Gerry across the Charles River and later on the tolls when a bridge replaced the ferry. William and Mary, starting with a royal grant of £2,000 later received from Virginia the duties levied on skins and furs and still later a tax levied on tobacco.").

[34] *Id.* at 35.

[35] Dartmouth Coll. v. Woodward, 17 U.S. 518 (1817) (holding that the New Hampshire legislature could not alter the college's charter because it was a private institution, meaning that the state's act to interfere with a private contract was unconstitutional).

[36] Whitehead & Herbst, *supra* note 24, at 334.

[37] THELIN, *supra* note 25, at 72.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

provided to some institutions that would be known as "private" institutions today, at the expense of the state's truly public educational institutions.[38] Historian Frederick Rudolph—while supporting the *Dartmouth College* decision as dispositive of the public/private split—writes that the crucial support by the states was often confused by the "highly romantic regard held by Americans for unaided effort and by the confusion introduced by the use of such terms as 'public' and 'private' to describe institutions in a world that was itself in the process of defining the meaning of such terms."[39] Rudolph's writings help illuminate the ways in which the public thought of its universities, and how society collectively perceived the role of public education. Additionally, these writings assist in understanding why the *Dartmouth College* decision is not viewed by all lawyers and historians as the watershed holding that many purport it to be.

In 1825, Kentucky Governor Joseph Desha spoke out against the financial support of Transylvania University, a private Kentucky university, stating that "[t]he State has lavished her money for the benefit of the rich, to the exclusion of the poor, . . . the only result is to add to the aristocracy of wealth, the advantage of superior knowledge."[40] This allocation of public funds to private universities—to the benefit of their elite students—was noted throughout the country. Conversely, in 1845 *The Richmond Whig*, a local newspaper, asked "[c]annot the annual appropriation of fifteen thousand dollars to the University [of Virginia] be more profitably expended for the great cause of education that in instructing from one hundred to one hundred and fifty youths, all of whom have the means of finishing their course through their own resources?"[41] This call was for the reallocation of state funds to institutions whose students could not afford to matriculate without state support.[42] While the University of Virginia was, in fact, a public university, its student body closely resembled those of the other elite universities, drawing the ire of the working class.[43] These comments suggest that in the early days following the *Dartmouth College* decision, both the states themselves and their populations did not

[38] *See* FREDERICK RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY 185 (Lawrence A. Cremin ed., 1962).

[39] *Id.*

[40] *Id.* at 206.

[41] PHILLIP ALEXANDER BRUCE, HISTORY OF THE UNIVERSITY OF VIRGINIA, 1819–1919, at 9–10 (1921).

[42] JAMES C. KLOTTER & DANIEL ROWLAND, BLUEGRASS RENAISSANCE: THE HISTORY AND CULTURE OF CENTRAL KENTUCKY, 1792–1852, at 216 (2012).

[43] RUDOLPH, *supra* note 38, at 213.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

look to the technical classification of the university to determine public versus private as much as they did to the institution's clientele.

While *Dartmouth College* did draw a distinction on how much control the state could have over an institution, this was more in terms of the "religious direction of the institution"[44] rather than in terms of public support. John S. Whitehead argues that while universities were referred to post-*Dartmouth College* as private, the modern understanding of a private university did not exist for another sixty years when universities adopted the terms "public" and "private" to distinguish between volunteer and government federal relief programs during the Civil War.[45]

2. Morrill and Postbellum Education

While tenuous before, the state's investment in public higher education became cemented with the enactment of the Morrill Act of 1862.[46] Prior to this Act, only seventeen states had been provided land grants by Congress.[47] The Morrill Act provided "grants of land or land scrip to the states for the support of agricultural and mechanical colleges, for which Congress later provided continuing appropriations."[48] The amount of land which was available for states to grant to institutions was directly connected to the number of congressional representatives, creating more opportunity for the more populous states.[49] A second Morrill Act was enacted in 1890 which specifically required that in order to receive the land, race could not be included in admissions criteria, and if it was, a separate institution must be established for African-American students.[50] In addition to the racial considerations, the 1890 Morrill Act also made grants to the states in the form of

[44] Whitehead & Herbst, *supra* note 24, at 335.

[45] THELIN, *supra* note 25, at 72 ("These terms were used to distinguish voluntary efforts (*e.g.*, the Red Cross) from the corrupt and inefficient federal programs for health and medical services during the Civil War.").

[46] First Morrill Act, ch. 130, 12 Stat. 503 (1862) (codified at 7 U.S.C. §§ 301–305, 307–309 (2018)).

[47] THELIN, *supra* note 25, at 75.

[48] WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: STUDENT VERSION 795 (5th ed. 2014).

[49] THELIN, *supra* note 25, at 76.

[50] 7 U.S.C. § 323 (2018).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

annual appropriations.[51] This second iteration of the Morrill Act greatly increased the support provided to land-grant institutions—from $600,000 annually in the first Act to $1,000,000 annually in the second Act.[52] Since the enactment of the respective Morrill Acts, over seventy institutions have been established as land grant institutions.[53] While not all public, these land grant institutions all draw their support directly from the state government which chartered them and the federal government which provided them funding.[54]

While public institutions were struggling with the implications of the Morrill Act, private institutions were forced to address the strain caused by their diminishing financial support. No longer receiving direct financial support from the state, private institutions were forced to raise tuition in order to fill what was called the "tuition gap,"[55] thus passing costs off to students directly. While this allowed private institutions as a whole to offset their costs, this increase created a new issue for students enrolling at these institutions, in particular those who did not come from affluence.[56] This tuition gap continues to exist in contemporary universities, and the struggle to afford higher education affects more, if not all of today's college students.[57]

B. Landmark Legislation

Another significant moment in the timeline of American higher education was the introduction and enactment of the 1964 Civil Rights Act. This Act was born of a proposed bill by President John F. Kennedy and was designed to eliminate

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[51] GEORGE N. RAINSFORD, CONGRESS AND HIGHER EDUCATION IN THE NINETEENTH CENTURY 109–13 (1972) ("Each grant amounted to $15,000 for the first year, increasing $1,000 annually for ten years and leveling off at $25,000.").

[52] *Id.* at 113.

[53] *NIFA Land-Grant Colleges and Universities*, NAT'L INST. OF FOOD & AGRIC., U.S. DEP'T. OF AGRIC. (Mar. 18, 2019), https://nifa.usda.gov/sites/default/files/resource/LGU-Map-03-18-19.pdf.

[54] *See, e.g.*, *Cornell's Land-Grant Mission Serves New York State*, CORNELL UNIV., https://landgrant.cornell.edu/ (last visited Oct. 28, 2019); Addison Killean Stark, *Living Up to MIT's Land Grant Commitment*, THE TECH (Sept. 21, 2012), https://thetech.com/2012/09/21/killean-v132-n39.

