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Helene E. Weinstein, Chair, NYS Assembly Ways & Means Committee
Via email: wamchair@nyassembly.gov

Liz Krueger, Chair, NYS Senate Finance Chair
Via email: financechair@nyenate.gov

February 13, 2019

**Re: In support of budget proposal clarifying New York’s Human Rights Law
applies to all educational institutions (Executive Budget, Part S)**

Dear Honorable Senators and Assemblypersons:

On behalf of the undersigned organizations and individuals, we call on you to support a provision in the executive budget that would help ensure *all* students attending school in New York are entitled to an education free from discrimination and harassment.

The proposed legislation (Part S in the Executive Budget) would resolve a statutory ambiguity that led the Court of Appeals to rule that New York’s Human Rights Law does *not* apply to public school students who have been subjected to harassment and discrimination. This measure would establish that all students in New York are protected under the Human Rights Law, and that the law provides a remedy for, and a deterrent to, conduct that violates students’ civil rights.

This legislation is needed to address a 2012 Court of Appeals ruling (decided by a single-vote margin) that held the Human Rights Law does not protect public school students from discrimination based on race, color, religion, disability, national origin, sexual orientation, military status, sex, age, or marital status.¹ By narrowly interpreting the term “education corporation or association,” the court excluded from the Human Rights Law’s protections around three million students who attend the state’s public schools.

The Court of Appeals opinion reversed decades of jurisprudence recognizing that public school students were indeed subject to the provisions of the Human Rights Law. Since its enactment in 1945, the Human Rights Law has served as the primary legal authority under which students in public and private non-parochial schools can seek redress when discriminated against.² The Human Rights Law also provides an administrative complaint procedure under

¹ *In the Matter of N. Syracuse Central Sch. Dist.*, No. 109 & *In the Matter of Ithaca City Sch. Dist.*, No. 110 (N.Y. Ct. of App., June 12, 2012).

² The objectives of New York Human Rights Law’s include “eliminat[ing] and prevent[ing] discrimination in ... educational institutions,” (Exec. Law §300), and “eliminat[ing] ... discrimination by the state or any agency or subdivision of the state” (*Bd. Of Higher Educ. Of City of N.Y. v. Carter*, 16 A.D.2d 443, 447 (1st Dep’t 1962), *aff’d as modified on other grounds*, 14 N.Y.2d 138 (1964)).

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the jurisdiction of the Division of Human Rights, the agency mandated to enforce the law. The Division of Human Rights has the authority to craft relief tailored to the specific circumstances of a case, ameliorating the harm to the complainant and addressing the underlying issues that gave rise to the complaint.

Adjudicating discrimination complaints through administrative procedures, including conciliation, as provided under the Human Rights Law, can be more efficient and cost-effective – for the individuals involved, for schools and for the state – than litigating those complaints in court. The related costs are not merely financial. Students who are targeted for bullying and harassment may seek to change schools, drop out, or even self-harm or attempt suicide as a result of their unaddressed pain and suffering. It is well documented that bullying and harassment can have severe emotional, physical and psychological effects on students. The treatment of these injuries carries significant societal costs.³ And research demonstrates that students who are bullied and harassed are more likely to become involved with the criminal justice system, and to become dependent on public assistance programs.⁴

The Court of Appeals’ ruling seriously compromises the rights of all public school students; however, the harmful consequences of this opinion are borne disproportionately by those who are most frequently the targets of bullying and harassment – students in racial or ethnic minority groups, students with certain religious affiliations, disabled students, and lesbian, gay, bisexual, transgender, and queer (LGBTQ) students. The incidence of bullying, threats and violence directed at LGBTQ students is particularly alarming. In a 2017 national survey of 23,001 students who were 13-21 years old, 87.3 percent of student respondents had experienced harassment or assault based on protected characteristics.⁵ Of the 1,009 student respondents who attended schools in New York, the vast majority regularly heard anti-LGBTQ remarks at school, most had experienced anti-LGBTQ victimization at school, and half had reported at least one form of anti-LGBTQ discrimination at school during the previous year.⁶

What’s more, the 2012 opinion limiting the scope of the Human Rights Law significantly disadvantages low-income families. Public school students who lack the financial resources to pursue other avenues of redress, including legal claims brought under federal law or other provisions of state law, are priced out of the civil justice system. It is fundamentally unfair that private school students – who are more likely to have the financial resources needed to pursue a lawsuit – can pursue a discrimination complaint through an administrative proceeding, under the Human Rights Law, but not public school students.

