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Negotiated Rulemaking: A Method for Addressing Ambiguity of Title IX's Applicability to Transgender and Gender Non-Conforming Students

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Applicability to Transgender and Gender Non-Conforming Students**

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TABLE OF CONTENTS

INTRODUCTION	1
PART I: THE DEPARTMENT OF EDUCATION AND TITLE IX	6
A. Office for Civil Rights	7
B. Title IX	9
C. Title IX and Claims of Discrimination Based on Gender Identity	13
<i>1. Gender Identity Claims Under Title VII</i>	<i>14</i>
<i>2. Gender Identity Claims Under Title IX</i>	<i>17</i>
D. The Department of Education’s Gender Identity Protection Under Title IX	17
PART II: PROTECTING STUDENTS THROUGH NEGOTIATED RULEMAKING	21
A. What is Negotiated Rulemaking?	23
B. Why Negotiated Rulemaking is the Solution	26
<i>1. A Comprehensive Title IX Regulation is Necessary</i>	<i>28</i>
<i>2. An Identifiable Number of Interests Exists</i>	<i>31</i>
<i>3. A Balanced Committee Can be Convened</i>	<i>32</i>
<i>4. The Committee Would Likely Reach a Consensus</i>	<i>36</i>
<i>5. The Department Would Participate and Utilize Committee’s Recommendation</i>	<i>40</i>
CONCLUSION	42

INTRODUCTION

Between 2008 and 2016, federal agencies under the Obama administration promoted policies that protect lesbian, gay, bisexual, and transgender (LGBT) individuals.¹ Since taking the Executive Office in January 2017, President Trump and his administration have limited the reach of some of the Obama era policies pertaining to LGBT individuals.² Before the Trump administration took office, and even more so now, LGBT people in the United States (U.S.) are subjected to harassment at inordinately high rates, particularly those who identify as transgender and gender non-conforming.³

“Transgender” refers to individuals whose gender identity or expression do not match the gender that society traditionally associates with their biological sex.⁴ A person is “gender non-conforming” when they have or are perceived to have characteristics and/or behaviors that differ

from what the public expects an individual of that sex to express.⁵

Transgender people are estimated to make up approximately three percent of the United States’ population,⁶ and more than sixty percent of the country’s population live in jurisdictions that do not have legal protection from discrimination based on gender identity.⁷ Research shows that LGBT youths are much more likely to be targets of harassment, commonly referred to as bullying,⁸ and discrimination than are other students.⁹ Additionally, victims of harassment are more likely to suffer from depression, anxiety, psychosomatic problems, and academic difficulties.¹⁰ The impact of harassment and violence at school can have a lifelong impact,¹¹ and may even lead victims to drop out of school¹² or commit suicide.¹³

The Department of Education (Department) is the principal agency charged with monitoring educational

institutions and ensuring that schools and universities work to eliminate harassment and discrimination.¹⁴ During the Obama administration, the Department took steps to combat discrimination and harassment by issuing guidance to educational institutions,¹⁵ notifying them that Title IX requires institutions to protect students from gender identity based discrimination,¹⁶ which led to school and universities challenging the Department's guidance in court.¹⁷ Trump administration has since rescinded the Department's guidance.¹⁸

To protect transgender and gender non-conforming students, and to eliminate Title IX's ambiguity, the Department should issue a regulation¹⁹ detailing Title IX's applicability to gender identity. Part I of this Comment explains the Department's authority and the legal history of Title IX gender identity claims. Then, Part II recommends that the Department employ negotiated rulemaking, which provides a

forum for compromise and fosters regulatory support, to promulgate the new regulation to ensure that all students can safely attend school.

PART I: THE DEPARTMENT OF EDUCATION AND TITLE IX

Congress established the Department of Education on May 4, 1980, through the *Department of Education Organization Act*.²⁰ The Department's mission is to "promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal rights."²¹ In addition to overseeing educational institutions and monitoring education attainment, the Department also enforces federal statutes prohibiting discrimination in programs and activities receiving federal funding.²² Specifically, the Office for Civil Rights (OCR), an agency within the Department,²³ has jurisdiction over anti-discrimination laws.²⁴

A. Office for Civil Rights

In enforcing anti-discrimination statutes, Office for Civil Rights responds to complaints of provision violations and conducts compliance reviews to determine if a violation occurred.²⁵ However, OCR does not need to wait for a complaint to conduct an investigation.²⁶ When a violation is detected, OCR often relies on agreements with the violating party to resolve the violation.²⁷ OCR also has the authority to terminate school and university federal funding if an investigation reveals a violation, so long as the institution has an opportunity for a hearing.²⁸

To ensure that federal fund recipients understand how OCR interprets, monitors, and enforces anti-discrimination regulations, OCR issues guidance documents to recipients, such as compliance manuals and “Dear Colleague” letters.²⁹ Guidance documents are OCR’s most common mode of communication with educational

institutions.³⁰ OCR can issue guidance documents, without going through the traditional rulemaking process required by the Administrative Procedure Act (APA),³¹ however, the guidance does not provide sufficient protection for transgender and gender non-conforming students, as shown by judicial precedent.

B. Title IX

President Nixon signed Title IX of the Education Amendments of 1972 (Title IX) into law on July 1, 1972.³² However, it was not until May 27, 1975 that President Ford signed the specific Title IX regulations, because it took the Department of Health, Education, and Welfare three years to translate the Title into implementing regulations.³³ Title IX provides 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."³⁴

The purpose of Title IX is to ensure that sex discrimination does not prevent people from obtaining an education and that all citizens are protected from discrimination and harassment.³⁵ The Title applies to public and private schools and universities that receive federal funding, and broadly covers the admission, counseling, facilities, athletics, and scholarship policies.³⁶

However, Title IX does not prohibit all sex-segregated areas, as it exempts religious organizations,³⁷ single-sex undergraduate higher education institutions,³⁸ and allows "separate toilet, locker room, and shower facilities on the basis of sex" if they are comparable.³⁹

All federal agencies that have authority to extend federal financial assistances to education institutions, programs, and activities must enforce Title IX.⁴⁰ However, because the Department of

Education has jurisdiction over Title IX compliance by all educational institutions, the Department's OCR is the primary enforcer of Title IX's provisions.⁴¹ Section 1682 of Title IX, authorizes the enforcing agencies to issue regulations necessary to achieve the objectives of Title IX, and to terminate or refuse to grant funding to institutions that do not comply.⁴² However, termination of funding can only occur after a hearing "on the record," which means a trial-type hearing conducted under the Administrative Procedure Act (APA).⁴³ OCR's most common mode of provision enforcement is through guidance documents, which it first utilized in 1975 to help clarify the Title's applicability to schools and universities.⁴⁴

Any individual can file a Title IX complaint directly with the OCR or their school district's or university's Title IX coordinator,⁴⁵ or they can also file a lawsuit.⁴⁶ To bring a Title IX violation

complaint, the individual must allege that: (1) they were excluded from participation in an educational program because of their sex; (2) at the time of exclusion the educational institution was receiving federal financial assistances; and (3) the exclusion harmed them.⁴⁷

In recent years, a common Title IX claim has been that schools and universities discriminate against transgender and gender non-conforming persons by requiring them to use restrooms matching their biological sex rather than gender identity.⁴⁸ Title IX's lack of definition of "sex" and split federal court decisions on whether Title IX protects persons based on gender identity has created questions of what protections, if any, transgender and gender non-conforming students have.⁴⁹

C. Title IX and Claims of Discrimination Based on Gender Identity

Title IX is silent on whether its provisions apply to transgender and gender

non-conforming individuals, and does not provide a definition of "sex."⁵⁰ The lack of definition and Title IX's broad prohibition on sex discrimination in educational institutions⁵¹ raises confusion about whether transgender and gender non-conformity are protected characteristics. When interpreting sex-discrimination prohibition under Title IX, courts commonly use the judicial interpretation under Title VII because its language and purpose are similar to Title IX.⁵²

1. Gender Identity Claims Under Title VII

Title VII of the Civil Rights Act of 1964 is the federal law for discrimination protection in employment.⁵³ Much like Title IX, Title VII prohibits sex discrimination, but does not define "sex."⁵⁴ However, the courts have addressed Title VII's applicability to gender identity.

