

ARTICLE

CONFORMITY OR NONCONFORMITY? DESIGNING LEGAL REMEDIES TO PROTECT TRANSGENDER STUDENTS FROM DISCRIMINATION

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In recent years, advocates have made significant strides in extending antidiscrimination protections to elementary and secondary students who identify as lesbian, gay, bisexual, and transgender. However, in this comparatively nascent field of law, there has been little discussion of how to effectively support and protect transgender students. These students often face harassment from their peers, lack of access to appropriate restrooms and locker rooms, and dress codes that prohibit them from wearing clothes consistent with their gender identities. Moreover, the needs of transgender students are often confusing to teachers and administrators, leading school personnel to respond to their transgender pupils in inappropriate and ineffective ways. As such, there is a compelling need

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for a cohesive framework of remedies that can be used to make schools more inclusive and safe for transgender students.

This Article provides concrete recommendations for remedying future cases of gender-identity discrimination in schools. To better comprehend the complexities involved in crafting effective remedies, the Article explores and applies Harvard Law School Dean Martha Minow's theories concerning "the dilemma of difference." Minow points out that decision makers must often determine whether to treat a protected class the same as or differently from the majority group—treating transgender students the same as their peers may at times be insensitive to their unique needs, but treating transgender students differently may draw attention to them and cause them to be further stigmatized by other students. Accordingly, this Article argues that decision makers should adopt a catalog of remedies that is flexible enough to adapt to the diverse range of circumstances that confront transgender young people.

To give substance to that catalog, the Article explores a recent settlement agreement involving a transgender student in the Arcadia Unified School District in California. The Article will argue that the framework of remedies implemented in the Arcadia case should be utilized in future cases to protect transgender students from discrimination. Whereas most other cases involving transgender students have focused primarily on enjoining specific acts of discrimination, the Arcadia settlement goes further—it requires changes to district policies, training and education programs, and individualized support teams for transgender students. These remedial mechanisms are likely to provide an effective system for supporting transgender students and protecting them from discrimination moving forward.

I. INTRODUCTION

Following the U.S. Supreme Court's ruling that same-sex couples have a constitutionally protected right to marry,¹ commentators have asked what issues should be confronted next in the movement to guarantee the rights of lesbian, gay, bisexual, and transgender ("LGBT") individuals.² This Article contends that establishing concrete protections for transgender students in elementary and secondary schools must be a top priority going forward. Transgender students' gender identities and gender expression are "different from cultural expectations based on the sex[es] they were assigned at birth,"³ and navigating elementary and secondary school environments is often more complicated and challenging for these students than it is for their

¹ Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

² See, e.g., James Esseks, *After Obergefell, What the LGBT Movement Still Needs to Achieve*, AM. CIV. LIBERTIES UNION (July 7, 2015, 10:15 AM), <https://www.aclu.org/blog/speak-freely/after-obergefell-what-lgbt-movement-still-needs-achieve> [<https://perma.cc/PT3P-YAF3>]; Tovia Smith, *After Supreme Court Decision, What's Next for Gay Rights Groups?*, NPR (July 1, 2015, 6:07 AM), <http://www.npr.org/2015/07/01/418838989/after-supreme-court-decision-whats-next-for-gay-rights-groups> [<https://perma.cc/X2XC-UESL>].

³ HUMAN RIGHTS CAMPAIGN & GENDER SPECTRUM, SUPPORTING AND CARING FOR OUR GENDER EXPANSIVE YOUTH: LESSONS FROM THE HUMAN RIGHTS CAMPAIGN'S YOUTH SURVEY 3 (2014), <https://issuu.com/humanrightscampaign/docs/gender-expansive-youth-report-final> [<https://perma.cc/6AJW-XPYT>]. In some literature, terms such as "gender-expansive" and "gender nonconforming" are used to denote similar categories of people whose gender identities and gender expression do not fit within the traditional confines of the male/female gender binary. See *id.*

lesbian, gay, and bisexual (“LGB”) peers. In addition to harassment from other students,⁴ transgender young people often face obstacles such as lack of access to appropriate restrooms and locker rooms, gender segregation in extracurricular activities, incorrect uses of names and pronouns, and dress codes that prohibit them from wearing clothing consistent with their gender identities.⁵ Because of these challenges, there is a compelling need for legal remedies that will effectively serve the needs of transgender students and protect them from discrimination.⁶

But how should transgender students be protected from discrimination in schools? To date, discussions surrounding this population have focused on transgender students’ rights to be treated like their peers.⁷ Though these rights-based inquiries are important, the rights themselves are simply symbolic without remedies that will actually protect transgender students from discrimination in their classrooms, restrooms, and hallways. Accordingly, this Article argues that courts and policymakers must also establish concrete mechanisms that will effectively safeguard transgender students’ rights from future violations.

In designing a workable set of remedial mechanisms, judges and policymakers must consider two important questions: “when does treating

⁴ A 2012 survey of gender-expansive youth found that forty percent of those surveyed were frequently or often excluded by their peers and thirty-seven percent were frequently or often verbally harassed and called names at school. HUMAN RIGHTS CAMPAIGN & GENDER SPECTRUM, *supra* note 3, at 10. Similarly, a survey conducted during the 2006–2007 school year found that fifty-three percent of transgender students “had been physically harassed (e.g., pushed or shoved)” and twenty-six percent “had been physically assaulted (e.g., punched, kicked, or injured with a weapon) in school in the past year because of their . . . gender expression.” EMILY A. GREYTAKE ET AL., *GAY, LESBIAN & STRAIGHT EDUC. NETWORK, HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS*, at xi (2009), <http://www.glsen.org/sites/default/files/Harsh%20Realities.pdf> [<https://perma.cc/U4KQ-S7HY>].

⁵ Emily Q. Shults, *Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender*, 12 CARDOZO J.L. & GENDER 337, 349 (2005). “As anyone can imagine, it is extremely disrespectful to be called by a pronoun or name one does not chose [sic] for oneself. It invalidates one[’s] identity and self-concept.” *Transgender and Gender Non-conforming Youth Recommendations for Schools*, TRANSGENDER L. & POL’Y INST., <http://www.transgenderlaw.org/resources/tlcschools.htm> [<https://perma.cc/3H8G-LH84>].

⁶ This Article takes the position that transgender students should be protected from discrimination and should have the ability to access restrooms and locker rooms that conform with their gender identities. However, questions concerning the rights of transgender individuals continue to be hotly contested as a policy matter. Conservative groups have used the issue of restroom access to build opposition to LGBT antidiscrimination laws. For example, in 2015, voters in Houston repealed a city ordinance that would have protected LGBT people from discrimination. Manny Fernandez & Mitch Smith, *Houston Voters Reject Broad Anti-discrimination Ordinance*, N.Y. TIMES (Nov. 3, 2015), http://www.nytimes.com/2015/11/04/us/houston-voters-repeal-anti-bias-measure.html?_r=0 [<https://perma.cc/K72Q-AWFn>]. Opponents of the antidiscrimination ordinance “said the measure would allow men claiming to be women to enter women’s bathrooms and inflict harm, and that simple message—‘No Men in Women’s Bathrooms’—was plastered on signs and emphasized in television and radio ads, turning the debate from one about equal rights to one about protecting women and girls from sexual predators.” *Id.*

⁷ See, e.g., Tina Sohaili, *Securing Safe Schools: Using Title IX Liability to Address Peer Harassment of Transgender Students*, 20 TUL. J.L. & SEXUALITY 79, 81 (2011).

people differently emphasize their differences and stigmatize or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on *that* basis?"⁸ Creating specific protections for transgender students might accentuate that these students are different from the cisgender majority (students whose gender identities and gender expression align with the sexes assigned to them at birth).⁹ As a result, the remedies themselves may lead cisgender students to further stigmatize and exclude the very transgender students that the antidiscrimination measures sought to protect in the first place.¹⁰ Conversely, if transgender students are not protected from discrimination by remedies that distinguish between students based on gender identity, transgender students may be more vulnerable to discrimination and may feel that their identities are not acknowledged and accepted by the majority.¹¹ Harvard Law School Dean Martha Minow calls this set of conflicting considerations "the dilemma of difference."¹²

To develop a set of remedies that will both protect transgender students from discrimination and minimize risks of stigma, the rest of the Article proceeds in three stages. Part II explores Minow's dilemma of difference and applies those concepts to transgender students. Although Minow's theories evoke challenging questions about how to design effective remedies for transgender young people without creating additional stigma, this Article argues that it is not necessary to resolve these questions in a uniform way for all students. Rather, policymakers should provide a catalog of remedial options for transgender students, and allow students and parents to assess the appropriateness of individualized measures based on their particular circumstances.

Part III then discusses recent cases and legislation concerning LGBT students, giving particular attention to decisions and policies involving transgender young people. Over the past several years, courts and state legislatures have provided increased legal protections for transgender students, but these advances have centered on the premise that transgender students should simply be treated the same as their cisgender peers.¹³ Unfortunately, decision makers have generally given little consideration to the complexities involved in crafting remedies that will effectively protect this diverse group of students from future discrimination. The remedial approaches articulated in these cases and legislation do not provide an adequate framework that will

⁸ MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990).

⁹ See HUMAN RIGHTS CAMPAIGN & GENDER SPECTRUM, *supra* note 3, at 3 (defining cisgender).

¹⁰ See MINOW, *supra* note 8, at 27–28.

¹¹ See *id.*

¹² *Id.* at 20.

¹³ See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 449 (7th Cir. 1996).

both prohibit specific acts of discrimination and protect transgender students from continuing stigma and exclusion.

To address these shortcomings, Part IV closely examines one recent case in which the Arcadia Unified School District in California denied a transgender student access to restrooms and locker rooms that aligned with his gender identity.¹⁴ After an investigation by the U.S. Department of Education's Office for Civil Rights ("OCR") and the U.S. Department of Justice ("DOJ"), the school district agreed to implement a set of measures to remedy the underlying rights violations.¹⁵

This Article asserts that courts, administrative agencies, and Congress should use the mechanisms employed in the Arcadia case as a model in crafting future remedies to protect transgender students from discrimination. When granting relief under Title IX or state nondiscrimination laws, courts should order school systems to establish policies barring discrimination based on gender identity, create nondiscrimination trainings for educators and students, correct acts of discrimination against particular plaintiffs, and provide individualized support teams for transgender students on an opt-in and confidential basis. OCR and DOJ should also continue to utilize these types of remedial mechanisms in future settlements with school districts. Most importantly, Congress should pass legislation that expressly protects transgender students from discrimination and delineates a specific catalog of remedies that may be implemented when discrimination occurs.¹⁶

II. MINOW'S DILEMMA OF DIFFERENCE

In exploring potential remedies for identity-based discrimination, Minow's theories provide a helpful starting point. Minow notes that "society assigns individuals to categories and, on that basis, determines whom to include in and whom to exclude from political, social, and economic activities."¹⁷ Likewise, legal frameworks reduce complex situations and multifaceted people to overly simplistic categories and treat those categories as "natural and inevitable."¹⁸ As a result, when institutions or legal systems seek to include a formerly excluded group or remedy past discrimination,

¹⁴ Letter of Findings at 3–4, Dep't of Justice v. Arcadia Unified Sch. Dist., OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70 (July 24, 2013) [hereinafter Letter of Findings, Arcadia Unified Sch. Dist.].

¹⁵ Resolution Agreement at 3–6, Dep't of Justice v. Arcadia Unified Sch. Dist., OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70 (July 24, 2013) [hereinafter Resolution Agreement, Arcadia Unified Sch. Dist.].

¹⁶ Notably, it would also be possible to create a legislative or regulatory regime in which school districts were required to implement nondiscrimination trainings and individualized support teams in order to receive certain allotments of funding. However, that type of program is beyond the scope of this Article, which focuses on remedies that should be available to individuals who bring discrimination claims in court or file administrative complaints with federal agencies.

¹⁷ MINOW, *supra* note 8, at 21.

¹⁸ *Id.* at 22.

they risk treating members of that group as welcome or subject to remedial measures only because of that trait.¹⁹ According to Minow, focusing on differences in this way may “replicate patterns of exclusion and hierarchy” and may prevent members of the formerly excluded group from integrating into society.²⁰ On the other hand, “a majority’s failure to acknowledge a minority’s difference communicates disapproval and nonacceptance and thus reinforces that difference.”²¹ Minow explains, “The dilemma for decision-makers . . . is how to help overcome past hostilities and degradation of people on the basis of group differences without employing and, in that sense, legitimating those very differences.”²²

Over the years, this dilemma has beleaguered civil rights advocates in many contexts. For example, Minow writes that throughout the struggle for racial equality in America, reformers frequently disagreed over whether “to integrate blacks within the dominant culture or . . . instead attempt to alter that culture by celebrating the distinct traditions of African and African-American experience.”²³ In *Brown v. Board of Education*, the U.S. Supreme Court held that black students must be permitted to enroll in white schools in order to obtain equal educational opportunities.²⁴ However, despite the legal system’s attempt to include black students, the white majority often resisted efforts to integrate.²⁵ Even when black students were able to enroll in formerly segregated schools, white people continued to stigmatize black students, leading to white flight and tracking programs that effectively re-segregated students on the basis of race.²⁶

Responding to the challenges of integrating into a community that still assigned lower status to black students, some black leaders called for a different approach: community control of local, black schools.²⁷ One plan for remedying race discrimination “emphasized hiring blacks to fill administrative positions in the school system, including the post of superintendent.”²⁸ According to these leaders, assimilation threatened black culture and black self-consciousness, whereas self-governance would give black communities greater autonomy, power, and pride in their identities.²⁹ Still, other advocates, including social psychologist Kenneth Clark, believed that community control would “further isolate the poor and the minority groups from the majority society and bring the customary consequences of racial and class isolation—eroded facilities, inadequate teaching and administrative staffs,

¹⁹ *Id.*

²⁰ *Id.* at 27–28.