[55] THELIN, *supra* note 25, at 293.

[56] *Id.* (explaining newly developed policies at private institutions such as need-based financial aid and "need-blind" admissions).

[57] Rachel F. Moran, *City on a Hill: The Democratic Promise of Higher Education*, 7 U.C. IRVINE L. REV. 73, 101 (2017).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

discrimination in hiring practices, public accommodations, education, and the like.[58] This bill was heavily debated in the House Judiciary Committee, who paid special attention to the need for a categorical exemption for "religious corporations, associations, and societies."[59] During the floor debate, Representative Graham Purcell of Texas offered an amendment which would provide a categorial exception for religious educational institutions to enable them to discriminate in their hiring.[60] Opposing Purcell, Representative William McCulloch of Ohio spoke against the amendment: "If we adopt this amendment, we may well be building in the bill a legal discrimination which we have worked so long to eliminate."[61] Despite the vocal objections of Representative McCulloch and other members of the House, the amendment passed both the House and the Senate.[62] While it only discussed religious exemptions in the context of educational hiring, the Act laid the groundwork for later iterations of the religious exception, notably the one found in Title IX.

The Civil Rights Act of 1964, while intended to address employment concerns, did have an overarching effect on other public forums. In addition to concerns surrounding the desegregation of places of public accommodation, the Act also stated that "any public college" must not discriminate based on race, color, religion, sex, or national origin if the college is "operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source."[63] This language, "discrimination on the basis of sex," while included in the Act, was not the primary focus and was a last minute inclusion.[64] Due to the last-minute addition of "sex" to the list of protected classes, it was not given

[58] Brigid M. Spicola, Case Note, *Application of Title VII of the Civil Rights Act to Partnerships:* Hishon v. King & Spalding*, 104 S. Ct. 2229 (1984)*, 8 HAMLINE L. REV. 411, 411 (1985); President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963) (transcript on file with the John F. Kennedy Presidential Library).

[59] CARLOS A. BALL, FROM LGBT EQUALITY TO THE FIRST AMENDMENT 175 (2017).

[60] *Id.*

[61] 110 CONG. REC. 2,587 (1964).

[62] BALL, *supra* note 59, at 176.

[63] Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c (2018).

[64] Brian P. McCarthy, Note, *Trans Employees and Personal Appearance Standards Under Title VII*, 50 ARIZ. L. REV. 939, 943–44 (2008).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

the benefit of illuminating floor debate and has scarce legislative history, leaving it to the courts to determine what is meant by discrimination based on sex.[65]

1. Higher Education Act of 1965

In addition to receiving support from the government in the form of land grants, public institutions also received funds through a number of federal programs. One of these federal programs is student financial aid.[66] This aid has been provided in a number of different programs, many of which were created by the Higher Education Act of 1965.[67] This Act was the "first federal measure to provide a broad permanent program of financial aid to both public and private colleges as well as to individual college students."[68] This federal measure can be broken down into five distinct categories of financial aid. The first category is comprised of programs where the federal government provides funds to institutions to establish revolving loan funds, such as the Perkins Loan Program.[69] The second category includes programs which provide funds to institutions who then offer the funds to students in the form of grants, such as Federal Work Study or the Federal Supplemental Educational Opportunity Grant.[70] The third category includes programs in which students receive money directly from the government, such as the "GI" Bill and Pell Grants.[71] In the fourth category of programs, students receive federal money via the state, such as the Leveraging Educational Assistance Partnership Program.[72] Finally, the fifth category is made up of programs in which students borrow directly from the federal government at participating schools, including Direct Stafford Loans, Direct Plus Loans, and Direct Consolidation Loans.[73] These loans, known collectively as Title IV funds or loans, can be applied at any institution which has been deemed eligible to receive funds by the United States Department of Education.[74] These funds, while

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[65] *Id.*

[66] *See* KAPLIN & LEE, *supra* note 48, at 428.

[67] 20 U.S.C. § 1070 (2018).

[68] BRUBACHER & RUDY, *supra* note 33, at 236.

[69] KAPLIN & LEE, *supra* note 48, at 430.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Matthew A. McGuire, Note, *Subprime Education: For-Profit Colleges and the Problem with Title IV Federal Student Aid*, 62 DUKE L.J. 119, 125–26 (2012); *see also* FED. STUDENT AID, U.S. DEP'T OF

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

a central part of American higher education, have become even more critical in light of the rising costs of college attendance.[75]

2. Higher Education Act of 1972

Seven years later, the federal government increased its investment—both financial and legislative—in the future of American higher education by enacting the Higher Education Act of 1972.[76] In fact, with this Act, the federal government emerged as "the principal financier of America's programs of higher education."[77] While the public reception was mixed at the time of enactment,[78] this Act was still considered the most "important federal measure in the field of higher education" in the last century.[79] In addition to the new avenue it created for federal higher education funding, the Higher Education Act of 1972 is well-known for introducing Title IX.[80]

III. TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Title IX of the Education Amendments of 1972 states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[81] While a plain reading of Title IX shows that if an educational institution received "[f]ederal financial assistance" it would not be able to discriminate based on sex, Title IX has faced many challenges since its enactment by the institutions themselves. First, there has been contentious

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EDUC., SCHOOL ELIGIBILITY AND OPERATIONS 2-5–2-21 (2019) (outlining the eligibility requirements for colleges and universities).

[75] Jessica L. Gregory, Notes & Comments, *The Student Debt Crises: A Synthesized Solution for the Next Potential Bubble*, 18 N.C. BANKING INST. 481, 495 (2014).

[76] BRUBACHER & RUDY, *supra* note 33, at 236.

[77] *Id.* at 237.

[78] Fred M. Hechinger, *Nixon Plan is Small Comfort to Colleges*, N.Y. TIMES, Feb. 28, 1971, at E9; Robert B. Semple Jr., *President Signs School Aid Bill; Scores Congress*, N.Y. TIMES, June 24, 1972, at 1; Editorial, *The Busing Distortion. . .* , N.Y. TIMES, June 27, 1972, at 40.

[79] BRUBACHER & RUDY, *supra* note 33, at 237.

[80] *Title IX and Sex Discrimination*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last modified Apr. 2015).

[81] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

debate on what constitutes a "program or activity" for the purposes of the Title.[82] Second, a number of court cases have hinged on what is determined to be "federal financial assistance."[83] Third—and most important for LGBT individuals—is how "sex" should be defined.[84] This third concern is complicated further by the continuously expanding, and intimately intertwined, definitions of gender, sex, and sexuality.