For decades, courts have denied people the ability to bring sex discrimination

claims under Title VII based on gender identity.⁵⁵ However, in 1989, the Supreme Court, in the case of *Price Waterhouse v. Hopkins*, began to expand Title VII's protection to include discrimination based on sex stereotyping, which gave transgender and gender non-conforming people some right to file a Title VII claim.⁵⁶ Moreover, in 2008, the District Court for the District of Columbia in *Schroer v. Billington*, applied Title VII sex discrimination protection to a discrimination claim based on gender non-conformity, not just sex stereotyping.⁵⁷ However, the Equal Employment Opportunity Commission (EEOC)⁵⁸ provided the greatest expansion of Title VII protection when in 2012, in *Macy*, it held that an employer who refused to hire a transgender woman because of her gender identity violated Title VII.⁵⁹ Moreover, in 2015, in *Lusardi*, the EEOC held that prohibiting a transgender employee from

using restrooms associated with their gender identity violated Title VII.⁶⁰

Although courts use judicial interpretations of Title VII as precedents in interpreting Title IX,⁶¹ the EEOC's adjudicatory hearing decisions are not binding on courts, and thus courts do not have to use its interpretation when deciding Title IX's applicability to gender identity based discrimination.⁶² Consequently, transgender and gender non-conforming students do not have as much guaranteed protection from discrimination and harassment as adults do under the EEOC's interpretations of Title VII.⁶³ Nevertheless, after the Supreme Court's ruling in *Price Waterhouse*, some courts began to use the sex stereotyping theory in Title IX claims.⁶⁴

2. Gender Identity Claims Under Title IX

In *Montgomery v. Independent School District No. 709*, the U.S. District Court for Minnesota held that a student who

was bullied due to expressing insufficient masculinity had a right to a Title IX claim because of sex stereotyping.⁶⁵ However, in *Kastl v. Maricopa County Community College District*, the U.S. Court of Appeals for the Ninth Circuit took a step back from *Montgomery*, when it granted summary judgment in favor of the community college on a transsexual instructor’s claim that the college violated Title IX by prohibiting her from using the women’s restroom.⁶⁶ Moreover, in March 2015, the U.S. District Court for the Western District of Pennsylvania held that “transgender” is not a protected characteristic under Title IX.⁶⁷ Due to the lack of protection that transgender and gender non-confirming students have received from the federal courts, OCR has attempted to provide protection for these students.

D. The Department of Education’s Gender Identity Protection Under Title IX

The OCR under the Obama administration interpreted Title IX’s sex discrimination protection to include gender identity, not just expression (or sex stereotyping).⁶⁸ Starting in 2010, OCR has issued a series of guidance documents,⁶⁹ notifying educational institutions receiving federal funding that OCR interprets Title IX to include gender identity.⁷⁰

In December 2014, OCR reiterated that it interprets Title IX to include protection based on transgender status and gender identity when it issued a “Dear Colleague” letter addressing the juvenile justice system.⁷¹ In the letter, OCR explains that Title IX protection extends to all students “regardless of their sex, sexual orientation, gender identity, or conformity with sex stereotypes.”⁷² Additionally, in December 2014, OCR issued a document called “Questions and Answers on Title IX and Single–Sex Elementary and Secondary Classes and Extracurricular Activities,”⁷³ in

which OCR explicitly states that transgender and gender non-conforming students are protected under Title IX, and that federal fund recipients should treat students according to their preferred gender identity.⁷⁴ Then, in April 2015, OCR issued a “Title IX Resource Guide” to Title IX coordinators,⁷⁵ notifying them that Title IX prohibits discrimination claims based on gender identity and non-conformity.⁷⁶

As recently as in May 2016, OCR issued a joint “Dear Colleague” letter with the Department of Justice, addressing the numerous questions that OCR received from students, parents, faculty, and administrators about the applicability of Title IX to transgender students.⁷⁷ In the letter, the agencies state that when schools provide sex-segregated facilities, the schools should allow transgender students to access the facilities consistent with their gender identity.⁷⁸ However, on February 22, 2017, the Department of Justice and the

Department of Education led by the Trump administration co-authored a new Dear Colleague letter rescinding the May 2016 letter on Transgender students.⁷⁹

Although the agencies rescinded its previous interpretation of Title IX, the February 22, 2017 letter does not specify that transgender and gender non-conforming students are not protected under Title IX.⁸⁰ It appears that the agencies simply chose not to take a position regarding the Title’s applicability to gender identity, and while it did rescind the May 2016 guidance, it did not rescind other OCR’s guidance pertaining to protection of transgender and gender non-conforming students.

Since the agencies rescinded their previous position through guidance documents, rather than a new regulation, courts can, but do not have to, give the Dear Colleague letter any weight during judicial review of Title IX discrimination cases.⁸¹ Thus, the protection of transgender and

gender non-conforming students under Title IX is still unclear as some courts may be persuaded that transgender and gender non-conformity should be protected under Title IX. However, rather than waiting to see how the courts will interpret the meaning of “sex” in Title IX, the Department should amend Title IX to directly address the protections that transgender students are entitled to under the Title to limit ambiguity and ensure consistent application of the law.

PART II: PROTECTING STUDENTS

THROUGH NEGOTIATED RULEMAKING

To ensure that all students are treated fairly and equally protected, the Department should promulgate a comprehensive Title IX regulation detailing the Title’s applicability to gender identity, not just as it pertains to the use of sex segregated facilities.⁸⁵ If the Trump administration is unwilling to address the ambiguity of Title IX’s applicability to transgender and gender non-conforming students, then the next

American youth spend most their early lives in educational settings, and their interactions with peers, faculty, and administrators have a significant impact on their development.⁸² Although educational institutions have an affirmative duty to educate and protect their students,⁸³ most schools and universities lack policies that protect transgender and gender non-conforming students from harassment and discrimination.⁸⁴

presidential administration should tackle this issue to ensure that all students receive equal protection from harassment and discrimination in schools. To limit opposition to the regulation, the Department should promulgate it through the negotiated rulemaking process, which has shown success in gaining agreement in highly polarizing areas of policy.⁸⁶

A. What is Negotiated Rulemaking?

Congress enacted the Negotiated Rulemaking Act (NRA) in 1990, which it permanently reauthorized in 1996.⁸⁷ The Administrative Conference of the United States (ACUS)⁸⁸ first recommended that agencies consider negotiated rulemaking when promulgating regulations in 1982.⁸⁹ Negotiated rulemaking allows affected parties and interests to directly participate in the rulemaking process by serving on the decisionmaking committee, which diminishes the likelihood of litigation once the final rule is issued⁹⁰ and helps build legitimacy.⁹¹

The NRA is codified under the Administrative Procedure Act.⁹² Section 563 of the APA provides seven criteria that an agency head must consider when deciding whether negotiated rulemaking is in the public interest.⁹³ The agency uses a convener to help decide whether to employ negotiated rulemaking, which is done during a “convening.”⁹⁴ If the convener gives a

positive answer, then the agency may go ahead, at which point the agency uses a “facilitator” (who may or may not be the same person as a convener) to mediate the discussion.⁹⁵ If the convener and agency head agree to use negotiated rulemaking,⁹⁶ the agency then publishes a notice of intent in the *Federal Register* announcing its intention to use negotiated rulemaking, and lists interests that will be represented on the committee.⁹⁷

Once the committee is created, it negotiates on issues regarding the proposed rule and tries to reach a consensus.⁹⁸ When the committee reaches a consensus, it provides a recommendation for the proposed rule to the agency, which the agency then uses to draft the final rule.⁹⁹ The final rule is still subject to the notice-and-comment process; however, because parties who are the most likely to comment on the rule participated in the decisionmaking process,

the agency receives fewer opposing comments that it must address.¹⁰⁰

B. Why Negotiated Rulemaking is the Solution

The use of negotiated rulemaking to promulgate a comprehensive Title IX regulation that provides protection for transgender and gender non-conforming students is in the public interest.¹⁰¹ As the ongoing litigation over the OCR's interpretation of Title IX demonstrates, the inclusion of gender identity and expression protection under Title IX is highly controversial.¹⁰² Because negotiated rulemaking provides a forum that facilitates discussion, understanding of competing interests, and encourages compromise,¹⁰³ it would allow the Department to ensure that the new regulation receives at least some support from all affected parties.¹⁰⁴

Additionally, the current situation surrounding transgender and gender non-conforming student rights under Title IX

meets all criteria that an agency head must consider when deciding whether to employ negotiated rulemaking.¹⁰⁵ First, a regulation addressing Title IX's applicability to gender identity and expression is necessary, because currently "sex" in Title IX is ambiguous especially as it applies to transgender and gender non-conforming students.¹⁰⁶ Second, an identifiable number of interests will be affected by the new regulation.¹⁰⁷ Third, the Department can convene a balanced committee of interests.¹⁰⁸ Fourth, the committee will likely reach a consensus.¹⁰⁹ Finally, the negotiated rulemaking process would not delay the final rule, and the Department would participate in negotiations and utilize the committee's recommendation in the final rule.¹¹⁰