²¹ *Id.* at 27.

²² *Id.* at 47.

²³ *Id.* at 25.

²⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); MINOW, *supra* note 8, at 24.

²⁵ MINOW, *supra* note 8, at 24.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

and minimum resources.”³⁰ Clark further argued that “the lower-status community will never have genuine power until its isolation is ended.”³¹

LGBT communities have also faced this dilemma of difference in the educational sphere, most prominently through New York City’s experiment establishing a school specifically for LGBT students. In 1985, the city’s public school system, in conjunction with a private organization, opened the Harvey Milk High School.³² Though students of all identities were allowed to enroll on a voluntary basis, the Harvey Milk High School was intended to be a safe environment for gay and lesbian students where they would be protected from the intimidation and discrimination they often faced in regular public schools.³³ In support of this separatist approach, advocates argued that “[t]here could and must be more efforts to ensure the safety and security of all children within the community, but while we are working on that, there have to be solutions for those kids who are being victimized today.”³⁴ By contrast, critics of the program argued that the school would lead to greater isolation of gay and lesbian young people and thus would be ineffective in dismantling discrimination.³⁵ One advocate stated, “Through long, painful years we reached a consensus that we couldn’t allow segregation. This is a short-term gain and we need to look at the long-term, larger issues.”³⁶ The *New York Times* argued that it could not “condone the concept of establishing a special school specifically for students based on their sexual orientation” because “history has taught us the best way to fight discrimination is to dismantle it where it occurs.”³⁷

In the years since the Harvey Milk High School opened, LGB individuals have become increasingly integrated into mainstream society, a trend most recently epitomized by the Supreme Court’s decision recognizing

³⁰ Kenneth B. Clark, *Introduction* to MARIO FANTINI ET AL., *COMMUNITY CONTROL AND THE URBAN SCHOOL*, at ix, xi (1970).

³¹ *Id.*

³² MARTHA MINOW, IN *BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK* 83 (2010). Eighteen years later, following the U.S. Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), New York City expanded the program “from two classrooms with 50 students to eight classrooms with 170 students and a full four-year high school.” *Id.* at 84.

³³ *See id.*

³⁴ Tania Branigan, *Responding to a Need, or to Fear?*, WASH. POST (Sept. 9, 2003) (quoting David Mensah, executive director of the Hetrick-Martin Institute, the advocacy group that founded the original program), <http://www.washingtonpost.com/archive/politics/2003/09/09/responding-to-a-need-or-to-fear/cd43b67a-788e-43b6-a442-4394a4e9fa09/> [https://perma.cc/UT4G-5VFF]. Notably, much of the debate surrounding the Harvey Milk High School arose in connection with the school’s expansion in 2003. *See* MINOW, *supra* note 32, at 84.

³⁵ *See* MINOW, *supra* note 32, at 84.

³⁶ Branigan, *supra* note 34 (quoting “Bill Dobbs, a lawyer, veteran gay activist, and civil libertarian”).

³⁷ Editorial, *The Harvey Milk High School*, N.Y. TIMES (Aug. 3, 2003), <http://www.nytimes.com/2003/08/03/opinion/the-harvey-milk-high-school.html> [https://perma.cc/X5CM-5W9N].

same-sex marriage as a fundamental right.³⁸ However, even as LGB identities have been largely normalized, transgender students continue to be seen as different from the majority because of their gender expression. Transgender young people are especially likely to be viewed as different when they do not identify with single categories in the gender binary,³⁹ when they are visually or aurally recognizable as transgender people,⁴⁰ or when they are voluntarily open about their gender identities. At the same time, many transgender people endeavor to conform to the norms of and assimilate into the majority—that is, they seek to “pass” as members of the genders with which they identify.⁴¹ Transgender students may feel particularly strong pressure to avoid being recognized as different in school environments, where fitting in is often highly valued.⁴²

In the context of protecting transgender students from discrimination, the dilemma of difference could be recharacterized as a choice between conformity and nonconformity. Transgender students face questions of whether to attempt to “integrate with a larger community that still assigns [them] a lower status” or to seek remedies that will distinguish them from the majority but may provide greater protection from discrimination.⁴³ For example, establishing an individualized support team for a transgender student might

³⁸ See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Some within the LGBT community have bemoaned this trend, suggesting that it may result in a diminution of shared experience and loss of group identity for LGBT people. See Jodi Kantor, *Historic Day for Gays, but Twinge of Loss for an Outsider Culture*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/2015/06/27/us/scotus-same-sex-marriage-gay-culture.html> [<https://perma.cc/FV6R-ZRMT>].

³⁹ The gender binary refers to the “notion that there exist only two genders, each solidly fixed, biologically based and attached to various expectations for behavior, appearance and feelings.” HUMAN RIGHTS CAMPAIGN & GENDER SPECTRUM, *supra* note 3, at 3. One survey of transgender youth found that “nearly 10 percent of the youth did not find the options of male or female adequate for describing their gender.” *Id.* at 4.

⁴⁰ Here, the Article refers to transgender individuals who do not readily “pass” as members of the genders with which they identify. These individuals may be recognized as transgender because they retain—or are unable to completely conceal—physical features or mannerisms traditionally associated with the genders they were assigned at birth.

⁴¹ “When used to refer to trans people, ‘passing’ is defined as being accepted by others as a member of one’s identified sex, on the basis of appearance, mannerism and voice.” Cary Gabriel Costello, *On “Passing,”* TRANSFUSION (July 26, 2011, 10:22 PM), <http://trans-fusion.blogspot.com/2011/07/on-passing.html> [<https://perma.cc/M57Z-T7LQ>]. Studies show that “investment in passing for many transgender individuals constitutes a positive goal in the process of actualizing and affirming their gender identity.” Walter O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103 AM. J. PUB. HEALTH 943, 949 (2013). However, the term itself is disfavored among some members of the transgender community. See Costello, *supra*.

⁴² See Corne Mufioz-Plaza et al., *Lesbian, Gay, Bisexual and Transgender Students: Perceived Social Support in the High School Environment*, 85 HIGH SCH. J. 52, 56 (2002) (noting that among high school students, “difference was often associated with a reported inability to ‘fit in’ with their peer groups and feelings of alienation”); see also Jeffrey T. Lashbrook, *Fitting In: Exploring the Emotional Dimension of Adolescent Peer Pressure*, 35 ADOLESCENCE 747, 754 (2000) (suggesting that “the threat of negative feelings (arising from evaluations of self in relation to others) is not only the motivational force behind conformity, but also what motivates others to apply pressure in the first place”).

⁴³ MINOW, *supra* note 8, at 25.

help protect that student's rights because the team will be able to adjust services and ensure that the student has access to appropriate facilities as circumstances change. Still, creating a support team for a transgender student may act as a marker—another display of nonconformity—that emphasizes the student's difference, leading other students in the school to focus on that difference and further exclude the student because of it. Without an individualized support team, the student might have an easier time fitting in with other students, the vast majority of whom do not have special support teams.⁴⁴

Ultimately, this Article will argue that it is not necessary to completely resolve this choice between conformity and nonconformity with a single approach for all transgender students. Instead, as Part IV will discuss, a range of remedial mechanisms should be made available to transgender students, and a plaintiff should be permitted to decide when the potential benefits of an individualized remedy outweigh the risks. At the same time, judges and policymakers should remain cognizant of this dilemma when designing and implementing legal remedies for transgender students in order to avoid adding to the social stigma that these students may already experience.

III. DEVELOPING PROTECTIONS FOR TRANSGENDER STUDENTS

In recent years, advocates have achieved significant success in establishing protections for transgender and LGB students. This Part examines efforts to advance the rights of LGBT students through several legal mechanisms: the Equal Protection Clause, Title IX of the Education Amendments of 1972, newly proposed federal nondiscrimination legislation, and state nondiscrimination laws. Although some of these efforts have succeeded in establishing rights for transgender and LGB students, decision makers have generally given little attention to determining effective remedies. Moreover, when courts and litigators have articulated remedies, those approaches have typically focused on enjoining specific discriminatory practices without providing remedial measures that will simultaneously help minimize stigma and exclusion. Therefore, this Part submits that a more comprehensive scheme—like the one outlined in the Arcadia case and discussed in Part IV—is needed to effectively protect transgender students from discrimination.

⁴⁴ In most schools, the only students with individualized support teams are students with disabilities, who have teams established for them pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1414(d) (2012) (discussing the requirement of individualized education program teams for students with disabilities). Studies suggest that students who are labeled as disabled are sometimes stigmatized because of those labels. See Dara Shifrer, *Stigma of a Label: Educational Expectations for High School Students Labeled with Learning Disabilities*, 54 J. HEALTH & SOC. BEHAV. 462, 475–76 (2013); see also MINOW, *supra* note 8, at 36 (noting that “history shows the stigmatizing and often segregative consequences” of labeling children as disabled). Similarly, transgender students may be stigmatized if they are labeled as different from their peers and provided with special support teams on the basis of that difference.

A. *The Equal Protection Clause*

Over the past two decades, litigants have attempted to use the Fourteenth Amendment's Equal Protection Clause⁴⁵ to protect the rights of LGBT students.⁴⁶ In a 1996 case, *Nabozny v. Podlesny*, the Seventh Circuit suggested that the U.S. Constitution provides at least some degree of protection to LGBT young people.⁴⁷ The plaintiff, an openly gay student, alleged that school officials discriminated against him based on his gender and sexual orientation by failing to respond to complaints that he was verbally harassed, subjected to a "mock rape," and physically assaulted on numerous occasions.⁴⁸ First addressing the gender-discrimination claim, the court noted that school officials "treated male and female victims differently" by dismissing the plaintiff's reports of harassment "because both the perpetrators and the victim were males."⁴⁹ The Seventh Circuit explained, "We find it impossible to believe that a female [complaining of a mock rape] would have received the same response."⁵⁰ Thus, school officials' inaction constituted "discrimination based on 'gender-based generalization[s]'" that violated the Fourteenth Amendment.⁵¹ Next, in analyzing the claim of sexual-orientation discrimination, the Seventh Circuit stated that it was "unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation."⁵² Therefore, the court denied the school officials' motion for summary judgment.⁵³

Although this approach has been replicated in other cases,⁵⁴ the Equal Protection Clause alone is an insufficient means of protecting LGBT students from discrimination. Professor Deborah Brake argues that the Seventh Circuit's analysis makes it easy for school officials to avoid liability while allowing discrimination to continue:

⁴⁵ U.S. CONST. amend. XIV, § 1.

⁴⁶ See *Nabozny v. Podlesny*, 92 F.3d 446, 449 (7th Cir. 1996); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1083 (D. Minn. 2000); AM. CIV. LIBERTIES UNION, KNOW YOUR RIGHTS: TRANSGENDER PEOPLE AND THE LAW 4 (Apr. 24, 2013), https://www.aclu.org/files/assets/lgbttransbrochure_2013_0.pdf [https://perma.cc/A8GJ-SAJ6]. See generally Heather L. McKay, Note, *Fighting for Victoria: Federal Equal Protection Claims Available to American Transgender Schoolchildren*, 29 QUINNIAC L. REV. 493 (2011).

⁴⁷ *Nabozny*, 92 F.3d at 454–58.

⁴⁸ *Id.* at 451–52. When the student and his parents reported these incidents to school authorities, the principal responded that "boys will be boys" and that "if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students." *Id.*

⁴⁹ *Id.* at 454.

⁵⁰ *Id.* at 454–55.

⁵¹ *Id.* at 455 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975)).

⁵² *Id.* at 458.

⁵³ *Id.* at 460–61.

⁵⁴ See, e.g., *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1089 (D. Minn. 2000) ("Assuming the allegations set forth in the pleadings to be true, defendant has responded to plaintiff's complaints differently than to those of other students because of his sexual orientation or perceived sexual orientation.").

If the school in fact ignored the complaints of all gay students, male and female alike, or had a sketchy record of responding to sexual harassment complaints generally, a plaintiff would be unsuccessful under the *Nabozny* holding. Thus, under the *Nabozny* rationale, a school can insulate itself from liability for sex discrimination by treating male and female harassment complainants uniformly, however inadequately it responds to the underlying harassment.⁵⁵

As Brake suggests, the Equal Protection Clause assures no substantive baseline of protection against harassment, and it provides no guidance on what remedial measures should be implemented to guard against future encroachments.