A. Early Challenges to Title IX

While many associate Title IX with lawsuits concerning collegiate athletics, a number of early Title IX cases hinged on much simpler aspects of the Act: the scope of the Act and what qualified as federal assistance. One of the earliest cases brought for a Title IX violation was *Cannon v. University of Chicago*.[85] Geraldine Cannon was a female student who was denied admission to both the University of Chicago and Northwestern University medical schools on the basis of her age.[86] While there had been institutional remedies for Title IX violations prior to this case, there was no recognized private cause of action.[87] Cannon's case was dismissed by the United States District Court for the Northern District of Illinois.[88] This dismissal was affirmed by the Seventh Circuit Court of Appeals for the lack of a private cause of action.[89] After granting certiorari, the Supreme Court recognized that the language of Title IX was largely based on the language found in Title VI, and found that for this reason, a private cause of action did exist under Title IX.[90] *Cannon* thus set the

[82] *See* Amy-Lee Goodman, Comment, *Title VII is Not the Only Cure for Employment Discrimination: The Implications of* Doe v. Mercy Catholic Medical Center *in Expanding Claims for Medical Residents Under Title IX*, 59 B.C. L. REV. E-SUPPLEMENT 64, 76–77 (2018).

[83] Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 342 (2012).

[84] J. Brad Reich, *A (Not So) Simple Question: Does Title IX Encompass "Gender"?*, 51 J. MARSHALL L. REV. 225, 234, 247–48 (2018).

[85] Cannon v. Univ. of Chi., 441 U.S. 677 (1979); Madeleine Weldon-Linne, Note, *Title IX: No Longer an Empty Promise*—Cannon v. University of Chicago, 29 DEPAUL L. REV. 263, 270 (1979).

[86] Weldon-Linne, *supra* note 85, at 265.

[87] *Id.*

[88] Cannon v. Univ. of Chi., 406 F. Supp. 1257, 1260 (N.D. Ill. 1976).

[89] Cannon v. Univ. of Chi., 559 F.2d 1063, 1077–78 (7th Cir. 1976).

[90] *Cannon*, 441 U.S. at 694; Weldon-Linne, *supra* note 85, at 271–72.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

ball in motion, providing all future plaintiffs with the ability to bring a private Title IX discrimination action.[91]

1. Program or Activity

In order to understand the impact of a private cause of action under Title IX, it is important to examine the entities against whom, and the extents to which, it can be applied. Per the original language of the statute, Title IX applies to "discrimination on the basis of sex in any education program or activity."[92] While initially given a plain meaning interpretation, challenges have been made to the recognized definition of a "program or activity."[93] Within the language of the statute, a program or activity is identified as a "college, university, or other postsecondary institution, or a public system of higher education."[94] This definition has been interpreted strictly in order to create a loophole for higher education institutions, providing them opportunities for leniency and ways to avoid applying Title IX, which has led to numerous battles in court.

Following Title IX's implementation, universities utilized a rather narrow approach for defining a program or activity. This narrow interpretation has become known as the "Earmark Theory."[95] This approach was supported by a line of court holdings before ultimately being overruled by Congress four years after Title IX's enactment.[96] The Earmark Theory was the narrowest approach for defining a "program or activity," and one that was preferred by universities seeking to evade government oversight.[97] Under this theory, the "smallest identifiable unit that is within an institution responsible for the alleged discrimination and that is specifically 'earmarked' to receive direct federal aid."[98] Following this theory, an individual would have to experience discrimination from the specifically funded program, for example an athlete would have to be discriminated against by the athletic team in

[91] Weldon-Linne, *supra* note 85, at 271–72.

[92] 34 C.F.R. § 106.1 (2019).

[93] *See* Claudia S. Lewis, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language with Its Broad Remedial Purpose*, 51 FORDHAM L. REV. 1043, 1044–45 (1983).

[94] 34 C.F.R. § 106.2(h)(2)(i).

[95] Lewis, *supra* note 93, at 1045.

[96] 20 U.S.C. § 1687 (2018).

[97] Lewis, *supra* note 93, at 1044–45.

[98] *Id.* at 1044.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

order to sustain a private cause of action. The first case to highlight the Earmark Theory was *Grove City College v. Bell.* Grove City College—a private Christian liberal arts institution[99]—"sought to preserve its institutional autonomy by consistently refusing state and federal assistance."[100] In order to maintain this institutional control, the College made the choice to not participate in many state and federal programs, and by doing so, the College believed it was free from the expectation of executing the "[a]ssurance of Compliance required by 34 C.F.R. § 106.4."[101] The case then hinged on whether funds were earmarked for a specific purpose, and whether Grove City College's enrollment of students who received Basic Education Opportunity Grants qualified as federal aid under the language of Title IX.[102]

The *Grove City College* Court held that the "program" which was implicated by the receipt of federal funds was specifically Grove City College's financial aid program, and not the university as a whole.[103] This holding embraced the Earmark Theory and restricted an otherwise expansive interpretation of Title IX.[104] This ruling insulated the admissions program from many of the programs that Title IX was seemingly designed to protect, such as athletics, employment, and any other program or activity at the university.[105] Under the Earmark Theory of funding, universities, like Grove City College, would be permitted to evade Title IX requirements as long as the particular department performing the discriminatory act did not receive support by way of federal funds.

The second case to examine the Earmark Theory, decided the same year as *Grove City College*, was *University of Richmond v. Bell*.[106] This case focused on whether the Department of Education was "authorized to investigate and regulate the athletic program of a private university where the athletic program itself receive[d] no direct federal financial assistance."[107] The federal district court found that since

[99] *Our Story*, GROVE CITY COLL., http://www.gcc.edu/Home/Our-Story (last visited Oct. 25, 2019).

[100] Grove City Coll. v. Bell, 465 U.S. 555, 559 (1984).

[101] *Id.* at 560.

[102] *Id.*

[103] *Id.* at 571.

[104] *Id.*

[105] Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. KAN. L. REV. 327, 383 (2016).

[106] Univ. of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982).

[107] *Id.* at 322.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

the athletic program was the beneficiary, and not the "whole university," the purview of the Department of Education was limited to that athletic department.[108] This decision, like the one in *Grove City College*, seemed to contradict the intended purpose of Title IX.

These decisions were quickly corrected by another Title IX case, *North Haven Board of Education v. Bell*,[109] which examined whether the Department of Education could examine the employment practices of a public school system.[110] While lower courts applied the Earmark Theory to determine that the employment practices were outside of the reach of the relevant program receiving federal funds, the Supreme Court utilized a more expansive understanding of "program-specific."[111] Specifically, that "courts should defer to the rules and regulations put forth by the federal agency empowered to enforce the particular federal law,"[112] and "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language."[113]

Following *North Haven*, the "program" loophole—and by extension, the Earmark Theory—was effectively closed by Congress with the passage of the Civil Rights Restoration Act of 1987. This Act restored "the prior consistent and long-standing executive branch interpretation and broad, institution-wide application" of Title IX.[114] With this new Act, any educational program or activity of any university, public or private, which accepts federal funds in any form falls under the regulation of Title IX.[115]

2. Federal Financial Assistance

As Title IX is exclusively concerned with the allocation of federal funds to educational entities, with the activity or program requirement understood, it is important to examine the ways in which those funds are provided to the universities. At the K-12 level these funds often are allocated as a part of a government

[108] *Id.* at 323.