1. A Comprehensive Title IX Regulation is Necessary

The non-legally binding nature of OCR's guidance,¹¹¹ the ambiguity of "sex" in Title IX,¹¹² and the clear discrimination

that transgender and gender non-conforming students endure daily while at school¹¹³ create a necessity for a regulation that describes the protections granted to transgender and gender non-conforming students under Title IX. By issuing a binding regulation,¹¹⁴ the Department would ensure protection for transgender and gender non-conforming students because courts commonly defer to agency interpretation of a binding regulation.¹¹⁵ Court deference to agency regulations would dissuade educational institutions from litigating agency enforcement of Title IX, because courts are less likely to rule in favor of an institution violating a law that survived judicial review.¹¹⁶

Additionally, neither Title IX or its legislative history address the Title's applicability to a whole class of people, which creates a further need for a clarifying regulation.¹¹⁷ The lack of explicit legal duties that apply to educational institutions

regarding transgender and gender non-conforming students under Title IX has significantly increased OCR's workload.¹¹⁸ Without clear guidelines, OCR needs to constantly issue guidance documents regarding how schools must treat students in various activities and different policy areas.¹¹⁹ Additionally, because OCR has twelve regional offices, a regulation addressing protections provided to transgender and gender non-conforming students is necessary to ensure that each office investigates and enforces Title IX in a uniform fashion.¹²⁰

Finally, a new regulation would reduce litigation, which would also save time and resources,¹²¹ by eliminating a common complaint, that the OCR's interpretation of Title IX through issuance of guidance documents violates the APA and thus OCR should not be able to enforce the interpretation,¹²² which occurred after the

Obama administration issued its guidance regarding gender identity in May 2016.

2. *An Identifiable Number of Interests Exists*

Prior to employing negotiated rulemaking to promulgate a new regulation, § 563(a)(2) of the APA suggests that the agency head first determine that there are a limited number of identifiable interests that the rule would significantly affect.¹²³ Amici briefs submitted in *G.G. el rel. Grimm v. Gloucester City School Board*¹²⁴ and *Gloucester City School Board v. G.G. el rel. Grimm*,¹²⁵ reveal some of the interests that a Title IX regulation addressing transgender and gender non-conforming students would significantly affect.¹²⁶ Although the amici briefs only show the interests affected by OCR's interpretation regarding restrooms, the new regulation would affect similar interests because the regulation would affect those who are closely involved with educational institutions and students.

Therefore, there are an identifiable number of interests that the new regulation would significantly affect.

3. *A Balanced Committee Can Be Convened*

For negotiated rulemaking to achieve its purpose,¹²⁷ the agency head must also determine that a balanced committee of interests can be convened.¹²⁸ It is crucial that the committee adequately represents all significantly affected interests and that all members negotiate in good faith.¹²⁹ Additionally, the Department must agree to use the committee's recommendation and cede some control to the committee members in the rulemaking process to allow a real exchange of interests.¹³⁰ Therefore, to ensure that the negotiations lead to a successful rule, the Department must invite parties who support and oppose a pro-gender identity Title IX regulation.

Specifically, the parties advocating for transgender rights that the Department

should consider including in the negotiations are Lambda Legal and the American Civil Liberties Union, who commonly advocate and represent LGBT individuals in discrimination and harassment claims.¹³¹ The Gay, Lesbian, & Straight Education Network (GLSEN), because they have extensive knowledge of LGBT youth and policies that would best serve transgender and gender non-conforming students.¹³² Finally, the Department should also include the World Professional Association for Transgender Health (WPATH), which is an international professional association of physicians, psychologists, social scientist and legal professionals.¹³³

In addition to including parties that promote transgender rights, the Department must invite interests that advocate for privacy and anti-lesbian, gay, bisexual, and transgender (LGBT) legislation. One such organization is the American Family Association whose mission is to preserve

“traditional moral values,”¹³⁴ and has been known to oppose LGBT rights.¹³⁵ Additionally, the Alliance Defending Freedom should also participate in the negotiations, which is an organization that focuses on religious freedom and right to bodily privacy.¹³⁶ Furthermore, the Family Research Council should also be invited as they made a statement in support of North Carolina’s bathroom law requiring people to use public facilities consistent with their biological sex.¹³⁷ Lastly, the Department should also invite the National Organization for Marriage, who released a video stating that OCR’s interpretation of Title IX allows for sexual predators.¹³⁸

The Department must also include educators and other education professionals as they will be required to amend existing school policies and procedures to comply with the new regulation. Thus, the Department should invite the National Association of Secondary School Principals

to be a member of the committee, which represents middle and high school principals, assistant principals, and school leaders.¹³⁹ The American Federation of Teachers should also participate as the organization represents teachers grades pre-K through twelve, school personnel, and state and local government employees.¹⁴⁰ The Association of Title IX Administrators, an organization that represents school and college Title IX coordinators and administrators, is another organization that the Department should include in the negotiations.¹⁴¹ The National School Boards Association (NSBA) should be the final member as it represents school boards and school board members nationally, and is an advocate for public schools.¹⁴²

With a balanced committee,¹⁴³ where no single interest dominates the negotiations,¹⁴⁴ the Department will increase the likelihood that committee members will negotiate in good faith. Consequently,

because all members will feel that they have decisionmaking power it will increase the likelihood that the committee will reach consensus on at least some of the provisions, which would limit the amount of opposition that the agency would receive if it issued the regulation without the input from the effected parties.

4. The Committee Would Likely Reach a Consensus

Not only can the Department convene a balanced committee of interests to negotiate on the provision of a new Title IX regulation, but it is also reasonably likely that such a committee will reach some consensus, even if it is not unanimous.¹⁴⁵ Because the committee will work to create a comprehensive regulation, the committee members will be able to rank issues according to their own priorities, which will leave room for compromise and trade-offs.¹⁴⁶

One of the issues that the committee negotiate is whether harassment and discrimination based on a student's transgender or gender non-conforming status, rather than just sex-stereotyping, should be protected under Title IX.¹⁴⁷ The committee should also consider whether teachers and administrators have an affirmative duty to institute policies that limit gender identity and expression based harassment.¹⁴⁸ Another issue that the committee members should consider, is whether educational institutions are required to address students by their preferred names and gender pronouns.¹⁴⁹ Moreover, the committee should consider whether, and which, sex-segregated activities and programs students can participate in according to their gender identity rather than biological sex.¹⁵⁰ Finally, the committee should explicitly address which restrooms and other school facilities, such as locker room, are available to transgender and

gender non-conforming students, and to what extent institutions can prohibit students from using certain facilities.¹⁵¹ Due to the number of issues before the committee, the committee may not be able to reach a consensus on all points. Even if this is the case, the members may agree on some issues, which would provide clarification on Title IX's applicability and grant some legally enforceable protection to transgender and gender non-confirming students. To ensure that all members negotiate in good faith and work to reach a consensus, the Department should also set a deadline for the negotiations, as having a deadline creates urgency and motivates members to look for consensus rather than just try to meet all individual goals.¹⁵²

Even if the committee cannot reach a consensus, the Department could still use the negotiations to create a regulation through the notice-and-comment process.¹⁵³ The negotiations would help the Department

to narrow down positions of the affected interests, identify information that could help to gain support of opposing parties, and find solutions to primary issues.¹⁵⁴ The committee can also provide the Department with a list of areas where it did reach consensus and reasoning for why it did not reach consensus in other areas.¹⁵⁵ Due to all the benefits that negotiations provide, the Department would use the committee's recommendation.

5. *The Department Would Participate and Utilize Committee's Recommendation*

For negotiated rulemaking to succeed, the agency's commitment to the process is crucial, which includes providing the committee with adequate resources.¹⁵⁶ The Department could provide the needed resources because allowing parties most invested in the issue to participate in the decisionmaking process would decrease the number of adversarial claims.¹⁵⁷ With fewer

claims, the Department would have more resources to dedicate to the committee.¹⁵⁸ Furthermore, the NRA also allows agencies to accept outside funding, such as gifts and devises, to use for negotiated rulemaking as long as not conflicts of interest exist.¹⁵⁹

Additionally, so long as the Department actively participates in the negotiations, hires an experienced third-party facilitator, and ensures that all interests have equal negotiation power, the process will not delay the issuance of the NPRM or the final rule.¹⁶⁰ All committee members dedicate time, personnel, and resources to participate in the negotiations. Hence, the members have additional motivation to meet the deadlines and push for compromise.