Moreover, the *Nabozny* approach is based on the assumption that the best way to remedy discrimination is to treat all students the same, but this assumption does not hold true in all circumstances and may even serve to denigrate LGBT identities.⁵⁶ In many cases, the right solution for individual transgender students is not to be treated the same as cisgender students. For example, using a communal boys' restroom may be unsafe for a female-to-male transgender student, who may fear that he will be subjected to ridicule or even violence if he uses the same facilities as his cisgender peers.⁵⁷

In addition, by simply declaring that all students will be treated equally, school administrators avoid acknowledging LGBT students' identities, and as a result, LGBT students may feel that they are not valued and welcome members of their school communities. As Minow notes, "when their identities are devalued in the society, children know it, and that message damages their self-esteem and ability to succeed."⁵⁸ Transgender and LGB individuals continue to inhabit an inferior status in American society. Thus, treating transgender and LGB students the same as their cisgender and heterosexual peers, respectively, may actually communicate school officials' discomfort with—or even disapproval of—LGBT students' identities.⁵⁹ Accordingly, there is a need for an approach that will provide substantive protections and simultaneously recognize the validity and value of LGBT identities. Advocates have sometimes turned to Title IX to promote those types of protections.⁶⁰

⁵⁵ Deborah Brake, *The Cruellest of Gender Police: Student-to-Student Harassment and Anti-Gay Peer Harassment Under Title IX*, 1 GEO. J. GENDER & L. 37, 41 (1999).

⁵⁶ See MINOW, *supra* note 8, at 26.

⁵⁷ In other circumstances, a female-to-male transgender student may prefer to use the communal boys' restroom. This illustrates the importance of individualized remedies in the context of protecting transgender students from discrimination.

⁵⁸ MINOW, *supra* note 8, at 27.

⁵⁹ See *id.* ("[A] majority's failure to acknowledge a minority's difference communicates disapproval and nonacceptance and thus reinforces that difference.")

⁶⁰ See Vanessa H. Eisemann, *Protecting Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, 128 (2000); Shults, *supra* note 5, at 34; Sohaili, *supra* note 7, at 81; Lara Kaufmann & Devi Rau, *Title IX at 40: Protect-*

B. Title IX

Title IX of the Education Amendments of 1972⁶¹ is a more promising source of concrete protections for transgender students than the Equal Protection Clause. This law states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁶² Though the text of Title IX only prohibits schools from discriminating against students on the basis of sex,⁶³ recent court cases and OCR policies suggest that the statute also protects students from discrimination on the basis of gender nonconformity—an analysis that may be used to safeguard the rights of transgender students.⁶⁴ Still, recent court decisions concerning gender-identity discrimination have failed to articulate an adequate set of remedies that will effectively protect transgender students from future discrimination.⁶⁵ Moreover, although these interpretations of Title IX have tremendous potential to expand protections

ing Students from Gender-Based Harassment, NAT'L WOMEN'S L. CTR. (July 6, 2012), <http://nwlc.org/title-ix-40-protecting-students-gender-based-harassment/> [<https://perma.cc/NCP3-JPD8>]; AM. CIV. LIBERTIES UNION, *supra* note 46. In addition, some have argued that disability law may provide protections for transgender people. See generally Daniella A. Schmidt, Note, *Bathroom Bias: Making the Case for Trans Rights Under Disability Law*, 20 MICH. J. GENDER & L. 155 (2013). However, this approach may be challenging, especially at the federal level, because the Rehabilitation Act of 1973 specifically excludes “transsexualism” and “gender identity disorders not resulting from physical impairments” from the definition of “individual with a disability.” 29 U.S.C. § 705(20)(F) (2012). This exclusion was not included in the original version of the Rehabilitation Act but was instead added to the law in 1990. See Schmidt, *supra*, at 169. Some commentators speculate that the exclusion was added in response to cases that had recognized “‘transsexualism’ as a disability under the federal law.” See *id.* (citing *Blackwell v. U.S. Dep’t of Treasury*, 639 F. Supp. 289, 290 (D.D.C. 1986)). Moreover, labeling transgender individuals as disabled in order to protect them from discrimination under state or federal disability law may create additional stigma for transgender students. See *supra* note 44.

⁶¹ 20 U.S.C. § 1681 (2012).

⁶² *Id.*

⁶³ In *Miles v. New York University*, a federal district court held that transgender individuals are protected under Title IX, at least when they are subjected to harassment that is sexual in nature. 979 F. Supp. 248, 250 (S.D.N.Y. 1997). In that case, university officials took no action after a transgender graduate student reported sexual harassment by a professor. See *id.* at 249. The court explained, “Title IX was enacted precisely to deter that type of behavior, even though the legislators may not have had in mind the specific fact pattern here involved.” *Id.* at 250. However, despite this promising ruling, a jury later found that the university was not negligent in failing to address the conduct. See *Miles v. N.Y. Univ.*, No. 98-9128, 1999 WL 464974, at *1 (2d Cir. June 23, 1999).

⁶⁴ See, e.g., *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp. 2d 952, 965 (D. Kan. 2005) (“In this case, a rational trier of fact could infer that plaintiff was harassed because he failed to satisfy his peers’ stereotyped expectations for his gender because the primary objective of plaintiff’s harassers appears to have been to disparage his perceived lack of masculinity.”); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000) (holding that “by pleading facts from which a reasonable fact-finder could infer that he suffered harassment due to his failure to meet masculine stereotypes, plaintiff has stated a cognizable claim under Title IX”); see also *infra* notes 73–80 and accompanying text.

⁶⁵ See *Logan v. Gary Cmty. Sch. Corp.*, No. 07-CV-431, 2008 WL 4411518, at *4 (N.D. Ind. Sept. 25, 2008).

for transgender students, decisions by district courts and the executive branch are less durable in the long term than concrete legislation that unequivocally bars discrimination based on gender identity and provides appropriate mechanisms for remedying such discrimination.

In 2000, a federal district court held—in *Montgomery v. Independent School District No. 709*—that gender nonconformity is a valid reason for protecting students from discrimination under Title IX.⁶⁶ The plaintiff in that case was subjected to frequent verbal, sexual, and physical abuse by other students because he was perceived to be gay.⁶⁷ Although school officials “implemented several disciplinary measures against the offending students,” these responses were inconsistent and ineffective in controlling the harassment.⁶⁸ Analyzing Montgomery’s claim, the district court looked to an important case litigated under Title VII of the Civil Rights Act of 1964, *Price Waterhouse v. Hopkins*.⁶⁹ In that case, the U.S. Supreme Court explained that employers could no longer “evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁷⁰ Applying this precedent to the Title IX context,⁷¹ the *Montgomery* court concluded that “by pleading facts from which a reasonable fact-finder could infer that he suffered harassment due to his failure to meet masculine stereotypes, plaintiff has stated a cognizable claim under Title IX.”⁷²

Under the Obama Administration, OCR has adopted a gender-nonconformity approach to Title IX that is similar to the one used in *Montgomery*. In a 2010 “Dear Colleague” letter, OCR provided an example of “a gay high school student who was called names[,] physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions

⁶⁶ 109 F. Supp. 2d at 1092.

⁶⁷ *Id.* at 1084–85.

⁶⁸ *Id.* at 1085–86.

⁶⁹ *Id.* at 1091–92 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). The district court also discussed *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), a case in which the Supreme Court “recognized for the first time that claims based on same-sex harassment are cognizable under Title VII” as long as the plaintiff can demonstrate that “he or she was harassed ‘because of . . . sex.’” *Montgomery*, 109 F. Supp. 2d at 1091 (quoting *Oncale*, 523 U.S. at 81 (1998)).

⁷⁰ *Price Waterhouse*, 490 U.S. at 251 (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

⁷¹ *Montgomery*, 109 F. Supp. 2d at 1090–92 (noting that “Title VII similarly requires that the discrimination resulting in the plaintiff’s claims be based on his or her sex” and that “the Supreme Court relied upon Title VII precedents in first recognizing a private cause of action for sexual harassment under Title IX”).

⁷² *Id.* at 1092. Likewise, in *Pratt v. Indian River Central School District*, a district court held that “harassment based on nonconformity with sex stereotypes is a legally cognizable claim under Title IX.” 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011). There, a male student was “repeatedly called names like ‘pussy,’ ‘sissy,’ and ‘girl,’ and was mocked with effeminate gestures.” *Id.* at 152. Because school officials failed to take action to stop the harassment, the court denied the district’s motion to dismiss the student’s Title IX claim. *See id.*

of how teenage boys are expected to act and appear.”⁷³ Because “the harassing conduct was based in part on the student’s failure to act as some of his peers believed a boy should act,” OCR concluded that the student was entitled to gender-based protection under Title IX.⁷⁴ Likewise, in 2014 guidance, OCR explicitly affirmed that the statute protects transgender students: “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.”⁷⁵

Consistent with OCR’s current policy statement, the gender-nonconformity analysis seems readily applicable to transgender students who do not match the gender stereotypes associated with the sexes assigned to them at birth.⁷⁶ Still, federal courts have yet to recognize that the analysis encompasses transgender students.⁷⁷ In one recent case, *Logan v. Gary Community*

⁷³ Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Colleagues 7–8 (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> [<https://perma.cc/V7L6-QKXH>].

⁷⁴ *Id.* It appears that OCR’s interpretation of Title IX has shifted somewhat over the past several years, perhaps due to political pressures from the White House. Under the George W. Bush Administration, OCR issued guidance to states and local educational agencies suggesting that Title IX protected LGBT students from harassment that was sexual in nature but did not protect students from nonsexual discrimination based on sexual orientation or gender nonconformity. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 3 (2001), <https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf> [<https://perma.cc/E5GZ-TP43>] (“Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance.”); OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., SEXUAL HARASSMENT: IT’S NOT ACADEMIC 8 (2008), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf> [<https://perma.cc/V48F-2MBD>] (“Title IX prohibits harassing conduct that is of a sexual nature if it is unwelcome and denies or limits a student’s ability to participate in or benefit from a school’s program, regardless of whether the harassment is aimed at gay or lesbian students or is perpetrated by individuals of the same or opposite sex. Title IX does not address discrimination or other issues related to sexual orientation.”).

⁷⁵ OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/U87L-LP4E>]; *see also* OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES 25 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf> [<https://perma.cc/2ZM9-AYML>] (“All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.”).

⁷⁶ *See* *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (holding that a transgender employee was protected from discrimination under Title VII and explaining that “employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex”); Schmidt, *supra* note 60, at 165 (noting that “it is literally ‘because of sex’ that trans people are discriminated against, most often because their assigned sex at birth or genitals do not accord with their lived sex”).

⁷⁷ On February 8, 2016, the author of this Article conducted a WestlawNext search of all federal cases using the following search criteria: “student” & (“transgender!” or “transsex-

School Corp., a federal judge in Indiana came close.⁷⁸ A transgender student arrived at her senior prom “wearing a prom dress of the type normally worn by high school girls,” but the principal refused to allow her to enter the prom, claiming that her attire violated the school’s dress code.⁷⁹ The court denied the school system’s motion to dismiss the student’s case, noting that “it would be premature to dismiss this claim at this early stage in the case.”⁸⁰ Although the court did not analyze the student’s Title IX claim in depth, *Logan* demonstrates a strong possibility that transgender students may be entitled to protection based on gender nonconformity.

A few years later, the parties settled the *Logan* case, with the school system agreeing to revise its dress code, change its nondiscrimination policy to include protections for LGBT students, and train administrators on respectful treatment of LGBT people.⁸¹ The approach outlined in the *Logan* settlement agreement provides a helpful starting point for designing future remedies for transgender students.⁸² In contrast to the *Nabozny* approach, the *Logan* settlement acknowledges the validity of transgender identities by requiring policy changes and training programs that specifically identify transgender people as a protected class. On the other hand, Minow notes that protections like these “reemphasize[] the particular category that has mattered in the past.”⁸³ By accentuating transgender students’ difference, these policies and trainings might result in increased stigma and lead transgender students to be further ostracized by the cisgender majority.⁸⁴ Thus, there is a need for a comprehensive remedial framework that will protect transgender students from discrimination, acknowledge their identities, and minimize risks of social stigma and exclusion.

ual!” or “gender identity”) & (“nonconform!” or “non-conform!” or “conform”). The search yielded fifty cases; however, none of these cases stated that transgender students were protected from discrimination under Title IX based on their gender nonconformity. In addition, the author searched for federal cases citing *Price Waterhouse* that included the following terms: “student” & (“transgender!” or “transsexual!” or “gender identity”). This search yielded eighteen cases, and again, none of these cases found Title IX violations based on gender identity under a gender-nonconformity approach. In one case, *Doe v. University of Massachusetts-Amherst*, the court suggested in dicta that “Title IX, like Title VII, prohibits discrimination on the basis of either a person’s biological sex or the person’s gender identity.” No. 14-30143, 2015 WL 4306521, at *6 n.2 (D. Mass. July 14, 2015), *appeal docketed*, No. 15-1856 (1st Cir. July 28, 2015). Finally, the author searched for federal cases citing *Montgomery* that included the following terms: “transgender!” or “transsexual!” or “gender identity.” This search yielded two cases, neither of which involved transgender students.