[109] N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).

[110] Anderson, *supra* note 83, at 340–41.

[111] Lewis, *supra* note 93, at 1044.

[112] Anderson, *supra* note 83, at 341.

[113] *N. Haven*, 456 U.S. at 521 (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

[114] 20 U.S.C. § 1687 (2018).

[115] Bryk, *supra* note 12, at 762.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

initiative—frequently a breakfast or lunch program[116]—in which federal dollars are used to supplement school costs, or through grants programs for students with low socioeconomic status.[117] Thus, under Title IX, any educational institution, public or private, which accepts federal funds of any kind, cannot discriminate against students, unless they have been granted a specified exception.[118] Under Title IX there are eight possibilities for exemptions. While most exemptions relate to single-sex education, the exemptions notably include a so-called "religious exemption."[119] This exemption, which will be explored more thoroughly below, provides that an educational institution "controlled by a religious organization" can be exempted if compliance with Title IX would not be consistent with their religious tenants.[120]

While this religious exception affects a large number of K-12 students—as seventy-eight percent of K-12 students who attend a private school attend a religiously affiliated school[121]—it affects far more undergraduate and graduate students. Rather than lunch programs, the federal funds provided to these undergraduate and graduate students come in the form of federal student loans.[122] These student loans not only facilitate many students going to college, they also greatly supplement the operating budget of many universities.[123] This can become problematic when examining the finances of institutions which have been given a religious exemption, such as the Baptist powerhouse Liberty University, whose

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[116] *National School Lunch Program*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., https://www.fns.usda.gov/nslp (last visited Oct. 25, 2019).

[117] *Programs: Rural & Low-Income School Program*, U.S. DEP'T OF EDUC., https://www2.ed.gov/programs/reaprlisp/index.html (last updated Sept. 1, 2017).

[118] 20 U.S.C. § 1681 (2018).

[119] *Id.*

[120] *Id.* § 1681(a)(3).

[121] STEPHEN P. BROUGHMAN ET AL., NAT'L CTR. FOR EDUC. STATISTICS, CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2015–16 PRIVATE SCHOOL UNIVERSE SURVEY 2 (Aug. 2017), https://nces.ed.gov/pubs2017/2017073.pdf.

[122] BRUBACHER & RUDY, *supra* note 33, at 236.

[123] Tom Gjelten, *Christian Colleges are Tangled in Their Own LGBT Policies*, NPR (Mar. 27, 2018), https://www.npr.org/2018/03/27/591140811/christian-colleges-are-tangled-in-their-own-lgbt-policies ("'The fear is so large in many institutions because 40 or 50 or maybe even 60 percent of their budgets are really coming from the federal government,' says Dale Kemp, the chief financial officer at Wheaton College in Illinois and the speaker at the CCCU session. 'To think they could survive without that [funding] would be catastrophic.'").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

annual budget primarily relies on student loans.[124] Whether the university receives the funds directly or indirectly, such as in the case of loans and scholarships, the university would still be subject to Title IX oversight.[125]

B. Title IX's Religious Exemption

As briefly discussed above, within Section 106.12 of Title IX lies an inherent exemption for religious organizations which are "controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the organization."[126] If granted, this exemption allows institutions to receive federal financial assistance while continuing practices which would otherwise be barred by Title IX. In order to receive such an exception, organizations were required to meet one of three criteria proving their religious control which has become known as the "control test"[127]:

> (1) It is a school or department of divinity, defined as an institution or a department or branch of an institution whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation, or to prepare them to teach theological subjects; or
>
> (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or
>
> (3) Its charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

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[124] Tobin Grant, *Liberty University, a Hub of Conservative Politics, Owes Rapid Growth to Federal Student Loans*, WASH. POST (July 15, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/07/15/liberty-university-a-hub-of-conservative-politics-owes-rapid-growth-to-federal-student-loans/?utm_term=.6fba00dea7d8.

[125] Bryk, *supra* note 12, at 763.

[126] 20 U.S.C. § 1681(a)(3) (2018).

[127] Cara Duchene, *Rethinking Religious Exemptions from Title IX After Obergefell*, 2017 BYU EDUC. & L.J. 249, 251.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

> [Office for Civil Rights] evaluates a religious exemption claim consistent with the requirements of the First Amendment to the U.S. Constitution and the Religious Freedom Restoration Act.[128]

This control test, established in 1977, has remained an internal policy within the Office of Civil Rights.[129] These exemptions were written in a way that allowed for nearly any religious institution to qualify, which can be seen in the language of the policy, noting an institution's "claim" of an exemption[130] rather than an application for one. This process was critiqued by leaders of private institutions who believed that any government evaluation of their religiosity was a violation of the First Amendment, and requested that any "application" process be removed in favor of an automatic exemption.[131] Despite the initial aversion by university administrators to government oversight, in the forty years since the introduction of the exemption, the Office for Civil Rights has not denied a single application for a religious exemption,[132] and as of 2016, 240 institutions have been given an exemption.[133] As of March 2019, the Office for Civil Rights has granted 333 religious exemption applications, making 277 institutions exempt from Title IX.[134] While institutions have been asked to provide additional information to supplement their application, and some institutions have subsequently retracted their application, the Office for Civil Rights has not denied any religious institution their ability to diverge from the requirements of Title IX.[135]

While it appears from the language of the policy, and the Office of Civil Rights' track record regarding applications, that the religious exemption is automatically granted, this belief was expanded following an incident at George Fox University. In this case, a transgender male attending a private Quaker college requested to live

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[128] *Exemptions from Title IX*, *supra* note 14.

[129] Duchene, *supra* note 127, at 251.

[130] 10 C.F.R. § 1042.205 (2019).

[131] Duchene, *supra* note 127, at 252–53.

[132] Augustine-Adams, *supra* note 105, at 396.

[133] *Id.* at 327 n.1. Since publication, the *Institutions Currently Holding Religious Exemption* report has been removed from the Department of Education website.

[134] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., INSTITUTIONS CURRENTLY HOLDING RELIGIOUS EXEMPTION, www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/rel-exempt-approved-and-pending.xlsx (last updated June 14, 2018).