Due to the highly controversial nature of the issues surrounding transgender and gender non-conforming student rights, the Department would likely utilize the committee's recommendation to promulgate the final rule.¹⁶¹ Therefore, the Department

would promulgate a final regulation that most parties, even those who would normally oppose such a rule, agree on at least parts of the new regulation because it would ensure that the new regulation withstands adversarial comments and limits litigation.¹⁶²

Consequently, a new regulation addressing the protection of transgender and gender non-confirming students is necessary and in the public interest.¹⁶³ The breadth of discrimination that transgender and gender non-confirming students experience, and the comprehensive nature of the new regulation, make negotiated rulemaking the ideal method for creating the regulation.

CONCLUSION

Research shows that transgender and gender non-confirming students experience harassment and discrimination at a disproportionately higher rate than their peers.¹⁶⁴ The federal government, specifically the Department of Education,

during either this or next term, should use negotiated rulemaking to promulgate a new regulation detailing the protections that students whose gender identity and expression do not match their biological sex have under Title IX. Doing so would remove any ambiguity in Title IX's interpretation, help all students by promoting fairness and equality in schools and universities, and would allow the Department to better enforce Title IX.

¹ See generally Rebecca Isaacs, *Our Next President Must Continue Obama's LGBT Legacy*, THE ADVOCATE (Oct. 21, 2016), <http://www.advocate.com/election/2016/10/21/our-next-president-must-continue-obamas-lgbt-legacy> (describing the different pro-lesbian, gay, bisexual, and transgender (LGBT) policies of the Obama administration).

² See generally Juliet Eilperin, Emma Brown, and Darryl Fears, *Trump Administration Plans to Minimize Civil Rights Efforts in Agencies*, WASH. POST (May 29, 2017), https://www.washingtonpost.com/politics/trump-administration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2-39a7-11e7-a058-ddbb23c75d82_story.html?utm_term=.ddabeef1973f (explaining that Trump administration plans to disband Labor Department's division that policed

discrimination practices of federal contractors, has cut the Department of Education's (Department) Office of Civil Rights (OCR) budget limiting the amount of discrimination cases OCR will review, and the Department of Housing and Urban Development's already revoked guidance that allowed transgender individuals to stay at sex-segregated shelters); *see also* Emma Brown, *Education Dept. Closes Transgender Student Case as it Pushes to Scale Back Civil Rights Investigations*, WASH. POST (June 17, 2017), https://www.washingtonpost.com/local/education/education-dept-closes-transgender-student-cases-as-it-pushes-to-scale-back-civil-rights-investigations/2017/06/17/08e10de2-5367-11e7-91eb-9611861a988f_story.html?utm_term=.5f35a7c15c89 (describing the Department's desire to limit number of civil rights investigations in public schools).

³ *See generally* Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY AND LESBIAN TASK FORCE (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf [hereinafter *Injustice at Every Turn*] (providing statistics on transgender discrimination). *See also* Maggie Astor, *Violence Against Transgender People is on the Rise*, *Advocates Say*, N.Y. Times (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/us/transgender-women-killed.html> (explaining that in 2017 there were twenty-five known killings of transgender people, as compared to twenty-three in 2016).

⁴ *See Advancement in State and Federal Law Regarding Transgender Employees: A Compliance Guide for Employers and*

Employment Law Attorneys, NAT'L CTR. FOR LESBIAN RIGHTS & TRANSGENDER LAW CTR. 1, 19

https://www.csusm.edu/gsr/irb/documents/policy_guidelines/compliance_guide_employers.pdf (last updated Apr. 2006) [hereinafter *A Compliance Guide*] (defining "transgender"). A person's gender identity, that is whether they identify as male, female, or somewhere in between, is their internal sense of being a specific gender or feeling as they do not fit into the traditional male-female binary. *See* Amanda Raflo, *Evolving Protection for Transgender Employees Under Title VII's Sex Discrimination Prohibition: A New Era Where Gender is More than Chromosomes*, 2 CHARLOTTE L. REV. 217, 221 (2010). However, gender expression is how an individual expresses their gender identity, and includes how they walk, dress, and behave. *Id.*

⁵ *See A Compliance Guide*, *supra* note 4, at 19. Although the public and the courts often use "sex" and "gender" synonymously, it is important to distinguish them. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 156 n.1 (1994) (Scalia, J., dissenting) (stating that "[t]he word gender has acquired the new and useful connotation of cultural and attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes").

"Sex" is a "person's biological or anatomical identity as male or female," and "gender" is "the collection of characteristics that are culturally associated with maleness or femaleness." Raflo, *supra* note 4, at 221.

⁶ *See* Ann P. Haas & Philip L. Rodgers, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey*, AMERICAN FOUND. FOR SUICIDE PREVENTION & WILLIAMS INST. 1, 16 (2014),

[21](http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-</p></div><div data-bbox=)

Report-Final.pdf (providing statistics on transgender persons in the United States).

⁷ See Victoria M. Rodríguez-Roldán & Elliot E. Imse, *Valuing Transgender Applicants & Employees: A Best Practices Guide for Employers*, D.C. OFF. OF HUMAN & NAT'L LGBTQ TASK FORCE 1, 7 (2016), http://www.thetaskforce.org/static_html/downloads/reports/reports/valuing_trans_employees_060316.pdf [hereinafter *A Best Practices Guide*] (explaining that as of May 2016, only nineteen states, and the District of Columbia, have laws prohibiting gender identity based discrimination).

⁸ See Devi M. Rao, *Gender Identity Discrimination is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 WIS. J. L. GENDER & SOC'Y 245, 246 (2013) (explaining how "bullying" is used to describe in-school harassment).

⁹ See Jaana Juvonen & Sandra Graham, *Bullying in Schools: The Power of Bullies and the Plights of Victims*, 65 ANN. REV. PSYCHOL. 159, 166 (2014) (discussing the impact of bullying on youth development).

¹⁰ *Id.* at 168 (explaining that victims are more likely to miss school and receive lower grades).

¹¹ Rao, *supra* note 8, at 251. See also Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. PUB. MGMT. & SOC. POL'Y 65, 74 (2013) (explaining that harassment and discrimination can lead to poverty and negative health outcomes).

¹² See Lara Awad, *Chapter 85: Providing Greater Protections for Transgender Students*, 45 MCGEORGE L. REV. 473, 476 (2014) (explaining that transgender students, who are harassed, often lack real sense of security at school, which leads them to miss classes and often drop out).

¹³ See Grant, *supra* note 3, at 6 (providing suicide statistics of LGBT persons).

¹⁴ See *infra* Part I.

¹⁵ See *infra* Part I(D).

¹⁶ See Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool to Stop Bullying of LGBT Students*, 125 YALE L. J. 2006, 2024 (2016) (explaining that Title IX has become an important tool for addressing harassment experienced by transgender students in schools).

¹⁷ *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 219 (6th Cir. 2016) (granting student's motion for preliminary injunction against school district's policy prohibiting students from using restrooms consistent with their gender identity); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 622 (M.D.N.C. 2016) (using Fourth Circuit's decision to grant a preliminary injunction against a North Carolina law requiring people to use public restrooms and locker rooms consistent with their biological sex); *Texas v. United States*, 201 F. Supp. 3d 810, 827-28 (N.D. Tex. 2016) (holding that OCR violated the APA because the interpretation is a legislative rule).

¹⁸ See *infra* note 79 and accompanying text.

¹⁹ See generally Steven Croley, *Making Rules: An Introduction Rulemaking: How Government Agencies Write Law and Make Policy*, 93 MICH. L. REV. 1511, 1512 (1995) (explaining that agency rulemaking "is one of the most important lawmaking functions of the government").

²⁰ Department of Education Organization Act, 20 U.S.C. § 3401 (2012).

²¹ *Mission*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/overview/mission/mission.html> (last visited Dec. 27, 2017). The Secretary of the Department of Education (Department) is appointed by the President and confirmed by the Senate, thus agency priorities change with each new administration. See John W. Borkowski et

al., *U.S. Department of Education's Office for Civil Rights Guidance: An Update*, COUNCIL OF THE GREAT CITY SCHOOLS 1, 2 (May 2016), http://www.cgcs.org/cms/lib/DC00001581/Content/Domain/4/OCRReport_R4.pdf (discussing the Department's structure and how policies change with each new administration).

²² See U.S. DEP'T OF EDUC., OVERVIEW OF THE U.S. DEPARTMENT OF EDUCATION 7-8 (2010) [hereinafter OVERVIEW] (discussing the extent of the Department's authority). See generally Akasha C. Perez, *Addressing an Evolution in America's Workforce: A Call for Negotiated Rulemaking in the Ridesharing Industry*, 59 HOWARD L.J. 787, 810 (2016) (explaining that Congress delegates authority to administrative agencies to regulate specific areas of law).