⁷⁸ No. 07-CV-431, 2008 WL 4411518, at *4 (N.D. Ind. Sept. 25, 2008).

⁷⁹ *Id.* at *2.

⁸⁰ *Id.* at *4.

⁸¹ *Logan v. Gary Community School Corporation*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/logan-vs-gary-community-school> [<https://perma.cc/DQ92-92LE>].

⁸² In many ways, these systemic reforms are quite similar to those implemented in the Arcadia case. See *infra* Section IV.A.

⁸³ MINOW, *supra* note 8, at 22.

⁸⁴ See *id.* (“Besides reducing people to one trait, this solution risks new harms if the category itself still carries stigmatizing or exclusionary consequences in other contexts.”).

Moreover, without clear guidance from Congress or the Supreme Court, the gender-nonconformity analysis as applied to transgender students—and any remedial framework established thereunder—will remain vulnerable to challenge. OCR’s current interpretation of Title IX could be modified or revoked by a new administration in the White House.⁸⁵ Moreover, some district courts have already rejected the argument that Title IX protects transgender students from discrimination based on gender nonconformity. For example, in *G.G. ex rel. Grimm v. Gloucester County School Board*, a district court directly disavowed OCR’s position that Title IX guarantees transgender students access to restrooms that conform with their gender identities.⁸⁶ Similarly, in *Johnston v. University of Pittsburgh*, a district court held that a university’s refusal to permit a transgender student “to use the bathrooms and locker rooms consistent with his gender identity rather than his birth sex” did not constitute “discrimination under a sex stereotyping theory.”⁸⁷ These types of decisions may continue until Congress passes legislation clearly protecting transgender and LGB students from discrimination.

C. *The Student Non-Discrimination Act*

In addition to pursuing protections under Title IX, advocates have pushed Congress to pass legislation unequivocally protecting LGBT students from discrimination and harassment.⁸⁸ On January 27, 2010, Representative Jared Polis (D-CO) first introduced the Student Non-Discrimination Act (“SNDA”).⁸⁹ This proposed legislation seeks “to ensure that all students

⁸⁵ See *supra* note 74.

⁸⁶ See No. 15-cv-54, 2015 WL 5560190, at *7–9 (E.D. Va. Sept. 17, 2015).

⁸⁷ 97 F. Supp. 3d 657, 680 (W.D. Pa. 2015). Another unreported case, *Doe v. Clark County School District*, held that “barring . . . a preoperative male-to-female transgendered student from using the communal ladies’ room” was not a violation of Title IX, even under *Price Waterhouse*. No. 06-CV-1074, 2008 WL 4372872, at *1, *4 (D. Nev. Sept. 17, 2008).

⁸⁸ See *Student Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/laws-and-legislation/federal-legislation/student-non-discrimination-act> [<https://perma.cc/3PUS-8SWQ>].

⁸⁹ Student Non-Discrimination Act of 2010, H.R. 4530, 111th Cong. (2010). Although the original bill died in committee, *H.R. 4530 (111th): Student Nondiscrimination Act of 2010*, GOVTRACK, <https://www.govtrack.us/congress/bills/111/hr4530> [<https://perma.cc/KS8W-THKY>], SNDA was reintroduced in both houses of Congress in 2011, 2013, and 2015. See *Student Non-Discrimination Act of 2015*, S. 439, 114th Cong. (2015); *Student Non-Discrimination Act of 2015*, H.R. 846, 114th Cong. (2015); *Student Non-Discrimination Act of 2013*, S. 1088, 113th Cong. (2013); *Student Non-Discrimination Act of 2013*, H.R. 1652, 113th Cong. (2013); *Student Non-Discrimination Act of 2011*, S. 555, 112th Cong. (2011); *Student Non-Discrimination Act of 2011*, H.R. 998, 112th Cong. (2011). Both the Senate and House versions of the bill are currently in committee, but the legislation is unlikely to be enacted in the near future. See *S. 439: Student Non-Discrimination Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/s439> [<https://perma.cc/9WVP-LAPC>] (predicting that the bill has a “2% chance of being enacted”); *H.R. 846: Student Non-Discrimination Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/hr846> [<https://perma.cc/MG7B-CMST>] (predicting that the bill has a “1% chance of being enacted”).

have access to public education in a safe environment free from discrimination, including harassment, bullying, intimidation, and violence, on the basis of sexual orientation or gender identity.”⁹⁰ The key provision of SNDA, which was modeled after Title IX,⁹¹ states:

No student shall, on the basis of actual or perceived sexual orientation or gender identity of such individual or of a person with whom the student associates or has associated, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.⁹²

Through this nondiscrimination command, SNDA would provide an unambiguous declaration that transgender students may not be subjected to discrimination in schools.

However, by clearly establishing a new class of protected students, SNDA also has the potential to emphasize that transgender students are different from their cisgender peers.⁹³ Minow points out that establishing these types of identity-based distinctions in the law can result in additional stigma and animosity toward those whom the legislation is intended to help.⁹⁴ Thus, SNDA’s nondiscrimination command is insufficient by itself—transgender students also need specific remedial mechanisms that will safeguard their rights from future violations.

SNDA aims to provide those types of “meaningful and effective remedies for discrimination in public schools based on actual or perceived . . . gender identity.”⁹⁵ Yet despite this laudable goal, the remedies for private actions are defined vaguely: “Aggrieved individuals may be awarded all appropriate relief, including equitable relief, compensatory damages, and costs of the action.”⁹⁶ SNDA would also empower federal agencies to issue “rules, regulations, or orders of general applicability,”⁹⁷ and agencies would be able to effectuate those requirements by terminating funding to noncompliant grantees or “by any other means authorized by law.”⁹⁸ Although these provisions would likely give greater force to the law’s nondiscrimination command, the potential private and administrative enforcement mechanisms provide little guidance on the specific types of remedies that would best protect transgender and LGB students from discrimination.

⁹⁰ S. 439 § 2(b)(1).

⁹¹ *Student Non-Discrimination Act*, *supra* note 88.

⁹² S. 439 § 4(a).

⁹³ *See supra* notes 39–44 and accompanying text.

⁹⁴ *See* MINOW, *supra* note 8, at 22.

⁹⁵ S. 439 § 2(b)(3). In an attempt to effectuate this goal, the legislation provides for both federal enforcement, *see id.* § 5, and a private cause of action, *see id.* § 6.

⁹⁶ *Id.* § 6(a).

⁹⁷ *Id.* § 5(a).

⁹⁸ *Id.* § 5(b).

D. State Nondiscrimination Laws

In recent years, some states have made progress in providing greater protections for transgender students. As of February 2016, fourteen states had enacted laws prohibiting discrimination in schools on the basis of gender identity.⁹⁹ In one additional state, Hawaii, school regulations bar discrimination toward transgender individuals.¹⁰⁰ These state laws have given rise to litigation, leading state courts to clarify that transgender students must be protected from discrimination in schools. However, instead of exploring the range of remedial mechanisms that might effectively safeguard this diverse group of students from discrimination, state courts have merely ordered schools to treat transgender plaintiffs the same as their cisgender peers.

For example, in *Doe v. Yunits*, a state trial judge in Massachusetts held that a transgender student should simply be treated like other young women in her school.¹⁰¹ In that case, the school's principal frequently sent the student home for dress code violations and eventually told the student "that she would not be allowed to attend [school] if she were to wear . . . padded bras, skirts or dresses, or wigs."¹⁰² At the time, Massachusetts law only prohibited discrimination in schools "on account of . . . sexual orientation," not on the basis of gender identity.¹⁰³ However, in analyzing the plaintiff's claim, the court applied an analysis similar to the gender-nonconformity approach discussed in Section III.B above:

Since plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear. If the answer to that question is no, plaintiff is being discriminated against on the basis of her sex, which is biologically male.¹⁰⁴

Concluding that the plaintiff would likely establish that the dress code was "applied to her in a gender discriminatory manner," the court preliminarily enjoined school officials "from preventing plaintiff from wearing any cloth-

⁹⁹ *Statewide School Non-discrimination Laws & Policies*, HUM. RTS. CAMPAIGN, http://www.hrc.org/state_maps [<https://perma.cc/X96W-CQEK>]. Those states are California, Colorado, Connecticut, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, Oregon, Vermont, and Washington. *Id.* In addition, Wisconsin enacted a law in 2001 that "addresses discrimination against students based on sexual orientation only." *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See No. 001060A, 2000 WL 33162199, at *1-2, *8 (Mass. Super. Ct. Oct. 11, 2000).

¹⁰² *Id.* at *1-2.

¹⁰³ *Id.* at *6 (quoting MASS. GEN. LAWS ch. 76, § 5 (2000)).

¹⁰⁴ *Id.* The court's juxtaposition of gender identity and biological sex was somewhat misguided. The court acknowledged that the student identified with the female gender. Yet at the same time, the court suggested that the discrimination stemmed from the school's decision to treat boys differently from girls by not allowing this student, whom the court classified as "biologically male," to wear girls' clothing. In contrast to the court's analysis, the correct question was actually whether the student was being discriminated against based on her lack of conformity with the sex that was assigned to her at birth.

ing or accessories that any other male or female student could wear to school without being disciplined.”¹⁰⁵

Similarly, in *Doe v. Regional School Unit 26*, Maine’s high court recently gave further credence to the notion that transgender students should merely be treated the same as their cisgender peers.¹⁰⁶ In this case, the transgender student’s “school, her parents, her counselors, and her friends all accepted that [she] is a girl.”¹⁰⁷ Moreover, a support team consisting of the student’s “mother, her teachers, the school guidance counselor, and the director of special services” recommended that the student should be allowed to use the girls’ restroom.¹⁰⁸ Despite the support team’s recommendation, however, the school terminated the student’s access to “the girls’ bathroom, requiring her instead to use the single-stall, unisex staff bathroom.”¹⁰⁹ Applying the Maine Human Rights Act (“MHRA”),¹¹⁰ the Supreme Judicial Court held, “Where, as here, it has been clearly established that a student’s psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the MHRA.”¹¹¹

These recent cases show that state courts are increasingly willing to protect transgender students from discrimination based on gender identity. Yet these analyses have two important shortcomings. First, the state courts seem to assume that the proper remedy for discrimination is simply treating

¹⁰⁵ *Id.* at *7–8. The court also enjoined the school officials “from disciplining plaintiff for any reason for which other students would not be disciplined.” *Id.*

¹⁰⁶ *See* 86 A.3d 600, 607 (Me. 2014).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 602–03. This support team was established under Section 504 of the Rehabilitation Act of 1973, which “prohibits discrimination based on disability in any program or activity that receives federal funds, including local schools.” *Id.* at 602 n.2 (citing 29 U.S.C. § 794 (2012)). Explaining the original creation of the 504 team, the court stated that “[a]lthough Susan did not have a disability, the format of the 504 plan was useful for addressing the impact of her gender identity issues on her educational experience.” *Id.* at 602 n.4. However, the creation of this team is somewhat difficult to understand given the Rehabilitation Act’s specific exclusion of “transsexualism” and “gender identity disorders not resulting from physical impairments.” 29 U.S.C. § 705(20)(F) (2012); *see also supra* note 60. The student was eventually diagnosed with “gender dysphoria, which is the medical term for psychological distress resulting from having a gender identity different from the sex that one was assigned at birth.” *Doe v. Reg’l Sch. Unit 26*, 86 A.3d at 602. Presumably, the support team was justified under Section 504 because of the psychological distress, not the “gender-identity disorder” itself. *See supra* note 60.

¹⁰⁹ *Doe v. Reg’l Sch. Unit 26*, 86 A.3d at 603. This change occurred after “a male student followed her into the restroom on two separate occasions, claiming that he, too, was entitled to use the girls’ bathroom.” *Id.*

¹¹⁰ The Act prohibits discrimination in public accommodations on the basis of “sexual orientation,” which is defined to include “a person’s actual or perceived gender identity or expression.” *Id.* at 605 (quoting ME. REV. STAT. tit. 5, §§ 4553(9-C), 4592(1) (2013)). Moreover, the law’s “definition of ‘discriminate’ includes, without limitation, [to] segregate or separate.” *Id.* (quoting ME. REV. STAT. tit. 5, § 4553(2)).

¹¹¹ *Id.* at 607. The lower court’s judgment was vacated and the case was “[r]emanded for further proceedings consistent with this opinion.” *Id.*

transgender students the same as other students—they never consider whether additional measures may be necessary to protect transgender young people from discrimination in schools. Second, the state courts fail to recognize concerns raised by Minow that further stigma may arise from attempting to integrate transgender students into school communities that often assign lower status to transgender individuals.¹¹² The next Part will address these problems and explore the range of remedies that should be used to more effectively protect transgender students from discrimination while minimizing risks of social stigma.