[135] Augustine-Adams, *supra* note 105, at 330.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

in the all-male residence hall on campus.[136] After refusing the student's request, the university contacted the Office of Civil Rights requesting a religious exemption for its housing, restrooms, locker rooms, and athletic programs.[137] This timeline is critical because in order to have a valid claim under Title IX there must be discrimination based on sex at an institution which, *at the time of the discrimination*, does not have any exemption. George Fox University had already discriminated against the transgender student before it contacted the Office of Civil Rights, and yet the discrimination was still permissible under the religious exemption.[138] The Office of Civil Rights operated on the notion that George Fox University had a presumptive religious exemption based on its institution type and the granted applications of similar institutions.[139] This shows that not only has the "control test"—which is used to regulate applications for religious exemptions—been completely loosened, but also the application process itself has reached the point of irrelevance.

C. Title IX and LGBT Students

Transgender students face unique challenges in pursuing justice under Title IX. This is primarily due to the ever-changing definition of discrimination *based on sex*. For the majority of the Title's life, legislators and courts have used a strict, biological, male-female dichotomy to define "sex."[140] While such a bright line made the Act initially implementable, application of Title IX has become increasingly complex as courts examine discrimination based on gender, gender stereotypes, and sexual orientation.

In order to bring a cause of action, an injured transgender student must allege a number of acts to establish a prima facie case. First the student must allege that the

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[136] Bryk, *supra* note 12, at 755.

[137] Letter from Robin Baker, President, George Fox Univ., to Catherine Lhamon, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ. (Mar. 31, 2014), http://www.scribd.com/doc/235291763/Religious-Exemption-Requests (requesting religious exemption for George Fox University).

[138] Letter from Catherine E. Lhamon, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., to Dr. Robin Baker, President, George Fox Univ. (May 23, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/george-fox-university-response-05232014.pdf (evidencing that George Fox University's exemption was not granted until May 23, 2014, months after the discrimination occurred and yet this discrimination was deemed justifiable under the exemption).

[139] *Id.* ("The University is exempt from these provisions to the extent they require a recipient to treat students consistent with their gender identity, but doing so would conflict with the controlling organization's religious tenets.").

[140] Katherine Kraschel, *Trans-Cending Space in Women's Only Spaces: Title IX Cannot be the Basis for Exclusion*, 35 HARV. J.L. & GENDER 463, 469 (2012).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

student was harassed based on sex.[141] Second, the plaintiff must prove that the school had notice of the discrimination.[142] Third, the harassment that the plaintiff endured must have been so severe, pervasive, and objectively offensive that it effectively prevented the plaintiff's access to education.[143] Finally, the plaintiff must prove that the school acted with deliberate indifference.[144]

While initially most cases of Title IX discrimination were brought on behalf of students claiming harassment by teachers, the overwhelming number of cases have now shifted to peer-to-peer harassment.[145] In a 2006 study by the American Association of University Women, 89% of college students surveyed reported sexual harassment occurring at their college, with 21% stating that this harassment was peer-to-peer.[146] The same study found that LGBT "students are more likely than heterosexual students to be sexually harassed in college and to be sexually harassed often" and that "LGBT students are more likely to have been harassed by peers (92 percent versus 78 percent)."[147] This kind of pervasive sexual harassment often constitutes the basis for LGBT students bringing Title IX claims.

1. Harassment Based on Sex

The initial hurdle a student plaintiff must clear is that the discrimination experienced was based on sex. Initially courts looked exclusively to the traditional male-female distinction for determining if discrimination occurred. As explored in *Oncale v. Sundowner Offshore Services*, the discriminatory act must be based on sex and cannot be "merely tinged with offensive sexual connotations."[148] One clear example of such discrimination is harassment with a clear sexual component, such as repeated touching or pervasive unwanted advancements.[149] The court held that

[141] Farah Ahmed, *Title IX of the 1972 Education Amendments*, 5 GEO. J. GENDER & L. 361, 366 (2004).

[142] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

[143] Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999).

[144] *Id.*

[145] Julie C. Doss, *Peer to Peer Sexual Harassment Under Title IX: A Discussion of Liability Standards from* Doe v. Londonderry, 24 TULSA L.J. 443, 446 (1999).

[146] CATHERINE HILL & ELENA SILVA, DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 14 (2005).

[147] *Id.* at 17.

[148] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

[149] *See* Carmichael v. Galbraith, 574 F. App'x 286 (5th Cir. 2014).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

such behavior would constitute harassment based on sex for the purposes of establishing a Title IX claim.[150]

A second option for proving discrimination is establishing that the discrimination occurred after the student failed to conform with gender stereotypes. While "stereotypes" may be ambiguous, there are a number of cases which have been decided on the basis of gender stereotype discrimination. In *Lipsett v. University of Puerto Rico*, the court held that harassment against a woman by male doctors who believed that women were not equipped to be surgeons constituted sufficient discrimination based on sex.[151] In determining what would constitute discrimination based on a gender stereotype, courts have looked to gendered derogatory name calling,[152] bullying based on mannerisms,[153] and also harassment based on a student's physical gender identity and whether the student actually possesses that identity or not,[154] though it is not enough for these to simply be present on their own. In *Davis v. Monroe County Board of Education*, the Court explained that because of the often immature nature of school children, the discrimination in question must be considered in light of a "constellation of surrounding circumstances"[155] and must be "so severe, pervasive, and objectively offensive . . . that the victim-students are effectively denied equal access to an institution's resources and opportunities."[156] It is important to note that discrimination based on *sexual orientation* can be included in this discrimination based on gender stereotypes, as lesbians, gays, and bisexuals are also frequently seen as diverging from gender expectations.[157]

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[150] *Id.*

[151] Lipsett v. Univ. of P.R., 864 F.2d 881 (1st Cir. 1988).

[152] Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011).

[153] J.R. v. N.Y.C. Dep't of Educ., No. 14-CIV.-0392-ILG-RML, 2015 WL 5007918, at *6 (E.D.N.Y. Aug. 20, 2015).

[154] Reed v. Kerens Indep. Sch. Dist., No. 3:16-CV-1228-BH, 2017 WL 2463275, at *12 (N.D. Tex. June 6, 2017) (explaining that J.R., because of his height and weight, appeared to have breasts which caused students to question his sexuality and manhood).

[155] Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651 (1998) (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

[156] *Id.*

[157] *See* Snelling v. Fall Mountain Reg'l Sch. Dist., No. CIV.-99-448-JD, 2001 WL 276975, at *4 (D.N.H. Mar. 21, 2001); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1092–93 (D. Minn. 2000).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

Transgender individuals also have the opportunity to bring Title IX claims against the university itself for discriminatory treatment related to gendered facilities. In order to prove such discrimination, the student must show that they were discriminated against by the program receiving federal funds,[158] that the discrimination was based on sex, and that the student was harmed by it.[159] Until recently, students had been successful in bringing suits against school districts and colleges where transgender students were forced to use the facilities of the gender they were assigned at birth.[160] While these suits have been successful, they require an interpretation of "sex" which has come under fire.