²³ The Office for Civil Rights (OCR) is led by the Assistant Secretary of Education, who is appointed by the President and confirmed by the Senate. See Borkowski, *supra* note 21, at 2 (discussing OCR's structure). In addition to the main OCR office, there are twelve regional offices that investigate and resolve complaints. See *About OCR*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last visited Dec. 29, 2017) (explaining the structure of OCR).

²⁴ 20 U.S.C. § 3413(a) (2012). OCR enforces Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990. See OVERVIEW, *supra* note 22, at 12 (describing the extent of OCR's authority in enforcing anti-discrimination statutes).

²⁵ All OCR's twelve regional offices follow its guidance manuals, but the offices have discretion over how they investigate the complaints. See generally Alison Renfrew,

The Building Blocks of Reform: Strengthening Office of Civil Rights to Achieve Title IX's Objectives, 117 PENN ST. L. REV. 563, 577-78 (2012) (explaining the lack of uniformity between offices).

²⁶ See Borkowski, *supra* note 21, at 6 (explaining that OCR can initiate an investigation whenever it chooses).

²⁷ See Renfrew, *supra* note 25, at 583 (discussing OCR's use of negotiation agreements to ensure that violating parties resolve Title IX violations).

²⁸ See *infra* note 42 and accompanying text.

²⁹ See Borkowski, *supra* note 21, at 6 (explaining that from 2010 to May 2016, OCR issued eight "Dear Colleague" letters on Title VI interpretations, seven on Title IX, five on Section 504 and American with Disabilities issue).

³⁰ *Id.*

³¹ See 5 U.S.C. § 553(b)(B) (2012) (exempting interpretive rules and general statements of policy, which are guidance documents, from the notice-and-comment rulemaking requirement).

³² See Civil Rights Division, *Title IX Legal Manual*, U.S. DEP'T OF JUSTICE, [https://www.justice.gov/crt/title-ix#II.Synopsis of Purpose of Title IX, Legislative History, and Regulations](https://www.justice.gov/crt/title-ix#II.Synopsis%20of%20Purpose%20of%20Title%20IX,Legislative%20History,%20and%20Regulations) (last visited Jan. 1, 2017) [hereinafter *Legislative History of Title IX*] (providing complete history of Title IX).

³³ See Iram Valentin, *Title IX: a Brief History*, 2 HOLY CROSS J.L. & PUB. POL'Y 123, 126 (1997). The Department of Health, Education, and Welfare enforced Title IX until 1980 when it split into the Department of Health and Human Services and the Department of Education. See *Legislative History of Title IX supra* note 32. The Department of Education maintained jurisdiction over Title IX, but both agencies adopted the sex discrimination regulations, and other agencies soon followed. *Id.*

³⁴ 20 U.S.C. § 1681(a) (2012).

³⁵ See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (explaining that in passing Title IX, Congress “wanted to avoid the use of federal resources to support discriminatory practices” and “to provide individual citizens effective protection”). See also Alexandra Polyzoides Buek & Jeffrey H. Orleans, *Sex Discrimination — A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1, 1 (1973) (explaining that Title IX was designed to ensure that all persons have access to education).

³⁶ 20 U.S.C. §§ 1681-1688 (2012); see also *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (stating that “Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition”).

³⁷ 20 U.S.C. § 1681(a)(3) (2012).

³⁸ 20 U.S.C. § 1681(a)(5) (2012).

³⁹ 34 C.F.R. § 106.33 (2016).

⁴⁰ 20 U.S.C. § 1682 (2012).

⁴¹ See *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last visited Dec. 27, 2017) (stating that OCR enforces discrimination statutes).

⁴² 20 U.S.C. § 1682 (2012). When the Department issues regulations, policy statements, or orders, it must follow the procedures set out in the Administrative Procedure Act (APA). See 5 U.S.C. §§ 551-559 (2012) (providing procedures that agencies must utilize when creating rules).

⁴³ 20 U.S.C. § 1682 (2012). See also 5 U.S.C. § 554 (2012) (explaining that a trial-type hearing before an administrative law judge or an agency employee authorized to decide on the issue is triggered when a statute requires a hearing “on the record”).

⁴⁴ See generally Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equality Law*, 22 MARQ. SPORTS L. REV. 325 (2012) (providing a timeline of OCR’s “Dear Colleague” letters that it issues almost annually).

⁴⁵ See Office of Civil Rights, *Title IX Resource Guide*, U.S. DEP’T OF EDUC. 1, 1 (2015) <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf> [hereinafter *Title IX Resource Guide*] (requiring all recipients to have a Title IX coordinator).

⁴⁶ See *Davis as Next Friend of LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1993) (holding that a student who was harassed by peers at school could bring a Title IX claim, but only “where the funding recipient acts with deliberate indifference to known acts of harassment” and if the harassment is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an education opportunity or benefit”); see also *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274 (1998) (holding that a student can bring a private damage claim under Title IX if the school knew about the discriminatory conduct and deliberately did not act to address it).

⁴⁷ See *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir.1994) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 680 (1979)).

⁴⁸ See *G.G. ex rel. Grimm v. Gloucester City School Board*, 136 S. Ct. 2442 (2016); *Dodds v. U.S. Dep’t of Educ.*, No. 16–4117, 2016 WL 7241402, at *1-2 (6th Cir. 2016) (granting student’s motion for preliminary injunction against school district’s policy prohibiting students from using restrooms consistent with their gender identity); *Carcaño v. McCrory*, 1:16cv236, 2016 WL

4508192, at * (M.D.N.C. Aug. 26, 2016) (using Fourth Circuit’s decision to grant a preliminary injunction against a North Carolina law requiring people to use public restrooms and locker rooms consistent with their biological sex); *Student v. U.S. Dep’t of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *1 (N.D. Ill. Oct. 18, 2016) (holding that OCR’s interpretation did not violate the APA because the guidance documents did not have an independent basis for enforcement action, and thus were only interpretive and did not violate § 553(b) of the APA); *Texas v. United States*, No. 7:16-cv-00054-O, 2016 WL 4426495, at * 1 (N.D. Tex. Aug. 21, 2016) (holding that OCR violated the APA because the interpretation is a legislative rule since fund recipients would suffer legal consequences if they did not comply).

⁴⁹ See generally Erin Buzuvis, “*On the Basis of Sex*”: *Using Title IX to Protect Transgender Students from Discrimination in Education*. 28 WIS. J.L. GENDER & SOC’Y 219, 221 (2013) (discussing the confusion over the protection of transgender students under Title IX).

⁵⁰ 20 U.S.C. §§ 1681-1688 (2012).

⁵¹ See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (stating that Congress did not provide any specific discriminatory practices in Title X so it is not clear whether it intended for a specific practice to be covered).

⁵² See Buzuvis, *supra* note 49, at 221.

⁵³ 42 U.S.C. §§ 2000e-2(a)(1) (2012); see also Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender Conforming and Gender Non-Conforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 469 (2004) (contending that Title VII does not cover solely racial and ethnic employment discrimination, but also sexual discrimination).

⁵⁴ See generally 42 U.S.C. §§ 2000e-2(a)-(n) (2012).

⁵⁵ See *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084-85 (7th Cir. 1984) (holding that “sex” under Title VII and Congress’s intent did not apply to transsexuals); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (ruling that the plain meaning of the word “sex” did not include transsexuals); *Dobre v. Nat’l. R.R. Passenger Corp.*, 850 F. Supp. 284, 286-87 (E.D. Pa. 1993) (holding that Title VII did not “prohibit an employer from discrimination against a male because he wants to become a female”).

⁵⁶ 490 U.S. 228, 250-51 (1989) (holding that an employee could bring a Title VII claim if the employer used sex stereotyping to make their decision); see also *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (holding that employers who discriminate against men for wearing women’s dresses and makeup are engaging in sex discrimination).

⁵⁷ 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008) (holding that the Library of Congress discriminated based on sex and gender non-conformity when it rescinded an offer of employment because the employer was uncomfortable of seeing a man dress in female clothing).

⁵⁸ Equal Employment Opportunity Commission (EEOC) is a bipartisan commission responsible for enforcing federal discrimination laws in employment. See *Overview*, U.S. EQUAL EMPLOY. OPP. COMM., <https://www.eeoc.gov/eeoc/> (last visited Jan. 1, 2017) (providing that the Equal Employment Opportunity Commission (EEOC) is a bipartisan commission responsible for enforcing federal discrimination laws in employment, and it investigates discrimination complaints, files charges against discriminating employers, settles charges,

holds adjudicatory hearings and may file lawsuits in court).

⁵⁹ *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 12, 2012).

⁶⁰ *Lusardi v. Department of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015).

⁶¹ *See Buzuvis*, *supra* note 49, at 221 (explaining court use of Title VII to interpret Title IX).