IV. ARCADIA UNIFIED SCHOOL DISTRICT: A FRAMEWORK OF SPECIFIC REMEDIES FOR TRANSGENDER STUDENTS

Thus far, the predominant approach to remedying gender-identity discrimination has focused on transgender students' rights to be treated the same as their peers.¹¹³ Most of the recent decisions have simply enjoined school officials from engaging in discriminatory conduct without considering whether transgender students may need additional remedial mechanisms to effectively safeguard their rights from future encroachment. Similarly, although SNDA articulates a strong nondiscrimination command, the bill provides only a vague list of remedies available in private actions and gives courts and federal agencies broad authority to articulate more precise rules.¹¹⁴

Some might argue that this lack of specificity in case law and proposed legislation might give local governments and school systems the flexibility to craft remedies that will best serve the interests of transgender students. However, this vagueness might also leave plaintiffs with ineffective remedies and permit local governments and school systems to take incremental steps that slow the process of achieving greater inclusion and acceptance of transgender students. Professor Kimberly Jenkins Robinson argues that *Brown v. Board of Education (Brown II)*¹¹⁵ contributed to “delays in desegregation by placing school districts that violated the Constitution in charge of developing the appropriate remedy for the segregation and by failing to issue guidance on the scope of the desegregation obligation, the timing by which desegregation must be completed, and the appropriate remedy for noncompliant districts.”¹¹⁶ A similar process could easily occur for trans-

¹¹² See MINOW, *supra* note 8, at 25.

¹¹³ See *supra* Sections III.A, III.B, III.D.

¹¹⁴ Student Non-Discrimination Act of 2015, S. 439, 114th Cong. § 6(a) (2015) (“Aggrieved individuals may be awarded all appropriate relief, including equitable relief, compensatory damages, and costs of the action.”).

¹¹⁵ 349 U.S. 294, 300–01 (1955).

¹¹⁶ Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 295 (2013).

gender students if courts, agencies, and Congress fail to specify a concrete set of measures that should be implemented to remedy discrimination.¹¹⁷

These decision makers could likely prevent such delays by establishing a catalog—“a detailed, but incomplete, list”—of remedies available to victims of gender-identity discrimination.¹¹⁸ A catalog is distinct from both a rule, which “contain[s] a precise formulation” of the permitted remedies, and a standard, which “provide[s] a generalized description” of the available relief and gives broad discretion to decision makers.¹¹⁹ “Catalogs, by virtue of their *limited* open-endedness, can be expeditiously and cheaply adapted to accommodate changes while reducing information costs for actors.”¹²⁰

A more specific and thorough catalog of remedies for gender-identity discrimination falls squarely within the traditional scope of permissible Title IX remedies. In *Franklin v. Gwinnett County Public Schools*, the U.S. Supreme Court made clear that a Title IX complainant is entitled to “any appropriate relief,” including injunctive relief and monetary damages.¹²¹ Consistent with this ruling, OCR and DOJ have utilized a broad range of remedies to address gender-based discrimination.¹²² For example, in one case involving sexual harassment of female students in the Rhinebeck Central School District, a federal judge approved a consent decree in which the school district agreed to respond promptly to future allegations of harassment, revise district policies and procedures, retain an expert in sexual-har-

¹¹⁷ Moreover, without clear and specific statutory language, there could be drawn-out litigation over appropriate remedies. In the context of IDEA, there was significant litigation over ambiguities in the available remedies—for example, whether parents of students with disabilities were entitled to reimbursement for their children’s private-school tuition. *See generally* *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993) (discussing the question of whether parents were entitled to reimbursement for private-school placements under IDEA when a school did not meet all of IDEA’s statutory requirements); *Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359 (1985) (discussing the question of whether parents were entitled to reimbursement for private-school tuition under IDEA’s predecessor). Congress could have prevented this litigation by spelling out the remedies in a more straightforward way.

¹¹⁸ Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165, 168 (2015).

¹¹⁹ *Id.* at 165–66.

¹²⁰ *Id.* at 172. “Catalogs [also] allow the legislature to keep the courts’ power in check, thereby striking a more desirable balance between the legislature and the judiciary.” *Id.*

¹²¹ 503 U.S. 60, 73–76.

¹²² *See, e.g.*, Consent Decree, *John Doe I v. Sch. Dist. of the City of Allentown*, No. 06-CV-1926 (E.D. Pa. filed July 31, 2012), <https://www.justice.gov/iso/opa/resources/990201273010810290492.pdf> [<https://perma.cc/7KQS-KNHJ>]; Consent Decree, *Jane Doe v. Anoka-Hennepin Sch. Dist. No. 11*, No. 11-cv-01999 (D. Minn. filed Mar. 5, 2012), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/resource/Anoka_Hennepin_ConsentDecree.pdf [<https://perma.cc/3FR9-PQMF>]; Stipulation and Settlement Agreement, *J.L. ex rel. Robert Sullivan v. Mohawk Cent. Sch. Dist.*, No. 09-CV-943 (N.D.N.Y. filed Mar. 29, 2010); Consent Decree, *AB ex rel CD v. Rhinebeck Cent. Sch. Dist.*, No. 03-CV-3241 (S.D.N.Y. filed Mar. 22, 2006) [hereinafter Consent Decree, *Rhinebeck Cent. Sch. Dist.*], <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/rcsdor.pdf> [<https://perma.cc/X23V-DA4L>].

assessment prevention, establish trainings for employees and students, and provide monetary compensation to the individual plaintiffs.¹²³

This Part argues that courts and administrative agencies should establish a catalog of concrete remedial mechanisms that will effectively protect transgender students from discrimination under Title IX and state nondiscrimination laws. Moreover, and more importantly in the long run, Representative Polis and other allies in Congress should revise SNDA to provide a catalog of specific remedial mechanisms. To give substance to the catalog, this Part examines the recent settlement of a case involving a transgender student in the Arcadia Unified School District.¹²⁴ The settlement agreement supplies a set of remedies that are likely to provide more meaningful protections for transgender young people than the incomplete approaches discussed in Part III. Many of the remedies in the Arcadia case are similar to those used in other administrative cases involving Title IX violations.¹²⁵ However, because the Arcadia case specifically seeks to address the needs of a student who identifies as transgender, it provides a better model for crafting appropriate relief in future cases of gender-identity discrimination.

Section A describes the factual background of the Arcadia case. Section B then analyzes the agreed-upon remedies using Minow's theories and provides recommendations for effective implementation. For purposes of analysis, the remedies in the Arcadia case will be divided into four main categories: (1) policy changes; (2) nondiscrimination training for educators and students; (3) individualized remedial measures directed toward resolving the discrimination at issue; and (4) individualized support teams that may be established at the request of transgender students and their parents.¹²⁶ A fifth section will discuss an additional remedy that was not awarded in the Arcadia case—monetary damages. Ultimately, this Part will argue that all of these remedies should be made available to transgender students, albeit with some modifications and clarifications to better protect transgender students from related stigma. Decision makers should be careful to safeguard the privacy of individual transgender students and allow those students to opt in to individualized measures that may risk isolating the students from their peers. In addition, this Part will argue that monetary damages should be made available to transgender plaintiffs who experience discrimination, even though such relief was not provided in the Arcadia case.

¹²³ Consent Decree, *Rhinebeck Cent. Sch. Dist.*, *supra* note 122.

¹²⁴ Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 3–6.

¹²⁵ Compare Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 3–6, with Consent Decree, *Rhinebeck Cent. Sch. Dist.*, *supra* note 122.

¹²⁶ See Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 3–6.

A. *The Arcadia Case*

The Arcadia case involved a transgender student who was denied access to “facilities consistent with his male gender identity.”¹²⁷ The student was “assigned the female sex at birth” but identified as a boy from an early age, and during fifth grade, the student began to transition from female to male.¹²⁸ He was quickly accepted as a boy by his teachers and classmates.¹²⁹ Prior to the start of sixth grade, the student’s parents met with school district administrators and requested that the student be allowed to use “male-associated restrooms and locker rooms at the middle school, in accordance with the Student’s and family’s wishes, as informed by medically appropriate standards of care recommended by the Student’s healthcare providers.”¹³⁰

However, even though students did not fully disrobe in the locker rooms and “there were no known instances of peer-on-peer harassment in the restrooms, locker rooms, or elsewhere in the school,” district officials refused to allow the student to access the boys’ facilities because of “generalized concerns about safety and privacy.”¹³¹ Instead, the student was required to use the private restroom in the health office as a restroom and changing area.¹³² This restroom was located far from the student’s classes and the school’s gymnasium; thus, traveling between those locations often caused the student to miss class time.¹³³ Over the course of his sixth- and seventh-grade years, the student “became increasingly unhappy with the arrangement because it made him feel ‘different’ and called unwanted attention to his situation with other classmates.”¹³⁴

While the student was in seventh grade, the district sponsored an overnight trip “to an academic camp at a private outdoor educational camp facility” where students slept in cabins.¹³⁵ Prior to the trip, the student’s parents contacted the school district and asked that he be allowed to stay in a cabin with other boys.¹³⁶ Students were also allowed to submit the names of classmates with whom they would like to share cabins.¹³⁷ “Several of the Student’s male friends, including boys who were aware of his transgender status, requested the Student as a cabin-mate. The Student submitted a request listing these classmates as well.”¹³⁸ Despite these requests, the district prohibited the student from staying in a cabin with other students, instead

¹²⁷ Letter of Findings, Arcadia Unified Sch. Dist., *supra* note 14, at 1.

¹²⁸ *Id.* at 2–3.

¹²⁹ *Id.* at 3.

¹³⁰ *Id.* at 3.

¹³¹ *Id.* at 3–4.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 4.

¹³⁵ *Id.* at 5.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

requiring that he sleep in a private cabin with one of his parents.¹³⁹ Again, these arrangements were based on “generalized safety and privacy concerns.”¹⁴⁰

After receiving complaints from the student’s parents and attorney, OCR and DOJ conducted an extensive investigation of the situation to determine whether the school district had violated Title IV of the Civil Rights Act of 1964¹⁴¹ and Title IX.¹⁴² Following this investigation, OCR and DOJ issued a findings letter stating that “[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX and Title IV.”¹⁴³ “[W]ithout admitting any violation of federal law,” the school district voluntarily agreed on July 24, 2013, to implement several measures to remedy the situation and better serve the needs of transgender students.¹⁴⁴ Teachers within the school system seemed to welcome the clarification that the settlement agreement provided.¹⁴⁵ According to Patrick Tierney, president of the Arcadia Teachers Association, “[t]he principal and staff want [the transgender student] to feel comfortable and supported at his . . . school, and are doing everything they can to help him succeed.”¹⁴⁶

B. *The Arcadia Remedies and Future Implementation*

1. *Policy Changes*

The Arcadia Unified School District agreed to revise “all of its policies, procedures, regulations, and related documents and materials . . . related to discrimination to . . . specifically include . . . discrimination based on a student’s gender identity.”¹⁴⁷ In addition, the district agreed to “ensure that

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 42 U.S.C. §§ 2000c–c-9 (2012). “Title IV prohibits discrimination by public schools against students based on race, color, national origin, sex, and religion.” Letter of Findings, Arcadia Unified Sch. Dist., *supra* note 14, at 1. “DOJ investigated its complaint under its Title IV authority.” *Id.* at 2.

¹⁴² 20 U.S.C. § 1681 (2012). “OCR investigated its complaint under its Title IX authority.” Letter of Findings, Arcadia Unified Sch. Dist., *supra* note 14, at 2.

¹⁴³ Letter of Findings, Arcadia Unified Sch. Dist., *supra* note 14, at 2 (citing *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135 (N.D.N.Y. 2011); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000)).

¹⁴⁴ *Id.* at 6–7; Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 1. According to Superintendent Joel Shawn, while the investigation was ongoing, district officials “took steps to ensure that the student in question was able to participate in all aspects of school.” Joel Shawn, *Letter to the Editor*, N.Y. TIMES (Aug. 15, 2013), http://www.nytimes.com/2013/08/16/opinion/transgender-students.html?_r=0 [https://perma.cc/WPQ6-KWKL].

¹⁴⁵ Sherry Posnick-Goodwin, *A New Law Accommodates Transgender Students*, CAL. EDUCATOR, Oct. 2013, at 41, 44.

¹⁴⁶ *Id.* at 41, 44.

¹⁴⁷ Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 4. These policy changes are consistent with recommendations from LGBT advocacy organizations, which have urged school districts to adopt model policies that prohibit “[d]iscrimination, bullying, and

its policies, procedures, and regulations . . . provide all students, including transgender students and other students who do not conform to sex stereotypes, equal access to and equal opportunity to participate in all [school] programs and activities.”¹⁴⁸ In response to the settlement, on December 10, 2013, the Arcadia Unified School District adopted a new nondiscrimination policy providing that “[d]istrict programs and activities shall be free from discrimination, harassment, intimidation, and bullying of any student based on the student’s . . . gender (including gender identity, gender expression, gender transition, transgender status, and nonconformity with sex stereotypes).”¹⁴⁹

Notably, in the context of the Arcadia case, these policy changes can be classified as remedies because the school district did not have such policies in place prior to the agreement. Until Congress passes legislation concretely barring gender-identity discrimination nationwide, this type of remedy may continue to be necessary in school systems where existing nondiscrimination policies do not specifically protect transgender students. However, once a nondiscrimination policy is established, the policy itself is not really a remedy per se; instead, it provides a concrete articulation of rights from which remedies will spring.