IV. GOVERNMENT ACQUIESCENCE

A. Transgender Recognition and Title IX

In order to receive protections by the government, individuals must first be recognized by that government. While the term LGBT is often used as an umbrella term, at its core it represents four distinctive identities, each with their own formalized protections—Lesbian, Gay, Bisexual, and Transgender. While these protections are often recognized as covering the comprehensive group, each respective constituency had to receive its own legal protections through the courts.

In May 2016, under the Obama Administration, the United States Department of Justice and the Department of Education took a broad and inclusive step by formally addressing how transgender students were affected by Title IX.[161] In their joint "Dear Colleague" letter, these Departments identified how schools should treat transgender individuals in terms of creating safe environments, proper use of identification documents, sex-segregated activities and facilities (including locker rooms and restrooms), and educational documents.[162] Perhaps most importantly the letter clearly explained what was covered by Title IX:

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[158] *See supra* Part III.A.

[159] Ahmed, *supra* note 141, at 363.

[160] Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267 (W.D. Pa. 2017) (holding that high school students successfully brought a discrimination claim after they were prevented from using the restroom that aligned with their gender identity).

[161] Civil Rights Div. & Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Catherine E. Lhamon & Principal Deputy Assistant Attorney General for Civil Rights Vanita Gupta*, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST. (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

[162] *Id.* at 2–7.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

> The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments' interpretation is consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination.[163]

The letter also explained that "gender identity" was an individual's internal sense of gender, which may or may not align with the sex the individual was assigned at birth.[164] This letter not only responded to increasing tensions surrounding the accessibility of restrooms for transgender individuals, but also countered the anti-LGBT statements of many religious leaders.[165] One such leader was Travis Weber, who, speaking on behalf of the Center for Religious Liberty at the Family Research Council, stated that "[w]e don't think that the law, as a legal matter alone, supports any sort of class protection, class distinction for sexual orientation and gender identity."[166] With this Dear Colleague letter, categorical protections were provided to transgender students across America.

Within a month of Trump's inauguration, the Trump Administration issued another "Dear Colleague" letter which immediately rolled back the protections provided by the Obama Administration.[167] This Trump Administration letter stated that the previous Title IX guidance was improper and did not engage in thorough legal analysis or any public process.[168] Despite withdrawing and rescinding the previous guidance without providing any policy substitute, the letter purported that it did "not leave students without protections from discrimination, bullying, or harassment,"[169] since all schools have a duty to create a safe environment.

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[163] *Id.* at 2.

[164] *Id.* at 1.

[165] Debbie Elliott, *Transgender Rights, The New Front in The Culture Wars*, NPR (May 11, 2016), https://www.npr.org/2016/05/11/477607429/the-fight-over-transgender-rights.

[166] *Id.*

[167] Civil Rights Div. & Office for Civil Rights, *Dear Colleague Letter from Acting Assistant Secretary for Civil Rights Sandra Battle and Acting Assistant Attorney General for Civil Rights T.E. Wheeler, II*, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST. 1 (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

[168] *Id.*

[169] *Id.* at 2.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

In late October 2018, the *New York Times* reported on a leaked memorandum from the Department of Health and Human Services under the guidance of the Trump Administration which further discussed transgender recognition.[170] This memo, according to the *New York Times*, stated that "[t]he agency's proposed definition would define sex as either male or female, unchangeable, and determined by the genitals that a person is born with."[171] This new definition would prevent transgender individuals from being protected by Title IX or Title VII as each of these protect "sex" not "gender." Without these protections, transgender students would not be able to bring any sort of claim of discrimination, nor would they be entitled to any legal recovery. Removing the legal definition would not prevent or reduce discrimination against transgender individuals, but would increase the pleading burden facing transgender plaintiffs, and would in fact leave students without the protections alluded to in the February 2017 Dear Colleague letter.

With this new, rigid definition of "sex," transgender students would no longer be able to bring a Title IX claim based on the use and availability of facilities which align with their identity. Further, it is uncertain how this new terminology would affect claims based on gender stereotypes and identity, but it is safe to say that the results would likely be less than favorable for transgender plaintiffs.

V. FALLACY OF SCHOOL CHOICE

Transgender, and more broadly LGBT, students face challenges beyond governmental recognition in terms of achieving educational justice. In addition to legislators, many university administrators and religious education advocates mischaracterize the college selection process for LGBT students.[172] Many of the proponents of these discriminatory exemptions argue that every student who enrolls at a religious institution, exempted under Title IX, understands the commitment of attendance and thus accepts any potential negative and discriminatory treatment.[173]

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[170] Erica L. Green et al., *'Transgender' Could be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 10, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html.

[171] *Id.*

[172] Ginger O'Donnell, *Toeing the Line: Christian Colleges Send Mixed Signals to LGBTQ+ Students*, INSIGHT INTO DIVERSITY (Sept. 18, 2018), https://www.insightintodiversity.com/toeing-the-line-christian-colleges-send-mixed-signals-to-lgbtq-students/.

[173] David Wheeler, *The LGBT Politics of Christian Colleges*, THE ATLANTIC (Mar. 14, 2016), https://www.theatlantic.com/education/archive/2016/03/the-lgbt-politics-of-christian-colleges/473373/ ("Students at Christian colleges freely choose to attend and willingly agree to the community covenants which are based

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http://lawreview.law.pitt.edu

This is a dangerous mentality as it not only shifts the responsibility to the student experiencing the discrimination, but also suggests that the student being discriminated against knew this was likely or a possibility. This is a standard we do not accept in other areas of the law, and we should not allow it to exist in an educational context. This problematic viewpoint was also espoused in the 1985 Department of Education memorandum, "Policy Guidance for Resolving Religious Exemption Requests."[174] In this memorandum, the Department of Education wrote that "[t]hese institutions make no secret of the religious tenets that influence the institution and potential faculty and students are aware of this influence upon joining the institution community."[175]

While it is true that universities may be public about their religiosity, it is less believable that every student is aware of the ways in which this religiosity could influence their constitutional rights. Unfortunately, while this argument is pervasive, it is also built on a fallacy of school choice and naively ignores the influence of familial pressure,[176] cultural expectation,[177] occupational trajectories, and socioeconomic restraints.[178] Finally, this understanding that the student knew what they were getting themselves into by applying to, and eventually enrolling at, these religious institutions ignores the complexity that goes into an individual's sexual orientation and gender identity.

First this understanding of college choice largely ignores the multiple factors which impact a student's college choice. Researchers have noted that "three sets of

on the theological underpinnings of the institution and its understanding of what is best for human flourishing.").