⁶² *See Dana Beyer et al., New Title VII and EEOC Rulings Protect Transgender Employees*, TRANSGENDER LAW CTR. 1, 3 (2014), <http://transgenderlawcenter.org/wp-content/uploads/2014/01/TitleVII-Report-Final012414.pdf> (explaining that EEOC adjudicatory decisions made by an administrative judge, who independently decides discrimination complaints, are not binding on courts; however, the decisions are persuasive especially in practice as employers want to avoid lawsuits).

⁶³ Transgender and gender non-conforming students are only protected from discrimination based on sex-stereotyping, which occurs when a student is discriminated because of how they express their gender, as compared to the common view of how the student should express the gender as it is associated with their biological sex. *See infra* Part I(C)(2). However, students are not protected from discrimination based on their actual gender identity. *Id.*

⁶⁴ *See generally Buzuvis*, *supra* note 49, at 221 (discussing how courts use Title VII precedent when reviewing Title IX claims of sex stereotyping).

⁶⁵ *Montgomery v. Independent School District No. 709*, 109 F. Supp. 2d 1081, 1090-93 (D. Minn. 2000).

⁶⁶ *Kastl v. Maricopa County Community College District*, 325 Fed. Appx. 492, 494 (9th Cir. 2009).

⁶⁷ *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) (holding that federally funded educational institutions do not violate Title IX when they prohibit students from using facilities associated with their gender identity because transgender people are not a protected class).

⁶⁸ *See supra* note Part I(B)(2).

⁶⁹ *See* 5 U.S.C. § 553(b)(B) (2012) (allowing agencies to issue interpretations of existing laws that they enforce directly to regulated parties without having to go through the notice-and-comment rulemaking process).

⁷⁰ *See* Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying*, U.S. DEP'T OF EDUC. 1, 8 (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (notifying schools that although Title IX does not prohibit discrimination “based solely on sexual orientation,” LGBT students are protected).

⁷¹ Office for Civil Rights, *Dear Colleague Letter: Juvenile Justice Residential Facilities*, U.S. DEP'T OF EDUC. 1, 1 (Dec. 8, 2014), <https://www2.ed.gov/policy/gen/guid/correctional-education/cr-letter.pdf>.

⁷² *Id.* at 8.

⁷³ Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, U.S. DEP'T OF EDUC. 1, 25 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf> [hereinafter *Single-Sex Elementary and Secondary Classes*].

⁷⁴ *Id.*

⁷⁵ *See Title IX Resource Guide*, *supra* note 45, at 1 n.1 (explaining that OCR issued the guide to aid Title IX coordinators in advising and monitoring fund recipient compliance with Title IX).

⁷⁶ *Id.* at 16.

⁷⁷ *Dear Colleague Letter on Transgender Students*, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE 1, 1 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [hereinafter *Dear Colleague Letter on Transgender Students*].

⁷⁸ *Id.* at 3.

⁷⁹ *See Dear Colleague Letter on Transgender Students*, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE 1, 1 (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [hereinafter *February 2017 Dear Colleague Letter*] (stating that the Department's decision to rescind the May 2016 letter, which notified educational institutions that transgender students should be able to use facilities according to their gender identify rather than sex, was based on the fact that the letter did not contain "extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did [it] undergo any formal public process.").

⁸⁰ *Id.* at 2 (explaining that although the May 2016 guidance is rescinded, that "all schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment.").

⁸¹ *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that guidance documents and opinion letters are only entitled to judicial respect, and the courts do not have to follow the interpretation if they do not find it persuasive).

⁸² *See* Deborah A. Phillips & Amy E. Lowenstein, *Early Care, Education, and Child Development*, 62 ANN. REV. PSYCHOL. 483, 483 (2011) (discussing impact of school interactions on youth development).

⁸³ *See* Raija Churchill, *Today's Children, Tomorrow's Protectors: Purpose and*

Process for Peer Mediation in K-12 Education, 13 PEPP. DISP. RESOL. L.J. 363, 364-65 (2013) (discussing how the Columbine High School shooting in 1999 increased the affirmative duty of school officials to not only educate, but also to ensure a safe learning environment).

⁸⁴ *See infra* note 113 and accompanying text.

⁸⁵ Although the Trump administration rescinded the Department's Obama era guidance regarding use of restrooms and locker rooms based on gender identity, the new administration did not rescind other guidance pertaining to protection against gender identity discrimination. *See supra* note 79. Additionally, after the Department rescinded the guidance, the Secretary of the Department, Betsy DeVos, "reaffirmed the administration's responsibility 'to protect every student in America and ensure that they have the freedom to learn and thrive in a safe and trusted environment,'" which suggests that the Department under the current administration may be willing promulgate a new regulation that grants at least some protections to transgender and gender non-conforming students. Ariane de Vogue, Mary Kay Mallonee, and Emanuella Grinberg, *Trump Administration Withdraws Federal Protections for Transgender Students*, CNN (Feb. 23, 2017), <http://www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protections-on-transgender-bathrooms-in-schools/index.html>.

⁸⁶ *See* Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 32 (2001) (discussing benefits of negotiated rulemaking).

⁸⁷ Pub. L. No. 101-648, 104 Stat. 4969, amended by 5 U.S.C. §§ 561-570 (1994). Soon after NRA was enacted, President Clinton issued an Executive Order encouraging agencies to use negotiated

rulemaking when they believe it is necessary. Exec. Order No. 12,866, § 6(a), 58 Fed. Reg. 51,735, 51,740 (Sept. 30, 1993).

⁸⁸ The Administrative Conference of the United States (ACUS) is an independent federal agency that conducts research, provides nonpartisan expert advice and recommends improvements for federal agency procedures. *See Conference*, ADMIN. CONFERENCE OF THE UNITED STATES, <https://www.acus.gov/about-administrative-conference-united-states-acus> (last visited Feb. 3, 2017) (describing the purpose and goals of ACUS).

⁸⁹ ACUS Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,708 (1982).

⁹⁰ *See* Henry H. Perritt, Jr., *Negotiated Rulemaking and Administrative Law*, 38 ADMIN. L. REV. 471, 471 (1986) (explaining that negotiated rulemaking arose from agency dissatisfaction with the notice-and-comment rulemaking, which had become extremely adversarial); *but see* William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1375 (1997) (claiming that negotiated rulemaking limits agency authority and goes against public interest since only some parties can participate).

⁹¹ *See* Mark L. Pelesh, *Regulations Under the Higher Education Amendments of 1992: A Case Study in Negotiated Rulemaking*, 57 LAW & CONTEMP. PROBS. 151, 156 (1994) (explaining that legitimacy occurs because involving affected parties in the decisionmaking process gathers support for the rule from those that are most likely to be in support and opposition of a rule).

⁹² 5 U.S.C. §§ 563-570 (2012).

⁹³ 5 U.S.C. § 563 (2012). The criteria include that: (1) a rule is necessary; (2) there exists an identifiable number of interests that

will be *significantly* affected by the rule; (3) there is a *reasonable* likelihood that a committee with balanced interests can be convened; (4) a *reasonable* likelihood exists that the committee *will* reach a consensus in the provided time period; (5) the negotiated rulemaking will not delay the final rule; (6) agency has and is willing to commit adequate resources to the process; and (7) the agency plans to use the committee's recommendations to promulgate the final rule. *Id.* (emphasis added).

⁹⁴ During the convening, the facilitator decides whether negotiated rulemaking is the correct approach in the specific situation, and identifies interests that they believe will be impacted by the proposed rule. *See* Harter, *supra* note 86, at 35 (explaining the convening).

⁹⁵ *See* Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 988 (2008) (explaining the convenor and facilitator, and how negotiations during committee meetings are structured).

⁹⁶ The agency head and convenor determine who should serve on the committee by evaluating what interests and parties will be most significantly impacted by the new regulation. *See* Harter, *supra* note 86, at 35. *See generally* Danielle Holley-Walker, *The Importance of Negotiated Rulemaking to the No Child Left Behind Act*, 85 NEB. L. REV. 1015 (2007) (discussing how the Department created a committee comprised of state education agencies, local school board officials, school administrators, teachers, parents and students when it utilized negotiated rulemaking to promulgate a regulation for the No Child Left Behind Act).

⁹⁷ 5 U.S.C. § 564(a) (2012). *See also* 5 U.S.C. § 566(b) (2012) (explaining that a senior representative of the agency, who is

responsible for issuing the rule, also fully participates in all negotiations as an equal member of the committee). Members of the public who do not believe that their interests are properly represented can apply for committee membership. *See* 5 U.S.C. § 564(b) (2012) (explaining the public comment process).