Within Minow’s framework, nondiscrimination policies such as the one implemented in the Arcadia case could draw attention to transgender students.¹⁵⁰ The Arcadia Unified School District adopted a policy that specifically bars discrimination based on “gender transition, transgender status, and nonconformity with sex stereotypes.”¹⁵¹ By classifying transgender students as a protected class, the Arcadia policy and others like it serve as additional markers of nonconformity that accentuate these students’ differences from the majority.¹⁵² Some transgender students may be comfortable being distinguished from their cisgender peers—perhaps because they are open about

harassment on the basis of . . . gender identity or expression.” GAY, LESBIAN & STRAIGHT EDUC. NETWORK & NAT’L CTR. FOR TRANSGENDER EQUALITY, MODEL DISTRICT POLICY ON TRANSGENDER AND GENDER NONCONFORMING STUDENTS 3 (June 1, 2013), http://www.glsen.org/sites/default/files/Trans_ModelPolicy_2013.pdf [<https://perma.cc/B56D-GWWE>].

¹⁴⁸ Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 4–5. Shortly after the Arcadia settlement agreement was issued, California’s Governor signed a bill into law stating that “[a] pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.” A.B. 1266, 2013–2014 Leg. Sess. at § 1(f) (Cal. 2013). Likewise, in March 2014, the California School Boards Association issued guidance stating that “districts should allow a student to use the gender-specific facility consistent with his or her gender identity.” CAL. SCH. BDS. ASS’N, FINAL GUIDANCE: AB 1266, TRANSGENDER AND GENDER NONCONFORMING STUDENTS, PRIVACY PROGRAMS, ACTIVITIES & FACILITIES 2 (2014).

¹⁴⁹ ARCADIA UNIFIED SCHOOL DISTRICT, BOARD POLICY § 5145.3 (2013), <http://site.ausd.net/modules/groups/homepagefiles/cms/1414168/File/AB%201266/BP%205145.3%20-%20policy%20-%20approved%2012-10-13.pdf> [<https://perma.cc/XQ4A-MPJ3>].

¹⁵⁰ See MINOW, *supra* note 8, at 28–29.

¹⁵¹ See ARCADIA UNIFIED SCHOOL DISTRICT, *supra* note 149.

¹⁵² Recall that the dilemma of difference may also be viewed as a choice between conformity and nonconformity. See *supra* Part I.

their gender identities or because their identities do not fit neatly into the gender binary.¹⁵³ Other transgender students—especially those who place high value on passing as members of the genders with which they identify¹⁵⁴—may prefer to blend in and conform to the norms of their peers. For these students in particular, establishing transgender status as a protected class may “delay or derail successful entry into the society that continues to make difference matter.”¹⁵⁵

Policies could be framed in ways that protect both transgender students and cisgender students from discrimination by prohibiting discrimination based on “gender identity” instead of specifically referring to transgender status. However, even when policies are broadly drafted, cisgender students are unlikely to see the nondiscrimination policies as protection for all students. Rather, many will view “gender identity” as simply a placeholder for “transgender” and thus conclude that transgender students have been given special protection. As a result, transgender students will be viewed as different from their cisgender peers.

Schools might be able to avoid this dilemma altogether by establishing policies that target conduct, such as harassment and identity-based discrimination, without specifically designating protected groups.¹⁵⁶ In the context of antibullying legislation, some states have enacted laws that protect all students from peer-on-peer harassment and do not list protected categories of students.¹⁵⁷ Similarly, certain states have adopted laws that prohibit bullying based on a broad and inclusive range of student attributes.¹⁵⁸ For example, Iowa bars harassment and bullying on the basis of “any actual or perceived trait or characteristic of the student.”¹⁵⁹ By extending protections to all students regardless of group membership, nondiscrimination policies could avoid drawing attention to transgender students and exposing them to additional stigma.

¹⁵³ See *supra* note 39.

¹⁵⁴ See *supra* notes 40–41 and accompanying text.

¹⁵⁵ MINOW, *supra* note 8, at 28–29.

¹⁵⁶ This approach might be analogized to the idea within the disability context that “universal design” can accommodate everyone without using potentially stigmatizing labels. See generally Joan M. McGuire, Sally S. Scott & Stan F. Shaw, *Universal Design and Its Applications in Educational Environments*, 27 REMEDIAL & SPECIAL EDUC. 166 (2006).

¹⁵⁷ JAMES C. HANKS, SCHOOL BULLYING: HOW LONG IS THE ARM OF THE LAW? 12–13 (2012) (“A number of states do not list any categories at all.”); see also FLA. STAT. § 1006.147(4) (“The school district bullying and harassment policy shall afford all students the same protection regardless of their status under the law.”); N.H. REV. STAT. ANN. § 193-F:4(II)(c) (“[A]ll pupils are protected regardless of their status under the law.”). South Dakota even goes so far as to state that “no school district policy prohibiting bullying . . . may contain any protected classes of students.” S.D. CODIFIED LAWS § 13-32-14.

¹⁵⁸ HANKS, *supra* note 157, at 12.

¹⁵⁹ IOWA CODE § 280.28(2)(b)–(c) (“‘Trait or characteristic of the student’ includes but is not limited to age, color, creed, national origin, race, religion, marital status, sex, sexual orientation, gender identity, physical attributes, physical or mental ability or disability, ancestry, political party preference, political belief, socioeconomic status, or familial status.”).

However, the potential benefits of creating nondiscrimination policies that specifically encompass gender identity and transgender status heavily outweigh the potential risks. Transgender students are often subject to significant harassment and discrimination in schools precisely because of their gender identities.¹⁶⁰ Nondiscrimination policies that encompass gender identity and transgender status discourage discrimination against this marginalized group and provide a clear means of redress for those transgender students who experience discrimination. Acknowledging transgender students' identities in these policies communicates greater approval and acceptance by the majority, which may in turn help transgender students develop self-esteem and pride in their identities.¹⁶¹

Moreover, clearer policies are likely to help prevent confusion among teachers and school administrators. According to Tierney, prior to the Arcadia complaint, district staff "were struggling with how to deal with this young person and trying to determine where he would fit in best."¹⁶² The settlement and revised policies clarified that transgender students should have the option of accessing gender-segregated facilities that align with their gender identities.¹⁶³

To provide these benefits on a broader scale, courts must acknowledge that Title IX protects transgender students from discrimination based on gender nonconformity.¹⁶⁴ Courts should further memorialize those protections by ordering offending school districts to establish policies that explicitly ban discrimination based on gender identity and that provide transgender students equal access to school facilities. When negotiating future settlements with school districts that have violated transgender students' rights, OCR and DOJ should continue to emphasize that Title IX protects transgender students from discrimination based on gender nonconformity, and the administrative agencies should push school systems to add gender-identity protections to their nondiscrimination policies.

Most importantly, Congress should enact SNDA into law to unequivocally establish protections for transgender students nationwide. Without a clear congressional message that transgender students are entitled to protec-

¹⁶⁰ See *supra* note 4.

¹⁶¹ See MINOW, *supra* note 8, at 27, 39–40.

¹⁶² Posnick-Goodwin, *supra* note 145, at 44.

¹⁶³ *Id.* The Arcadia policy currently indicates that the "principal or designee shall develop a plan to provide students with appropriate accommodations when necessary for their protection from threatened or potentially harassing or discriminatory behavior" and that "[s]eparate arrangements may be made for students according to sex in order to protect modesty in shower rooms and sex instruction." ARCADIA UNIFIED SCHOOL DISTRICT, *supra* note 149. However, despite the flexibility the policy allows, the policy also clarifies that "employees and volunteers shall carefully guard against segregating or stereotyping students," suggesting that it would be impermissible to separate out transgender students who wish to access sex-specific facilities that conform with their gender identities. *Id.*

¹⁶⁴ Notably, in its current form, SNDA specifically notes that Title IX already protects transgender and LGB students from discrimination. See Student Non-Discrimination Act of 2015, S. 439, 114th Cong. § 2(b)(5) (2015).

tion from discrimination, courts and school systems may continue to interpret Title IX in ways that do not adequately protect this population.¹⁶⁵ SNDA's strong nondiscrimination command would solve remaining ambiguities in the interpretation of Title IX¹⁶⁶ and guarantee a clear means of redress for transgender individuals who experience discrimination in their schools.¹⁶⁷

2. *Training and Education*

In addition to changing its policies and procedures, the Arcadia Unified School District agreed to “provide training to all certificated District-level and school-based administrators regarding the District’s obligations to prevent and address gender-based discrimination . . . and best practices for creating a nondiscriminatory school environment . . . for transgender students.”¹⁶⁸ Administrators would then be responsible for disseminating the information to faculty and staff.¹⁶⁹ The district also agreed to “provide age-appropriate instruction to all students on gender-based discrimination and . . . provide examples of prohibited conduct, including harassment, in various school-related contexts, including the types of conduct prohibited with respect to sex-specific facilities and elsewhere at school.”¹⁷⁰

These approaches raise concerns that are similar to those raised by the nondiscrimination policies themselves. By instructing teachers and students on gender-identity discrimination—and presumably on how transgender students should be treated—the school risks accentuating transgender students’ differences.¹⁷¹ In contrast to nondiscrimination policies, which might never actually be read by faculty and students, the process of discussing prohibited conduct forces faculty and students to confront the issue of gender-identity discrimination. In doing so, the trainings imply that transgender students are entitled to special protection and thus that transgender students are different from the majority. This perceived nonconformity could create social barriers that prevent transgender students from integrating with their peers. As a result, the trainings seem to pose an even greater risk of social stigmatization and exclusion than the nondiscrimination policies.

¹⁶⁵ See *supra* notes 86–87 and accompanying text.

¹⁶⁶ See *supra* note 164.

¹⁶⁷ See *supra* notes 92–96 and accompanying text.

¹⁶⁸ Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 5.

¹⁶⁹ *Id.* Again, these requirements are similar to the ones proposed by the Gay, Lesbian and Straight Education Network (“GLSEN”) and the National Center for Transgender Equality. GAY, LESBIAN & STRAIGHT EDUC. NETWORK & NAT’L CTR. FOR TRANSGENDER EQUALITY, *supra* note 147, at 8 (suggesting that school districts should “conduct staff training for all staff members on their responsibilities under applicable laws and [nondiscrimination policies]”).

¹⁷⁰ Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 6. This commitment was further memorialized in the district’s nondiscrimination policy, which states that the “Superintendent or designee shall provide age-appropriate training and information to students, parents/guardians, and employees regarding discrimination, harassment, intimidation, and bullying.” ARCADIA UNIFIED SCHOOL DISTRICT, *supra* note 149.

¹⁷¹ See MINOW, *supra* note 8, at 28–29.

Furthermore, if educational programs are poorly designed and carried out, these programs could compound the discrimination and stigma transgender students face. Training providers have the potential to spread misinformation about transgender individuals, and such instruction may lead faculty and students to further stereotype and marginalize transgender students. Preventing these adverse consequences is one area in which the Arcadia settlement falls short. The settlement requires the school district to submit a faculty training plan “for the United States’ review and approval” and submit “a detailed written description of any changes to the District’s bullying prevention and sexual harassment programs . . . including a copy of all relevant instructional materials.”¹⁷² Yet the agreement does not supply any guidance on how the school system should select appropriate training providers and curricula, and it does not explain how OCR and DOJ will provide oversight on these training programs.¹⁷³ This lack of specificity could result in training that is poorly executed and even damaging to transgender individuals.

Despite these concerns, trainings and educational programs that appropriately explore issues of gender-identity discrimination seem likely to discourage future acts of discrimination against transgender students and help them better integrate into their schools. For one, nondiscrimination policies are unlikely to be effective if administrators, teachers, and students are never made aware of them—trainings are one means of raising awareness about existing policies. Moreover, even when nondiscrimination policies specifically protect transgender students, there remains a high probability that educators and students will still be confused about gender identity and how to best support transgender students. Trainings are likely to decrease confusion among school personnel and students and give them insight into how they can be more supportive and inclusive of transgender individuals.¹⁷⁴ The trainings may also have the added benefit of further validating transgender students’ identities and demonstrating that they are valued members of their school communities.¹⁷⁵ In these ways, trainings and educational programs

¹⁷² Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 5–7.

¹⁷³ *Id.*

¹⁷⁴ At least one empirical study suggests that trainings on gender identity may help improve support systems for transgender students in schools. See Jenifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 J. YOUTH & ADOLESCENCE 1175, 1186 (2010) (“Comments from participants also suggest that district level efforts to train existing advocates on issues of gender identity and to publicize the availability of those advocates to young people could go a long way to improve the status of individual students as they move through schools.”). Research also suggests that education about and exposure to transgender people decreases prejudice toward transgender people. See, e.g., Susan E. Walch et al., *Using Intergroup Contact Theory to Reduce Stigma Against Transgender Individuals: Impact of a Transgender Speaker Panel Presentation*, 42 J. APPLIED SOC. PSYCHOL. 2583, 2591, 2597 (2012) (finding that transphobia decreased among college students after some students listened to a lecture about issues facing transgender people and others observed a panel of transgender people).