As a result of the 2012 court decision, New York’s Human Rights Law now has two standards of justice – one standard for students who can afford private-school tuition, and a

³ See Center for Health Promotion and Disease Prevention at Windber Research Institute, “The Cost Benefit of Bullying Prevention: A First Time Analysis of Savings,” Highmark Foundation (2012).

⁴ *Ibid* at 11.

⁵ GLSEN, “The 2017 National School Climate Survey,” *2017 National School Climate Survey*, available at <https://www.glsen.org/article/2017-national-school-climate-survey-1>.

⁶ GLSEN, “2017 State Snapshot: School Climate in New York,” *2017 National School Climate Survey*, available at https://www.glsen.org/sites/default/files/New%20York%20State%20Snapshot%20-%202017%20NSCS_0.pdf.

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lesser standard for those who cannot. The current state of the law makes no sense; it is simply unequal and unfair.⁷

Despite the alarming rate at which LGBTQ students face discrimination, they are afforded only limited and incomplete patchwork protections under current state and federal law. The status of these protections fluctuate wildly with political mood swings across the state and country, leaving these vulnerable students with uncertain legal recourse and remedies.

Title IX of the federal civil rights statute prohibits institutions with education programs or activities that receive federal financial assistance from excluding, denying benefits to, or discriminating against anyone based on sex. For years, many federal courts have ruled that Title IX protects transgender and gender-nonconforming students specifically, finding that such students experience sex discrimination when they are perceived as failing to conform with sex or gender stereotypes.⁸

Then came the case of Gavin Grimm, a transgender student who attended a public high school in Virginia. When Gavin came out as trans to his school administrators, he asked to be called Gavin, be addressed with male pronouns, and be permitted to the boys' bathrooms and locker room. The school initially agreed, but then the school board buckled under pressure from upset parents of cisgender (*i.e.*, non-transgender) students and reversed the school's trans-affirmative policies. Gavin sued. In 2016, during the course of Gavin's case, the Dept. of Education issued landmark Guidance on how schools should support transgender and gender-nonconforming students.⁹ Finally, Gavin's case reached the U.S. Supreme Court, the issue centering around the Dept. of Education's authority to issue such Guidance in the first place. and oral arguments were scheduled for early 2017. But in February 2017, following the 2016 presidential election, the new administration promptly rescinded the Guidance, saying that it did not agree with the previous administration's interpretation of Title IX. Without the Guidance, there was no longer an issue for the Supreme Court to decide. In June 2017, the U.S. Department of Education issued a memo stating that it was permissible for field agents to dismiss complaints from transgender students.¹⁰ In February 2018 – almost one year after rescinding the Guidance – the Dept. of Education announced that it would no longer act on complaints filed with its Office for Civil Rights (OCR) regarding refused access to restrooms or locker rooms appropriate to a

⁷ The laws in states neighboring New York recognize that prohibitions against discrimination apply to all public-school students in grades K-12. See New Jersey (N.J.S.A. 10: 5-12), Connecticut (Conn. Gen. Stat. §10-15c, §10a-6(b)), Massachusetts (Mass. Gen. Laws Ch. 76, §5), Pennsylvania (43 P.S. §§953-954), and Vermont (9 V.S.A. §4501).

⁸ See *e.g.*, Nation Center for Transgender Equality, "Federal Case Law on Transgender People and Discrimination," available at <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination>.

⁹ U.S. Department of Education, "Dear College Letter on Transgender Students," May 13, 2016, available at https://docs.wixstatic.com/ugd/0bb653_ac1078d95d76491db3f268c257e99093.pdf.

¹⁰ U.S. Dept. of Education, Office for Civil Rights, "OCR Instructions to the Field re Complaints Involving Transgender Students," June 6, 2017, available at <https://assets.documentcloud.org/documents/3866816/OCR-Instructions-to-the-Field-Re-Transgender.pdf>.

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transgender student's gender identity.¹¹ Federal protections for students based on their actual or perceived sexual orientation is even less clear, and such students would benefit from explicit protections under state law.¹² The future of these federal protections are uncertain, and must be supplemented with state law.