⁹⁸ *See* 5 U.S.C. § 562 (2012) (defining consensus as the “unanimous concurrence among the interests represented on a negotiated rulemaking committee”).

⁹⁹ *See* 5 U.S.C. § 566(f) (2012). If the committee does not reach a consensus, it can provide a report listing issue areas and a list of recommendations. *See* Peter H. Schuck & Steven Kochevar, *Reg Neg Redux: The Career of a Procedural Reform*, 15 THEORETICAL INQ. L. 417, 426 (2014) (explaining that negotiations are helpful even if the committee does not reach a consensus).

¹⁰⁰ *See generally* Harter, *supra* note 86, at 35 (explaining benefits of negotiated rulemaking).

¹⁰¹ *See* 5 U.S.C. § 563 (2012) (requiring that the agency head determine that negotiated rulemaking is in the public interest for the specific situation prior to employing the method).

¹⁰² *See* *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 218 (6th Cir. 2016) (mentioning that the school district claimed that OCR’s interpretation violated the APA); *G.G. el rel. Grimm v. Gloucester Cty. School Bd.*, 822 F.3d 709, 723 n.9 (4th Cir. 2016) (noting that the school board argued that OCR’s interpretation contradicts 34 C.F.R.

§ 106.33); *Bd. of Educ. of the Highland Local School Dist. v. U.S. Dep’t of Educ.*, 208 F.Supp.3d 850, 859 (S.D. Ohio 2016) (noting that the school district claimed that OCR’s interpretation did not comply with § 553 of the APA); *Student v. U.S. Dep’t of Educ.*, No. 16-CV-4945, 2016 WL 6134121,

at *1 (N.D. Ill. Oct. 18, 2016) (explaining that the plaintiffs, an organization of students and parents, asserted that OCR’s enforcement of its interpretation violated the APA); *Texas v. United States*, 201 F.Supp.3d 810, 819 (N.D. Tex. 2016) (noting that the plaintiffs claimed that OCR violated the APA).

¹⁰³ *See* Schuck & Kochevar, *supra* note 99, at 418.

¹⁰⁴ Agency regulations in highly controversial areas that do not represent all interests receive more comments during the notice-and-comment process and are litigated more often. *See* Harter, *supra* note 86, at 53 (explaining that balanced committee of interests reduces litigation).

¹⁰⁵ *See supra* note 93 and accompanying text.

¹⁰⁶ *See* 5 U.S.C. § 563(a)(1) (2012).

¹⁰⁷ *See* 5 U.S.C. § 563(a)(2) (2012).

¹⁰⁸ *See* 5 U.S.C. § 563(a)(3) (2012) (stating that negotiated rulemaking should not be used unless a balanced committee of affected interests can be convened).

¹⁰⁹ *See* 5 U.S.C. § 563(a)(4) (2012) (explaining that an agency should not utilize negotiated rulemaking unless it is reasonably likely that the committee will reach a consensus).

¹¹⁰ *See* 5 U.S.C. §§ 563(a)(5)-(7) (2012) (stating that negotiated rulemaking should not be employed if it will delay the final rule, if the agency does not have adequate resources to provide the committee, or if the agency believes that it will not use the committee’s recommendation).

¹¹¹ *See* *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) (holding that “transgender” is not a protected characteristic under Title IX, even though OCR had issued numerous guidance documents, starting in 2010, interpreting

that Title IX does protect students based on their gender identity and expression).

¹¹² See *supra* Part I(C).

¹¹³ Out of 10,528 survey respondents, fifty percent reported that their school prohibited transgender students from using gender pronouns that matched their gender identity, and sixty percent were required to use schools' facilities of their biological sex. See Joseph G. Kosciw et al., *The 2015 National School Climate Survey: The Experience of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GAY, LESBIAN, & STRAIGHT EDUC. NETWORK xi, xvii (2015), <http://www.glsen.org/article/2015-national-school-climate-survey> [hereinafter *2015 National School Climate Survey*] (explaining that forty-three percent of survey respondents reported feeling unsafe at school because of their gender identity). Additionally, while eighty-three percent of students reported that their school had anti-bullying policies, only ten percent reported that the policies included protection based on sexual orientation and gender identity. *Id.* at xxi.

¹¹⁴ See generally *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (explaining that agency regulation imposing binding obligations is the basis for an enforcement action).

¹¹⁵ See Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813, 841 (2015) (explaining that *Chevron* deference urges courts to defer to agency interpretation of a regulation because they are the expert in the regulated area).

¹¹⁶ See 5 U.S.C. § 706 (2012) (listing what a reviewing court should consider when deciding whether agency action is unlawful).

¹¹⁷ See generally 20 U.S.C. §§ 1681-88 (2012).

¹¹⁸ See Lyndsey Layton, *Civil Rights Complaints to U.S. Department of*

Education Reach a Record High, WASH.

POST (Mar. 18, 2015),

https://www.washingtonpost.com/news/local/wp/2015/03/18/civil-rights-complaints-to-u-s-department-of-education-reach-a-record-high/?utm_term=.14531b6dedbf (explaining that OCR has seen its workload double since 2007).

¹¹⁹ See *supra* Part I(D) (discussing the numerous guidance documents OCR issued on Title IX).

¹²⁰ OCR's regional offices use manuals issued by OCR to enforce Title IX, but each office has autonomy in which complaints they investigate and how stringy it enforces OCR's guidance. See Renfrew, *supra* note 25, at 577-78 (explaining the lack of uniformity among OCR offices).

¹²¹ See Harter, *supra* note 86, at 32 (explaining that rulemaking helps to save time and money).

¹²² See *Dodds v. U.S. Dep't of Educ.*, No. 16-4117, 2016 WL 7241402, at *1 (6th Cir. 2016) (mentioning that the school district claimed that OCR's interpretation violated the APA); *G.G. el rel. Grimm v. Gloucester Cty. School Bd.*, 822 F.3d 709, 723 n.9 (4th Cir. 2016) (noting that the school board argued that OCR's interpretation contradicts 34 C.F.R. § 106.33); *Bd. of Educ. of the Highland Local School Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349, at *10 (S.D. Ohio Sept. 26, 2016) (noting that the school district claimed that OCR's interpretation did not comply with § 553 of the APA); *Student v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *1 (N.D. Ill. Oct. 18, 2016) (explaining that the plaintiffs, an organization of students and parents, asserted that OCR's enforcement of its interpretation violated the APA); *Texas v. United States*, No. 7:16-cv-00054-O, 2016 WL 4426495, at * 1-2 (N.D. Tex. Aug. 21, 2016) (noting that the

plaintiffs claimed that OCR violated the APA).

¹²³ 5 U.S.C. § 563(a)(2) (2012).

¹²⁴ 822 F.3d 709 (4th Cir. 2016).

¹²⁵ 136 S. Ct. 2442 (2016).

¹²⁶ See, e.g., Brief for The World Professional Association for Transgender Health, Pediatric Endocrine Society et al. as Amici Curiae Supporting Appellant, G.G. v. Gloucester County School Board, 822 F.3d 709 (4th Cir. 2016) (No. 15-2056) (explaining the importance of broad school policies and legal protection for transgender and gender non-confirming students); Brief for National School Boards Association and AASA The School Superintendents Association as Amici Curiae Supporting the Petitioner, Gloucester City School Board v. G.G. et al. rel. Grimm, 136 S. Ct. 2442 (2016) (No. 16-273), 2017 WL 128356 (asking the court to reverse Fourth Circuit decision upholding OCR's interpretation); Brief for Liberty, Life and Law Foundation & Wethepeopleinorder.com et al. as Amici Curiae Supporting Petitioner, Gloucester County School Bd. v. G.G., 137 S. Ct. 369 (2016), 2016 WL 4565643 (arguing that allowing the use facilities according to gender identity impacts parental rights, religious liberty, and safety of students).

¹²⁷ See generally William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 181 (2009) (explaining that “[n]egotiated rulemaking arose out of desire to avoid adversary and litigation”).

¹²⁸ 5 U.S.C. § 563(a)(3) (2012).

¹²⁹ See Perez, *supra* note 22, at 813 (explaining that although the committee members should be diverse, parties whose interests can be successfully addressed through the notice-and-comment process do not need to be included).

¹³⁰ See Pelesh, *supra* note 91, at 91 (discussing how Department of Education's use of negotiated rulemaking to promulgate a rule under the Higher Education Amendments of 1992 did not work because the Department did not follow the recommended process and refused to give power to the committee); see also Funk, *Bargaining Toward the New Millennium*, *supra* note 90, at 1359 (discussing *USA Group Loan Services, Inc. v. Riley*, 82 F.3d 708, 714(7th Cir. 1996), where committee sued the Department for not issuing the recommended rule).