[174] Memorandum from Harry M. Singleton, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Reg'l Civil Rights Dirs. (Feb. 19, 1985), https://www2.ed.gov/about/offices/list/ocr/docs/singleton-memo-19850219.pdf.

[175] *Id.*

[176] *See generally* NOEL-LEVITZ, INSTITUTIONAL BRAND AND PARENTAL INFLUENCE ON COLLEGE CHOICE (2009), https://files.eric.ed.gov/fulltext/ED541569.pdf (investigating parental influence on student college choices).

[177] *See generally* Amaura Nora, *The Role of Habitus and Cultural Capital in Choosing a College, Transitioning from High School to Higher Education, and Persisting in College Among Minority and Nonminority Students*, 3 J. HISP. HIGHER EDUC. 180 (2004) (studying the influence of cultural factors on college choice and success).

[178] *See generally* Andrew Koricich et al., *Understanding the Effects of Rurality and Socioeconomic Status on College Attendance and Institutional Choice in the United States*, 41 REV. HIGHER EDUC. 281 (2018) (studying the effects of socioeconomic and rural location on college choice).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

factors influence college decisions: academic, financial, and individual traits/experiences."[179] Logically, a student can only enroll in an institution if they have been admitted and where they can afford to attend. To suggest that an LGBT student has the means and the ability to enroll at any other college which is not exempted from Title IX completely disregards all the factors which contribute to a student's choice. Further, family traditions of attending a particular school, or potential kinds of schools—for example Historically Black Colleges and Universities, a liberal arts institution, or a university in a certain geographic area—may limit the potential number of institutions to which a student may feasibly apply. It is also important to consider career aspirations when factoring in a student's college choice. Finally, there are often other considerations such as the opportunity to participate in college athletics or study in a particularly prestigious academic program that can substantially affect school choice. Each of these factors may encourage a student who is conscious of their LGBT identity to go back into the closet or to disregard the possibility of negative or discriminatory actions against them should they enroll.

A. LGBT Identity Formation

In order for an LGBT student to be "aware" of the religious influence of their institution and the implications of that within Title IX, they must also be consciously aware of how their identity interacts with Title IX. While some students may be aware of their identity at the time they enter the university, it is surely not representative of every student. Researcher Vivian Cass proposed an identity framework to help specifically assess the individual identity formation of LGBT individuals.[180] Cass's model utilizes six developmental stages of homosexual identity development and has been widely recognized as the preeminent model for LGBT identity formation.[181] Within this six stage model, only three stages include internal acceptance of an LGBT identity, with selective outward expression beginning at Stage Four.[182] Prior to Stage Four, "[d]isclosure to heterosexuals at this point is extremely limited, with the emphasis placed on the maintenance of two

[179] Terrell L. Strayhorn et al., *Factors Affecting the College Choice of African American Gay Male Undergraduates: Implications for Retention*, 11 NAT'L ASS'N STUDENT AFF. PROF. J. 88, 93 (2008).

[180] *See generally* Vivienne C. Cass, *Homosexuality Identity Formation: Testing a Theoretical Model*, 20 J. SEX RES. 143 (1984) (outlining the six stages and sixteen factors used to describe the stages of identity formation).

[181] Strayhorn et al., *supra* note 179, at 91.

[182] Cass, *supra* note 180, at 152.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

separate images: a public or presenting one (heterosexual) and a private one (homosexual) exhibited when only in the company of homosexuals."[183] Within Cass's original study, twenty-one percent of participants reported being at this, or a lesser, degree of acceptance with their LGBT identity.[184] Should these students enroll at a religious institution, it is highly unlikely that they would outwardly and publicly project an LGBT identity, if they were even aware of such an identity themselves.

Further compounding onto the degree of identity comprehension and outward expression of an LGBT identity are the cultural pressures of religious and societal acceptance.[185] Individuals who are raised in highly religious communities or families are substantially more likely to be affected by selective intolerance with "general religiousness correlat[ing] strongly with less acceptance of homosexuals."[186] Such treatment at the community level could cause an individual who internally suspects themselves of being LGBT to suppress this identity for fear of rejection or retribution. The same pressure which would keep an LGBT individual from accepting an LGBT identity could also prevent them from eliminating a potential educational institution simply because it is associated with a particular religion, or to disclose this identity at the time of application.

Finally, this argument hinges on the fact that the LGBT individual is out and open to their family, a situation which varies wildly within the LGBT community.[187] If a student is not out to their family, or in a situation in which such news could not be delivered safely and securely, that same student would not be able to explain why they could not apply to, or safely enroll at, a certain college. Without this disclosure, a student may find themselves pressured to enroll at a Title IX exempt institution with no reasonable alternative, and thus would be forced to endure any discrimination which may take place.

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[183] *Id.* at 151.

[184] *Id.* at 155.

[185] *See* Ian K. MacGillivray, *Educational Equity for Gay, Lesbian, Bisexual, Transgendered, and Queer/Questioning Students: The Demands of Democracy and Social Justice for America's Schools*, 32 EDUC. & URB. SOC'Y 303 (2000).

[186] Wade C. Rowatt et al., *Associations Among Religiousness, Social Attitudes, and Prejudice in a National Random Sample of American Adults*, 1 PSYCHOL. RELIGION & SPIRITUALITY 14, 20 (2004).

[187] Joanne LoCicero, *The Right to be Yourself: LGBT Students in New Jersey Public Schools*, N.J. LAW., June 2013, at 51 (explaining that "coming out is a personal and significant decision" which can have direct effects on family life).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

VI. PATHWAY TO RECOVERY

LGBT students at religiously exempt institutions are frequently expelled from their respective universities for "Student Code Violations," or simply not following the prescribed lifestyle of their university.[188] This is a less explicit version of discrimination, but meets the criteria for a valid Title IX claim nonetheless. Should a student be expelled under such circumstances, there is no opportunity for the student to recover the thousands of dollars, if not more, that they have paid in student tuition during their tenure at the exempted institution. Alternatively, if this same student experienced the same discriminatory treatment at a public college, they would have a strong claim under Title IX. One LGBT student, Danielle Powell, made headlines when she was expelled from Grace University, a private Christian university which had been granted a religious exemption, for her lesbian relationship.[189] Following her expulsion, Ms. Powell received a bill for $6,000, a percentage of the scholarship she had been awarded to attend Grace University.[190] Per the university policy, students must complete 60% of the semester in order to receive their scholarship credit, and Ms. Powell, at the time of expulsion had completed 54.89%.[191] Grace University defended its choice to expel Ms. Powell by noting that all students were required to sign a statement of agreement with Grace University's community standards during their first year.[192] Adding insult to injury, Ms. Powell chose her institution because of athletic opportunities, and at the time of admission she was not aware of her homosexual identity.[193] Without this knowledge, there is no way that Ms. Powell could have anticipated a conflict with the values statement she signed as a entering student at Grace University.