New York's Human Rights Law currently provides broader protections of LGBTQ rights, and the adjudicatory function of the Human Rights Division provides investigative and enforcement resources that may not be available to a complainant who must resort to litigation for relief. Under the Human Rights Law, "sexual orientation" is expressly protected in the stator language. On Friday, January 25, 2019, Governor Andrew Cuomo signed into law the Gender Expression Nondiscrimination Act (GENDA), which adds "gender identity" and "gender expression" to the list of protected statuses under the Human Rights Law. Prior to the passage of GENDA, in 2015 Gov. Cuomo directed the Division of Human Rights to promulgate regulations that would protect transgender and gender-nonconforming people under the existing law. In 2016, the new regulations clarified the definition of "sex" to include gender identity and transgender status, and "disability" to include gender. Since 2016, transgender people have successfully used this regulation to exercise their rights and get the legal relief they need after experiencing discrimination. It is expected that with the passage of GENDA, more transgender and gender-nonconforming individuals will seek to exercise their rights under our state law.

Despite these major developments, almost all students in our state – including LGBTQ students who would now be otherwise protected under the Human Rights Law – remain grossly unprotected due to the 2012 Court of Appeals decision.

The only other available legal protection for students statewide, the Dignity for All Students Act (DASA), also falls short. This statute does not provide a private right of action for students who experience harassment, discrimination, or bullying otherwise prohibited under the law. Its enforcement mechanisms – the option for students, parents, and school staff to file reports of violations for investigations, and the school's requirement to annually report such complaints to the State – are arbitrarily applied at best or disregarded at worst. Often students and parents don't understand their rights under DASA, cannot find or contact the designated

¹¹ Dominic Holden, "The Education Department Officially Says It Will Reject Transgender Student Bathroom Complaints," *BuzzFeed News* (Feb. 12, 2018), available at <https://www.buzzfeednews.com/article/dominicholden/edu-dept-trans-student-bathrooms>.

¹² The U.S. Dept. of Education has interpreted Title IX as protecting all students "regardless of the actual or perceived sexual orientation or gender identity of the harasser or target." U.S. Dept. of Education, Office for Civil Rights, "Dear Colleague Letter," Oct. 26, 2010, available at https://docs.wixstatic.com/ugd/0bb653_a9dbe42ce2754a58a6ca598caa14c512.pdf. Additionally, Title IX's definition of "sex" is historically linked to the meaning of "sex" under Title VII -- the federal law that prohibits sex discrimination in employment. For several decades, there has been a clear evolution of Title VII's "sex" as including gender identity, transgender status and sexual orientation (see e.g., *Zarda v. Altitude Express*, 883 F.3d 100 (2nd Cir. 2018) (finding Title VII covered discrimination against a gay male skydiving instructor who was terminated because of his actual or perceived sexual orientation)). This means that there's a theoretical case to be made for Title IX sex discrimination claims for LGBTQ+ students on a theory of "gender-stereotyping" (failing to conform with social expectations of gender or sex). However, students would benefit from more explicit protections in the meantime.

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DASA coordinator, cannot access a school's DASA report form, and never know whether investigations that occur actually work to address the issues at hand. Further, there is no standard by which these reports must be classified by the school in its reporting to the State, and so there is no accurate uniform data to draw from and determine the efficacy of the DASA reporting system.

Finally, public school students in our great state are afforded disparate rights and protections dependent solely on where they reside. New York City provides a clear layer of added protections for its public school students within the five boroughs, defining "educational institution" as including "kindergartens, primary and secondary schools, academies, colleges, universities, professional schools, extension courses, and all other educational facilities." Title 8 of the New York City Administrative Code § 8-102. Thus, thousands of Upstate public school students are not entitled to the same protections and rights as their Downstate counterparts, and yet are just as much if not more at risk of experiencing anti-LGBTQ discrimination and harassment in their schools.

We the undersigned, as organizations and individuals, have personally experienced, advocated for, and heard of countless situations of anti-LGBTQ discrimination and harassment that could have been more effectively and efficiently addressed if only the Human Rights Law protected all students in our state. Here are just a few anecdotes for illustration:

"My transgender daughter has Asperger's and attended a very small central public school in Jefferson County. She was harassed and bullied mercilessly throughout her school career because of her disability, but things got exponentially worse after she came out as transgender in high school. The students would taunt her in the classroom, in front of teachers who did nothing to stop it. They would provoke her, calling her the wrong pronouns and by her old name, just to get a rise out of her. Because of her Asperger's, she would sometimes react violently, having outbursts, swearing, hitting her head against a wall or door – only then would a teacher intervene, but would *send her* off to the principal for detention or suspension. The kids who harassed her never got in trouble. After one of these outbursts, a bunch of these kids' parents gathered at a school board meeting to accuse her of being a "deviant" and a danger to the student population. They called local media to come cover the meeting, and someone filed a false police report saying she planned to shoot up the school – which was entirely ridiculous! The parents tried to demonize her, tried to get her kicked out of the school, and the administration almost allowed it until we got an attorney involved. Even then, we didn't have much legal footing aside from federal disability laws and DASA (which didn't do much). Thankfully, we got the school to agree to support her long enough to get her to graduation, so she could move on with her life. We should have been able to do more to fight the violence she experienced – we needed a stronger legal platform to stand on. No student should ever have to go through that!"

"I have a 15-year-old non-binary trans child who attends a public high school in Greene County. My child uses gender neutral pronouns, they and them. At the beginning of this school year we gave the school their legal name change papers and informed the school

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that their pronouns are they and them. The teachers and staff have been good with the name change, but all but one teacher consistently misgenders my child, addressing them as she or her. My child suffers from anxiety and gender dysphoria, which is made worse by the constant misgendering by school staff and teachers. My child self-advocates a little, when they can, but it's not their job to teach these teachers who to be respectful! I asked the guidance counselor to help, but I don't know if she did anything. I have also reported anti-transgender bullying to the school, and it was addressed but not quickly or well – it still continues. I wasn't told about our rights under DASA, but the issue is so systemic throughout the school, I don't know what good that would do anyway.”

“I am a mother of a transgender student. My child's and my family's rights need to be protected under clear, broad, and unambiguous law. If not, there are life-and-death consequences.”

“My son is the sweetest boy you will ever meet. He is not transgender, but he's a very effeminate young gay man. He went to a centralized public school in Washington County. It's a very small town and a very small school. All the kids in his class he knew since before they could read. By the time he got to junior high, he was wearing tight girl's clothes and light makeup, and in high school he was just the most beautiful boy you've ever seen. The other kids got cruel, calling him “faggot” in the crowded hallways between classes, shoving him against the lockers, throwing food at him in the cafeteria. One day when he was walking home after school, he passed the athletic fields and the entire lacrosse team stopped practicing, turned to him with their sticks raised and started chanting “faggot” – their coach stood by and did nothing. We filed DASA reports for bullying based on his sexual orientation and gender expression, but nothing happened, the harassment continued. My boy spiraled – he became extremely depressed and anxious, started cutting himself every day and attempted suicide twice in a few months. We had to take him to an outpatient facility over two hours away for support, but it wasn't enough. We even thought about sending him to live with his grandparents in Vermont so he could be safer at another school. Finally, an attorney helped us use his 504 Plan for anxiety to try and address the bullying, and that seemed to be enough to get him through the next two years til graduation. We shouldn't have to do legal somersaults to protect our kids! The school should have been held accountable for treating our kid that way.”

“As a mental health therapist who serves mostly transgender adolescents, young adults, and adults, I have seen my fair share of individuals impacted by injustices in schools. For example, where schools – without thinking about the rippling safety risks – disclose a student's LGBTQ identity to their parents without the student's knowledge or consent. Or where a school forces a student to participate in female-segregated gym or sports activities even when the student identifies as male, has taken testosterone for years, and has updated their identity documents to reflect their male identity. New York must go further to protect our youth and future leaders.”

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“I’m the parent of two LGBTQ+ children and am also a public school teacher. I serve as an advisor of my school’s Gender & Sexuality Alliance (GSA), as well as a volunteer with the local LGBTQ community center’s youth program. Our kids NEED this legislation. Please do the right thing for our children.”

Our legislature must act to bridge the legal gap so that there are clear and undeniable protections for all students in our state, especially our most marginalized and vulnerable. All New York students deserve an education free of discrimination and harassment. We urge you to stand by this principle and protect the rights of all students by passing this legislation.

Sincerely,



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Additional Signatories

Organizations & Coalitions

Brooklyn Law School LGBT Advocacy Clinic
Gender Equality New York
Lambda Legal
The Lesbian, Gay, Bisexual & Transgender Community Center (NYC)
Long Island Transgender Advocacy Coalition
New York Legal Assistance Group LGBTQ Law Project
New York State Transgender Advocacy Coalition
Out Alliance of Rochester
Transcend Legal
Transgender Legal Defense and Education Fund
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