¹³¹ See Jeffrey Brown, *Fighting for Their Lives: The LGBTQ Student's Right to a Harassment-Free Education*, 81 MISS. L. J. SUPRA 125, 145 (2011-2012) (discussing organizations that help LGBT students file Title IX complaints).

¹³² See *Improving Education, Creating a Better World*, GAY, LESBIAN & STRAIGHT EDUCATION NETWORK, <http://www.glsen.org/learn/about-glsen> (explaining that GLSEN conducts research and provides resources to educators on safe and affirming school environments for all students).

¹³³ The association publishes the “Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People,” which is the authoritative standard of transgender healthcare. *The Standard of Care*, WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351.

¹³⁴ *Our Mission*, American Family Association, <https://www.afa.net/who-is-afa/our-mission/>

¹³⁵ Evelyn Schlatter, *18 Anti-Gay Groups and Their Propaganda*, SOUTHERN POVERTY LAW CENTER (Nov. 4, 2010), <https://www.splcenter.org/fighting->

hate/intelligence-report/2010/18-anti-gay-groups-and-their-propaganda.

¹³⁶ The organization's senior counsel released a statement urging the Supreme Court to reverse the Fourth Circuit's ruling in *G.G. v. Gloucester County School Bd.*, because it believes the Circuit's ruling violates right to bodily privacy. See *US Supreme Court Agrees to Hear Student Privacy Case*, ALLIANCE DEFENDING FREEDOM (Oct. 28, 2016), <http://www.adfmedia.org/News/PRDetail/9929> (asking to reverse the Fourth Circuit's decision).

¹³⁷ See *Family Research Council Statement on Gov. McCrory's Executive Order on H.B. 2*, FAMILY RESEARCH COUNCIL (Apr. 12, 2016), <http://www.frc.org/newsroom/family-research-council-statement-on-gov-mccrory-executive-order-on-hb-2> (stating that it supports the state's efforts to protect people's "deeply-held views on sexuality or their expectation of privacy").

¹³⁸ See Noel Gutierrez-Morfin, *National Organization for Marriage Releases Anti-Transgender Ad*, NBC NEWS (Nov. 7, 2016), <http://www.nbcnews.com/feature/nbc-out/national-organization-marriage-releases-anti-transgender-ad-n679016> (explaining organization's position).

¹³⁹ *Who We Are*, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, <https://www.principals.org/who-we-are> (last visited Jan. 1, 2017). Having such an organization on the committee would provide members, including the Department, with insight of the types of issues that these professionals face when attempting to implement new policies.

¹⁴⁰ *About Us*, AMERICAN FEDERATION OF TEACHERS, <http://www.aft.org/about> (last visited Jan. 1, 2017).

¹⁴¹ *About ATIXA and Title IX*, ASSOCIATION OF TITLE IX ADMINISTRATORS,

<https://atixa.org/about/> (last visited Jan. 1, 2017).

¹⁴² See Brief for National School Boards Association and AASA The School Superintendents Association as Amici Curiae Supporting the Petitioner, *Gloucester City School Board v. G.G. et al. Grimm*, 136 S. Ct. 2442 (2016) (No. 16-273), 2017 WL 128356.

¹⁴³ See Jane Hudson et al. *Negotiated Rulemaking a Better Alternative*, 44 CLEARINGHOUSE REV. 526, 533 (2011) (explaining that the number of representatives from each side of the issue does not need to be equal so long as they all have equal bargaining power).

¹⁴⁴ See Lubbers, *supra* note 95, at 993 (explaining the importance of equal control).

¹⁴⁵ See 5 U.S.C. § 563(4) (2012) (stating that the agency head should decide that there is a reasonable likelihood that a committee will reach a consensus). Section 562 defines "consensus" as "unanimous concurrence among the interests represented on a negotiated rulemaking committee." 5 U.S.C. § 562(2) (2012). However, the committee can decide on a different definition of "consensus." 5 U.S.C. §§ 562(2)(A)–(B) (2012).

¹⁴⁶ See Lubbers, *supra* note 95, at 993 (discussing how diverse issues that committee members can negotiate on allows for broader compromise).

¹⁴⁷ By failing to recognize, with a legally binding force, that transgender is a protected characteristic under Title IX, and that gender identity discrimination is sex discrimination, educational institutions can discriminate and avoid liability by reasoning that the discrimination is due to the student's transgender status rather than their non-conformity with sex stereotypes. See Vittoria L. Buzzelli, *Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the*

Equal Protection Clause, 121 PENN ST. L. REV. 187, 205 (2016) (discussing how only prohibiting discrimination based on sex stereotyping allows blatant gender identity discrimination); *see also* Rao, *supra* note 8, at 256 (discussing how requiring students to identify with their biological sex, rather than gender identity, to file a sex stereotyping lawsuit makes the individual feel like an outsider).

¹⁴⁸ *See generally* Brown, *supra* note 131 (discussing the importance of reprimanding students similarly for similar crimes).

¹⁴⁹ It is important to allow students to use names and pronouns that match their gender identity, because requiring students to use feminine pronouns when they identify as a male, or masculine when they identify as a female, reinforces the idea that they are different from their peers and that it is not acceptable for them to be the person who they internally feel they are. *See* Erin E. Buzuvis, "As Who They Really Are": *Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports*, 34 LAW & INEQ. 341, 377 (2016) (discussing the importance of inclusive school policies that do not draw attention to gender identity).

¹⁵⁰ Many school policies prohibit transgender students from participating in teams or clubs matching their gender identity in fear that it would pose an unfair advantage. *See* Elizabeth M. Ziegler & Tamara I. Huntley, "It Got Too Tough to Not Be Me": *Accommodating Transgender Athletes in Sport*, 39 J.C. & U.L. 467, 471 (2013) (discussing positive effects of athletic participation on youth development and importance of allowing transgender students to play). However, that argument is weak because transgender persons commonly undergo hormonal treatment, which subsides any biological advantages. *Id.*

¹⁵¹ Policies that require transgender students to behave per norms traditionally associated with their biological sex only when performing certain tasks, such as using the restroom, signals out those students and tells them that they are different from the other students. *See* Harper J. Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WISC. J. L. GENDER & SOC'Y 301, 316 (2013) (explaining that sex-based policies and practices marginalize, stigmatize, and exclude transgender and gender non-conforming students).

¹⁵² *See* Lubbers, *supra* note 86, at 993 (explaining that deadlines help move the process along).

¹⁵³ Lubbers, *supra* note 86, at 994 (explaining how negotiations that do not lead to consensus can help the agency to develop a regulation on its own).

¹⁵⁴ *See Id.* (providing ways that an agency can use committee reports that did not lead to consensus to promulgate a supported regulation).

¹⁵⁵ *Id.*

¹⁵⁶ *See* 5 U.S.C. § 563(6) (2012) (suggesting that before employing negotiated rulemaking, that the agency determine that it has and is willing to commit resources needed to the committee).

¹⁵⁷ *See* Harter, *supra* note 86, at 53 (discussing benefits of negotiated rulemaking).

¹⁵⁸ *See* Lubbers, *supra* note 95, at 997 (explaining that although negotiated rulemaking involves greater upfront costs than promulgating a rule through the notice-and-comment process, the higher costs of organizing the committee and providing technical assistances during negotiations are canceled out by less litigation once the final rule is published).

¹⁵⁹ See 5 U.S.C. § 569(b) (2012) (listing the requirement for an agency to receive donations).

¹⁶⁰ See 5 U.S.C. § 563(4) (2012) (explaining that agency should only employ the negotiated rulemaking if reasonable certainty exists that the process will not “unreasonably delay” the notice of proposed rulemaking (NPRM) pursuant to § 553, or the issuance of the final rule).

¹⁶¹ See 5 U.S.C. § 563(7) (2012) (explaining the importance of agency commitment to use the recommendation, as it serves as a motivator for compromise during negotiations). From the start of the process, all parties in the negotiated rulemaking process must agree to support the final recommendation and the final rule, if the rule reflects the negotiated decisions. See Harter, *supra* note 86, at 33 (discussing how the agreement helps to ensure support of the final rule).

¹⁶² See Pelesh, *supra* note 91, at 156 (explaining how negotiated rulemaking reduces litigation).

¹⁶³ See *supra* Part II(B)(1); see also 2015 *National School Climate Survey*, *supra* note 113, at xvii (explaining that eighty-one percent of survey respondents reported that their school engaged in anti-LGBT policies or practices).

¹⁶⁴ See Juvonen & Graham, *supra* note 9, at 166 (explaining the high rates of discrimination experienced by transgender and gender non-confirming students).