Another similarly situated student, Gary Campbell, was expelled from Clark Summit University, a Christian university in Pennsylvania which had not applied for

[188] Alan Noble, *Keeping Faith Without Hurting LGBT Students*, THE ATLANTIC (Aug. 15, 2016), https://www.theatlantic.com/politics/archive/2016/08/christian-colleges-lgbt/495815/.

[189] Allie Grasgreen, *Expelled for Sexuality, and Sent a Bill*, INSIDE HIGHER ED (June 13, 2013), https://www.insidehighered.com/news/2013/06/13/student-expelled-being-gay-and-charged-6000-back-tuition-protests-online-petition.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

a religious exemption, after the university discovered that he is gay.[194] Gary, who had taken a personal leave from the University, was six credits away from graduating when he was informed that his application for readmission would not be granted and he would not be able to complete his degree because he had violated the "sexual purity" policy of their student handbook by identifying as a homosexual.[195] With his inability to re-enroll at Clark Summit, and being two courses away from completion of his degree, Campbell feared he would never be able to complete a college degree and would leave with more than $30,000 in debt and no degree.[196] Due to the publicity of Mr. Campbell's case in the local newspaper, Gary was offered admission to a nearby university, Lackawanna College, where he was only required to complete fifteen credit hours in order to receive his degree.[197] While Mr. Campbell found a remedy for the discriminatory treatment he received at the hands of Clark Summit University, his success is credited to the local notoriety associated with his case, a benefit which cannot be granted to every wronged LGBT student. Danielle Powell and Gary Campbell are clear and unfortunate examples of what can happen if gender and sex-based discrimination are allowed to occur unchecked at these institutions.

In addition to the tuition loss, such an expulsion would likely be noted on their student transcript, making transfer and re-enrollment at another institution unlikely. In many cases such expulsions occur later in a student's tenure at the institution—perhaps due to an increase in personal confidence, individual awareness of identity, or general maturation—thus increasing the amount of tuition lost exponentially, and reducing the chances of any other educational institution admitting them.[198] If the student is able to transfer to another institution there is no assurance that all of their previously earned credits will transfer to their new institution with them. How many credits a particular college will accept is up to the university, and many institutions

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[194] Jeremy Bauer-Wolf, *Turned Away for Being Gay*, INSIDE HIGHER ED (Sept. 13, 2018), https://www.insidehighered.com/news/2018/09/13/clarks-summit-university-refuses-let-gay-student-return.

[195] *Id.*; *see Live in Community, Student Handbook*, CLARKS SUMMIT UNIV., https://www.clarkssummitu.edu/campus-life/osd-values/ (last visited Oct. 31, 2019).

[196] Sarah Hofius Hall, *College Dismisses Man for Being Gay*, CITIZEN'S VOICE (Sept. 10, 2018), https://www.citizensvoice.com/news/college-dismisses-man-for-being-gay-1.2383962.

[197] Sarah Hofius Hall, *Dismissal to Degree*, TIMES-TRIB. (May 20, 2019), https://www.pressreader.com/usa/the-times-tribune/20190520/281638191665703.

[198] Many higher education institutions apply a credit cap to transfer students, thus not allowing someone who had completed too many credits at another school to transfer and finish at their institution without repeating courses. *See, e.g.*, *Semester and Credit Requirements for Graduation*, BRANDEIS UNIV., https://www.brandeis.edu/registrar/bulletin/provisional/arts-sciences/req-ugrd/semestercreditreq.html.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

require a base number of credits to be completed at their university in order to receive a degree from that school.[199] Should an LGBT student have to retake classes, or lose credits during their transfer, they would again be financially penalized for their LGBT identity.

Even if there is a possibility of transferring to a different institution, this process can still be extremely expensive for the individual student. While there is not much data surrounding LGBT students' attempts to recoup lost funds, looking to other claims brought under Title IX, it is clear that sexual harassment and assault can result in a large financial loss to the student being harassed.[200] One college student explained that following their sex-based harassment, and subsequent Title IX investigation, the student lost a scholarship, co-ops, and with the costs of transferring, the harassment "easily cost me and my family an additional $100,000 at least."[201] This expense was the result of a sexual assault, an act that falls squarely within the reach of Title IX, and yet it is still unlikely that the victim will receive any compensation, and unlikely that the Office of Civil Rights will proactively enforce their policies regarding university repayment.[202] This is because the Office of Civil Rights has not explicitly identified the costs that a university must repay to a student survivor of sexual or gender-based violence or harassment.[203] If this is the difficulty faced by an individual whose harassment is clearly within the parameters of the Title, it is unclear what could be done for LGBT students for whom Title protections have proven to be insufficient.

With no identifiable standards for repayment, and the tenuous ability of LGBT students, especially transgender students, to even bring a Title IX claim for harassment, it is clear that this Act is not equally protecting all students as it was designed to do.

VII. CONCLUSION

Considering the intent and language of Title IX, the choice is simple: either institutions with such discriminatory desires must refuse federal student aid or the

[199] *Transfer Credit Policies*, UNIV. OF WASH., https://admit.washington.edu/apply/transfer/policies/ (last visited Oct. 25, 2019) ("The UW allows a maximum of 90 credits of lower-division transfer coursework to be applied toward a UW degree. Of the 180 credits required for graduation from the UW (some majors require more than 180), a maximum of 90 lower-division transfer credits are allowed.").

[200] Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2117 (2016).

[201] *Id.*

[202] *Id.* at 2119.

[203] *Id.* at 2120.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2020.721
http://lawreview.law.pitt.edu

exemptions allowing them to discriminate and still receive federal aid must end. While the religious exemption may have been instituted to ensure a separation of church and state, what it has done is create a federally funded discrimination scheme. Discrimination which—due to the temperamental nature of the Department of Education, and the unreliability of current Secretary Betsy Devos—will likely not be remedied in the government or legislature. If students are to truly be provided an equal opportunity to learn in an environment which is supported by federal funds where they are not subjected to pervasive discrimination based on sex, the religious exemption must not allow institutional discrimination. Recognizing the acquiescence in other branches of government, the burden of righting these wrongs falls to the judiciary. In ruling that disparate treatment based on the gender of students at federally funded religious institutions is illegal, the courts would create not only a safety net for LGBT students pursuing higher education, but also a pathway for financial recovery for students who were illegally discriminated against. The Supreme Court held that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language,"[204] and surely such a sweep must equally and equitably include LGBT students, no matter their institution.

[204] N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982).

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http://lawreview.law.pitt.edu