¹⁷⁵ See MINOW, *supra* note 8, at 28–29.

can help effectuate nondiscrimination policies and help transgender students feel welcome in their schools.¹⁷⁶

Accordingly, when granting injunctive relief under Title IX or state nondiscrimination laws, courts should order school districts to establish training programs that will inform educators and students about nondiscrimination policies and help them establish safe and welcoming environments for transgender students. OCR and DOJ should also continue to negotiate for school systems to establish these types of trainings and educational programs in future settlements. Likewise, Congress should revise SNDA to urge courts to order personnel trainings and student-education programs when school systems violate the rights of transgender students. This specificity in the law will give courts, agencies, and school systems clear direction on how to effectively implement nondiscrimination policies and ensure that transgender students are protected from discrimination. At the same time, all of these players must be sensitive to the reality that nondiscrimination trainings could be poorly executed and result in misinformation and further stigma surrounding transgender individuals. To address these concerns, courts, administrative agencies, and Congress should require school systems to work with plaintiffs and experts to identify training providers and curricula that will supply accurate and culturally sensitive information to training participants.¹⁷⁷

3. *Individualized Remedial Measures*

The next category consists of individualized remedial measures that sought to remedy the discrimination toward the individual transgender student in Arcadia. The district agreed to “provide the Student access to sex-specific facilities designated for male students at school consistent with his

¹⁷⁶ See CAL. SCH. BDS. ASS'N, *supra* note 148, at 4 (“[A] district should consider providing professional development to teachers and other staff as well as offering educational activities and forums for students, parents, guardians, and the community. The purpose of the professional development and the educational activities is to encourage understanding of gender identity, gender expression, and related issues.”); see also Posnick-Goodwin, *supra* note 145, at 44 (discussing the Arcadia Unified School District’s work with an expert on gender identity); AB 1266 *Transgender Resources*, ARCADIA UNIFIED SCH. DISTRICT, <http://site.ausd.net/modules/cms/pages.phtml?pageid=308323> [<https://perma.cc/T8D9-ZU7V>] (including links to training resources).

¹⁷⁷ In March 2014, DOJ launched a new program to train law enforcement officials on working with transgender individuals. James M. Cole, Assistant Attorney Gen., U.S. Dep’t of Justice, Remarks at the Community Relations Service Transgender Law Enforcement Training Launch (Mar. 27, 2014); see Parker Marie Molloy, *U.S. Department of Justice Launches Trans Outreach Training Initiative*, ADVOCATE (Apr. 21, 2014, 9:30 AM), <http://www.advocate.com/transgender/2014/04/21/us-department-justice-launches-trans-outreach-training-initiative> [<https://perma.cc/SSH9-94UV>]; Eric Tucker, *Department of Justice Trains Police to Better Respond to Transgender Individuals*, HUFFINGTON POST (Mar. 27, 2014), http://www.huffingtonpost.com/2014/03/27/doj-police-transgender_n_5044935.html [<https://perma.cc/4L6J-8K8V>]. OCR and DOJ could consider implementing a similar program for public school administrators and faculty.

gender identity.”¹⁷⁸ Although the student would be allowed to access the boys’ restrooms and locker room, he would not be required to use those facilities. Rather, the agreement noted that the student retained the option of “request[ing] access to private facilities based on privacy, safety, or other concerns.”¹⁷⁹ Likewise, the district agreed to “treat the Student the same as other male students in all respects in the education programs and activities offered by the District.”¹⁸⁰ In essence, these measures are simply the injunctive remedies that flow from the school district’s failure to provide the transgender student “equal access” to gender-appropriate restrooms, locker rooms, and cabins. Thus, these individualized remedial measures complement the nondiscrimination policies discussed above.¹⁸¹

As Minow points out, individualized remedial measures like the ones implemented in the Arcadia case present a question of whether treating transgender students “the same” as cisgender students is “insensitive to their difference and likely to stigmatize or hinder them on *that* basis.”¹⁸² As discussed above, the predominant remedial approach in the case law has been to simply order school systems to treat transgender students the same as their cisgender peers.¹⁸³ Some transgender students—the student in the Arcadia case, for example—may be perfectly happy to be treated like members of the genders with which they identify. However, conformity and integration may not be as easy or natural for other students—for example, those who do not fit the gender binary, those who are visually or aurally recognizable as transgender, and those who are not supported or accepted by their peers. With regard to students who do not identify as purely male or female, it may be impossible to avoid treating them differently than their peers because their gender identities do not align with the traditionally accepted categories. Yet even if a transgender student is theoretically able to be treated the same as cisgender students, the student may experience feelings of “powerlessness” that “emerge from efforts to integrate with a larger community that still assigns a lower status” to transgender individuals.¹⁸⁴ Minow argues that integration “offers no solution unless the majority itself changes

¹⁷⁸ Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 3.

¹⁷⁹ *Id.* Likewise, the 2014 guidance issued by the California School Boards Association recommended giving transgender students the ability to choose between private, single-user facilities or communal, gender-segregated facilities. CAL. SCH. BDS. ASS’N, *supra* note 148, at 2.

¹⁸⁰ Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 3. These remedies are quite similar to the ones imposed in *Doe v. Yunits*, where the court enjoined the school “from preventing plaintiff from wearing any clothing or accessories that any other male or female student could wear to school without being disciplined” and “from disciplining plaintiff for any reason for which other students would not be disciplined.” No. 001060A, 2000 WL 33162199, at *8 (Mass. Super. Ct. Oct. 11, 2000).

¹⁸¹ See *supra* notes 147–161 and accompanying text.

¹⁸² MINOW, *supra* note 8, at 20.

¹⁸³ See *supra* Sections III.B, III.D.

¹⁸⁴ MINOW, *supra* note 8, at 25.

by sharing power [and] accepting members of the minority as equal participants.”¹⁸⁵

Therefore, “the same” may not always be the best for transgender students. At times, transgender students may need access to separate facilities and may need to be treated differently than their cisgender peers in order to be protected from harassment and violence in their schools.¹⁸⁶ This is an important caveat that most of the cases thus far have failed to acknowledge.¹⁸⁷

On the other hand, allowing nonconformity by transgender students may create the opposite problem—stigma associated with a student’s divergence from the norm.¹⁸⁸ In the aftermath of the Arcadia case, Tierney explained, “Separation called attention to the student, which was not what he needed. Students began to talk about him because of the special treatment, which is to be expected.”¹⁸⁹ In addition, allowing transgender students to separate themselves from their peers may prevent transgender students from learning to cope with the cisgender majority, and it may prevent the majority from coming to know and respect transgender individuals, a process which is arguably necessary for dismantling discrimination.¹⁹⁰

This dilemma might be alleviated by establishing single-user, unisex restrooms and changing rooms that are available to all students.¹⁹¹ Some public schools have already made these types of facilities available to their student bodies. For example, Grant High School in Portland, Oregon, recently created “four student restrooms and two staff restrooms—all single stall—[that are] open to all students.”¹⁹² This approach may help mitigate

¹⁸⁵ *Id.* One potential solution to this problem is to create a separate space entirely, where LGBT students are allowed to embrace their differences openly and without fear of harassment and violence. New York City has experimented with this approach by opening the Harvey Milk High School. *See supra* notes 32–37 and accompanying text. However, some gay-rights supporters “warn that the separate schooling fails to equip these schools’ students for the real world and fails to dismantle discrimination.” *See* MINOW, *supra* note 32, at 84.

¹⁸⁶ The model policy issued by GLSEN and the National Center for Transgender Equality “acknowledges that some students, for a variety of reasons, may feel uncomfortable using shared facilities.” GAY, LESBIAN & STRAIGHT EDUC. NETWORK & NAT’L CTR. FOR TRANSGENDER EQUALITY, *supra* note 147, at 6. “The model policy provides for accommodating students upon request by providing a safe and non-stigmatizing alternative.” *Id.*

¹⁸⁷ *See supra* Sections III.B, III.D.

¹⁸⁸ MINOW, *supra* note 8, at 28–29.

¹⁸⁹ Posnick-Goodwin, *supra* note 145, at 44.

¹⁹⁰ MINOW, *supra* note 8, at 29, 39–40; *see* MINOW, *supra* note 32, at 84.

¹⁹¹ *See* McGuire, Scott & Shaw, *supra* note 156.

¹⁹² Nicole Dungca, *Grant High’s Transgender Students Get Unisex Bathroom Option*, OREGONIAN (Mar. 22, 2013, 7:34 PM), http://www.oregonlive.com/portland/index.ssf/2013/03/grant_highs_transgendered_stud.html [<http://perma.cc/VGF2-K88R>]; Emily Volpert, *Unisex Bathrooms*, GRANT MAG. (Mar. 21, 2013), <http://grantmagazine.com/unisex-no-one-should-feel-uncomfortable-when-using-the-bathroom/> [<https://perma.cc/9U7D-CUU6>]; *see also* GAY, LESBIAN & STRAIGHT EDUC. NETWORK & NAT’L CTR. FOR TRANSGENDER EQUALITY, *supra* note 147, at 7 (“Where available, schools are encouraged to designate facilities designed for use by one person at a time as accessible to all students regardless of gender, and to incorporate such single-user facilities into new construction or renovation.”). Notably, “[t]he conversion cost less than \$500, most coming from changing to interior locks.” Dungca, *supra*.

potential stigma toward transgender students who wish to use separate facilities but fear that this choice will draw attention to their difference. Even when these unisex facilities are generally available to students, however, transgender individuals may still be subject to some remaining stigma if most students use the communal restrooms and changing rooms.¹⁹³ “Until every student is identified as different[,] the tendency to create a ‘normal’ group and to label others as ‘deviant’ will remain pronounced and take on forms of childish cruelty in the school setting.”¹⁹⁴ These complex social dynamics may be somewhat unavoidable for transgender students who do not conform with the gender binaries within their schools, whether by choice or by circumstance.

In contrast to prior cases, the Arcadia settlement strikes a better balance between these conflicting concerns (on the one hand, that the same treatment may be insensitive to transgender students’ distinct identities, and on the other, that different treatment may lead to isolation and exclusion). The Arcadia case allows the student to access restrooms and locker rooms that conform to his gender identity. At the same time, the case leaves the door open to some degree of nonconformity or differential treatment by giving the student the option of using a private restroom upon request.¹⁹⁵ In this way, the settlement agreement rightly acknowledges that transgender students themselves—not their teachers and school administrators—are best positioned to determine the arrangements that will make them feel safe and integrated within their school communities.

As the Arcadia case highlights, broadly applicable remedial measures are not always workable in the context of protecting transgender students from discrimination. Instead, when designing individualized remedial measures, courts and administrative agencies should work closely with students, parents, and school systems to find approaches that will effectively address the students’ precise circumstances and needs, whether that means using gender-specific communal facilities or using separate single-user facilities. Courts and agencies should also give transgender students the flexibility to change their minds in the future. At one point in a student’s life, using gender-specific communal facilities may be most appropriate; at another point, single-user, unisex facilities may be a better fit. Where feasible, schools should be required to make single-user facilities available to all students to help decrease the stigma associated with those single-user facilities.

However, these costs may be higher for other schools that do not have restrooms that can be easily converted to unisex facilities.

¹⁹³ It could also be impractical to allow all students to change in unisex, single-user facilities for physical education classes. If many students choose to use this option (for privacy or other reasons), this could result in delays in changing times that interfere with physical education or other instruction.

¹⁹⁴ MINOW, *supra* note 8, at 31; *see also* Sohaili, *supra* note 7, at 92–93 (arguing that sexual harassment “is a way to target students who do not comply with gender stereotypes [and] create shame or guilt about the individual’s gender nonconformity”).

¹⁹⁵ *See supra* notes 178–179 and accompanying text.

Likewise, Congress should pass a version of SNDA that explicitly gives transgender students the ability to access gender-specific communal facilities that align with their genders.¹⁹⁶ SNDA should also make clear that transgender students must be able to access single-user, unisex facilities upon request. Specifically articulating these options will send a clear message to courts, agencies, and schools that they must ensure that transgender students have access to facilities that are appropriate for their individual circumstances.¹⁹⁷

4. Individualized Support Teams

The Arcadia Unified School District agreed to give the student the option of having the district “establish a support team to ensure the Student has access and opportunity to participate in all programs and activities, and is otherwise protected from gender-based discrimination at school.”¹⁹⁸ This support team would “develop a Student-specific support plan to provide the Student with safe and equitable access to all school and District facilities and activities, addressing any particular issues raised by the Student or his parents.”¹⁹⁹ In addition, the district agreed to promptly inform other transgender students “of their right to request a support team of appropriate individuals” whenever the district is notified that a “student is undertaking, planning to undergo, or has completed a gender transition.”²⁰⁰

The agreement to create these support teams was somewhat surprising. As discussed in Part III, most of the cases involving gender-identity discrimination have focused on ordering school systems to treat transgender students the same as their cisgender peers.²⁰¹ Moreover, this individualized support team seems similar to individualized education program teams provided for students with disabilities,²⁰² a remedy that is rarely utilized outside the disability context.

¹⁹⁶ This language could be modeled after the law recently passed in California. See A.B. 1266, 2013–2014 Leg. Sess. (Cal. 2013) (“A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”).

¹⁹⁷ See *supra* notes 115–117 and accompanying text.

¹⁹⁸ Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 3–4.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 5.

²⁰¹ For example, in *Doe v. Yunits*, a case brought under Massachusetts law, the court preliminarily enjoined school officials “from preventing plaintiff from wearing any clothing or accessories that any other male or female student could wear to school without being disciplined” and “from disciplining plaintiff for any reason for which other students would not be disciplined.” No. 001060A, 2000 WL 33162199, at *8 (Mass. Super. Ct. Oct. 11, 2000); see *supra* notes 101–105 and accompanying text.

²⁰² Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d)(B) (2012) (discussing the requirement of individualized education program teams for students with disabilities). It is also worth noting that within the disability context, individual education program teams are required, not simply allowed on an opt-in basis. *Id.*

Under Minow's framework, individualized support teams have the potential to significantly distinguish transgender students from their cisgender peers and "replicate patterns of exclusion."²⁰³ Essentially, the school is providing special treatment to transgender students by giving them the option of having support teams that are not available to other students. If other students in a school learn about a transgender student's support team, this may accentuate the student's difference from the majority and cause the student's peers to stigmatize and exclude the student on that basis.²⁰⁴ In this way, establishing a support team could harm the student that the team is designed to help. The special treatment may act as a marker of nonconformity that further accentuates the transgender student's difference.²⁰⁵

However, with two essential safeguards in place, individualized support teams like those provided in the Arcadia settlement are likely to minimize risks of stigma and better facilitate a student's inclusion into the school community. First, the existence of a support team and its proceedings must be kept confidential.²⁰⁶ Although the parties in the Arcadia case may have intended for the support team to be kept confidential, the settlement agreement did not make that clear.²⁰⁷ This modification of the remedy would help prevent other students from learning about the support team, thereby reducing the risk that the student would be stigmatized and excluded based on that difference.

Yet even with confidentiality in place, a support team may still distinguish a transgender student from the majority. When a student's parents enter the school to meet with teachers and other school officials, the parents may draw attention to the student and lead other students to infer that the meeting is being held because of the student's transgender status. As a result, the student may be subjected to stigma and exclusion.

To curtail these risks, confidentiality must be implemented in concert with a second protection: the support team must be made available on an opt-in basis.²⁰⁸ If students—and parents where appropriate²⁰⁹—have the power to decide whether support teams should be established, they will be

²⁰³ MINOW, *supra* note 8, at 27–28.

²⁰⁴ *Id.* at 28.

²⁰⁵ *Id.*

²⁰⁶ In their model policy, GLSEN and the National Center for Transgender Equality emphasize the importance of privacy and confidentiality for transgender students. GAY, LESBIAN & STRAIGHT EDUC. NETWORK & NAT'L CTR. FOR TRANSGENDER EQUALITY, *supra* note 147, at 4 ("Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information. The fact that a student chooses to disclose his or her transgender status to staff or other students does not authorize school staff to disclose other medical information about the student."). Likewise, the guidance issued by the California School Boards Association notes that "[a] student's decision to inform the district that his or her gender identity differs from his or her biological gender is extremely personal and private." CAL. SCH. BDS. ASS'N, *supra* note 148, at 3. The guidance goes on to explain that "districts are . . . legally responsible to maintain a student's privacy according to the student's wishes." *Id.*

²⁰⁷ Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 3–4.

²⁰⁸ This protection was provided in the Arcadia settlement. *Id.*

able to weigh the pros and cons based on the environmental circumstances of their schools and the students' specific needs. If student and parents decide that establishing a support team will draw unwanted attention to the student's gender identity, they can simply choose to not request the team. Moreover, if a team is established and it creates more problems than it solves, the student should be able to have the support team dissolved (a lever that was notably absent from the Arcadia settlement²¹⁰). This will provide flexibility that is necessary to respond to unexpected circumstances and evolving student needs.

With confidentiality and the opt-in approach in place, individualized support teams have the potential to significantly benefit transgender students and better facilitate their inclusion in school environments.²¹¹ Studies suggest that support systems within schools contribute to the academic performance and emotional wellbeing of transgender students.²¹² Furthermore, if future litigation ensues, a support team's recommendations can provide a strong basis for preserving a student's access to appropriate facilities and services. In *Doe v. Regional School Unit 26*, the support team created a plan for the student and recommended that she be allowed to access restrooms that conformed with her gender identity.²¹³ Though the school did not follow the support team's recommendation, the court relied on the team's assessment in determining that the school had violated the student's rights.²¹⁴

Perhaps the greatest strength of the individual support team is its ability to adapt to changing circumstances within a school. Under the approach laid out in the Arcadia case, the support team develops a plan tailored to the specific needs and circumstances of the individual student.²¹⁵ If those needs change over time, the support team has the ability to modify existing arrangements and ensure that the student continues to be protected from harassment and discrimination.²¹⁶ This flexibility has the potential to minimize stigma in the long run. By contrast, the remedial approaches discussed in

²⁰⁹ "In some cases, . . . notifying parents carries risks for the student, such as being kicked out of the home." GAY, LESBIAN & STRAIGHT EDUC. NETWORK & NAT'L CTR. FOR TRANSGENDER EQUALITY, *supra* note 147, at 8. Therefore, the model policy suggests that "[p]rior to notification of any parent or guardian regarding the transition process, school staff should work closely with the student to assess the degree to which, if any, the guardian will be involved in the process and must consider the health, well-being, and safety of the transitioning student." *Id.*

²¹⁰ Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 3–4.

²¹¹ *Cf.* MINOW, *supra* note 8, at 36 (noting that "procedural protections [for students with disabilities] represent means by which parents may secure special attention for their child: special consideration of the child's needs, an educational program drawn up specifically for that child, and review by administrators and courts to assure that such specialized attention and individualized programs are in fact delivered").

²¹² See McGuire et al., *supra* note 174, at 1187.

²¹³ 86 A.3d 600, 602–03 (Me. 2014).

²¹⁴ See *supra* note 111 and accompanying text.

²¹⁵ Resolution Agreement, Arcadia Unified Sch. Dist., *supra* note 15, at 3–4.

²¹⁶ *Id.*

Part III did not provide this type of adaptability—they made no provisions for altering the ordered relief.²¹⁷

Courts should order schools to provide transgender students with the option of confidential support teams when schools violate Title IX or state nondiscrimination laws. Even when courts believe that the remedy is appropriate, students should still be given discretion to request or decline the support teams and have the support teams dissolved in the future. OCR and DOJ should likewise continue to make these types of support teams available to transgender students in future cases, while clarifying that the existence and proceedings of these support teams must be kept confidential.

In addition, Congress should add a provision to SNDA that makes individualized support teams available to transgender plaintiffs. Congress should specify that these support teams must be kept confidential, should only be provided when requested by students, and may be dissolved at a later time if needed. Fashioning the remedy in this way will encourage courts and agencies to utilize support teams in appropriate circumstances, thereby accelerating the process of creating safe and inclusive learning environments for transgender students.²¹⁸

5. *Monetary Damages*

Although the Arcadia agreement provided only injunctive relief, courts and Congress should also make monetary damages available to transgender plaintiffs. The threat of damages will give school systems an incentive to take steps to avoid harassment and discrimination upfront before litigation occurs. Damages are often used to remedy Title IX violations, particularly those involving gender-based harassment.²¹⁹ In the years since the U.S. Supreme Court's acknowledgment in *Franklin* that monetary damages are a permissible remedy for Title IX violations,²²⁰ schools and universities have had “a strong economic incentive to eliminate . . . problems [of gender-based discrimination] long before any complaint is filed.”²²¹ Likewise, if courts systematically begin awarding damages when gender-identity discrimination occurs, those awards are likely to push local governments to make their schools more inclusive and welcoming for transgender students in order to avoid the monetary costs associated with litigation. In this way, damages have the potential to benefit transgender students on a broad scale.

²¹⁷ See *supra* Sections III.B, III.D.

²¹⁸ See *supra* notes 115–117 and accompanying text.

²¹⁹ See *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1099 (D. Minn. 2000) (discussing what is required “to state a claim for damages under Title IX”). Notably, OCR and DOJ sometimes participate in negotiating consent decrees that provide monetary damages for particular plaintiffs. See, e.g., Consent Decree, *Rhinebeck Cent. Sch. Dist.*, *supra* note 122, at 17.

²²⁰ *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992).

²²¹ Ellen J. Vargyas, *Franklin v. Gwinnett County Public Schools and Its Impact on Title IX Enforcement*, 19 J.C. & U.L. 373, 384 (1993).

Similar to the nondiscrimination policies discussed above, awards of monetary damages could draw unwanted attention to transgender students.²²² Undoubtedly, news coverage of cases in which transgender students are awarded damages is likely to draw attention to those students and may act as an additional marker of nonconformity that distinguishes transgender students from their peers.²²³ Yet this kind of publicity is a byproduct of the litigation itself, and any stigma that results from the publicity will not be avoided by a court declining to award damages to a transgender plaintiff.

Overall, monetary damages present a relatively small and short-lived risk of causing unintended stigma for transgender students. In comparison to injunctive remedies, awards of damages do not have the same lasting, day-to-day impact on transgender students' social environments. Over time, a transgender student's peers will likely become less focused on a successful lawsuit and related damages, but that same student's decision to use gender-specific communal restrooms will be witnessed by cisgender students every day. As such, monetary damages have a less palpable impact on social dynamics among transgender students and their peers.²²⁴

Thus, in cases brought under Title IX or similar state laws, courts should award monetary damages to transgender plaintiffs who are subjected to discrimination in their schools. In addition, as currently drafted, SNDA would further bolster the use of these types of remedies by including "compensatory damages" (and "costs of the action") within the list of permissible remedies.²²⁵ Congress should retain that language when it passes the bill, allowing transgender students to obtain compensatory relief for the emotional and other harms they suffer when discrimination occurs.

V. CONCLUSION

In recent years, federal and state courts have made significant progress in protecting transgender students from discrimination. Through a more inclusive conception of gender-based discrimination, courts have suggested that Title IX may protect transgender students from discrimination based on gender nonconformity. In addition, several states have implemented statutes

²²² See MINOW, *supra* note 8, at 28–29.

²²³ See *id.*

²²⁴ Notably, awarding monetary relief to successful transgender plaintiffs raises another pragmatic concern. Many school systems have insufficient resources, making it difficult for them to effectively educate all students. See, e.g., Valerie Strauss, *Study Shows Deep Disparities in Funding for Schools*, WASH. POST (Oct. 12, 2010), <http://voices.washingtonpost.com/answer-sheet/equity/study-shows-deep-disparities-i.html> [<https://perma.cc/W2P9-862L>]. Imposing monetary damages on these schools will likely place additional financial stress on already struggling school systems. See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 680 (1999) (Kennedy, J., dissenting) (“[T]here are no damages caps on the judicially implied private cause of action under Title IX. As a result, school liability in one peer sexual harassment suit could approach, or even exceed, the total federal funding of many school districts.”).

²²⁵ Student Non-Discrimination Act of 2015, S. 439, 114th Cong. (2015).

that protect transgender students from discrimination in schools, and Members of Congress have proposed legislation to protect transgender students nationwide. However, despite this progress, for the most part, the remedial approaches utilized in these cases and statutes focus on treating transgender students the same as their cisgender peers. Most decision makers have not considered whether more nuanced remedial mechanisms may be necessary to protect transgender students from stigma and exclusion.

The Arcadia Unified School District case provides a model for designing concrete and effective remedies. In the school district's settlement with OCR and DOJ, the district agreed to establish policies barring discrimination based on gender identity, provide nondiscrimination training to educators and students, enable the transgender student to access facilities and programs that align with his gender identity, and create individualized support teams for transgender students on an opt-in basis. Although all of these remedies may create risks of stigma for transgender students, on the whole, they are likely to benefit students and facilitate their inclusion into school environments.

Accordingly, courts and administrative agencies should provide these remedies in future cases of gender-identity discrimination, whether those cases are resolved under Title IX, state nondiscrimination laws, or newly passed federal legislation. Congress should also pass a more specific version of SNDA that explicitly provides this catalog of remedies to transgender students who are subjected to discrimination in schools. While implementing these remedial mechanisms, courts, administrative agencies, and school systems must also be careful to minimize the stigma and exclusion that may result from treating transgender students differently than the cisgender majority. In this regard, the most important question is not whether to simply treat transgender students the same as their classmates. Instead, these players should ask how individual transgender students want to be treated and provide remedies that will effectively respond to those particular circumstances and needs.

