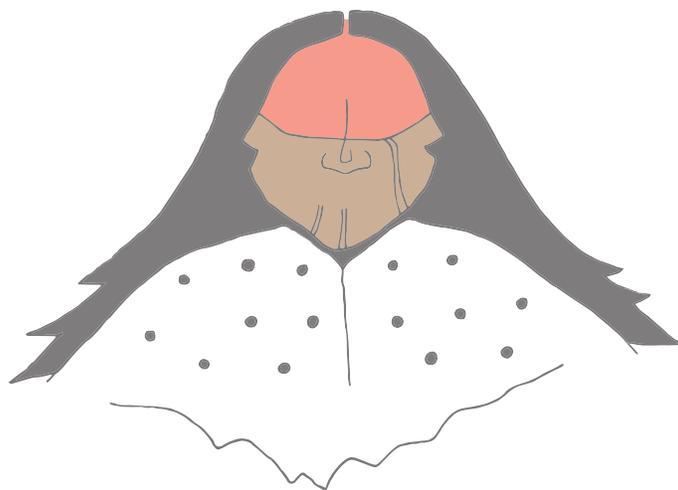




Tribal Equity Toolkit 3.0:

TRIBAL RESOLUTIONS AND CODES TO SUPPORT
TWO SPIRIT & LGBTQ JUSTICE IN INDIAN COUNTRY



A COLLABORATION OF

WESTERN STATES CENTER, CENTER FOR AMERICAN PROGRESS, NATIONAL CONGRESS OF AMERICAN INDIANS, CENTER FOR NATIVE AMERICAN YOUTH AT ASPEN INSTITUTE, NATIONAL CENTER FOR TRANSGENDER EQUALITY, NATIONAL LGBTQ TASKFORCE, NATIONAL CENTER FOR LESBIAN RIGHTS, MOVEMENT ADVANCEMENT PROJECT, TRANSGENDER LAW CENTER, FAMILY EQUALITY COUNCIL, GAY, LESBIAN & STRAIGHT EDUCATION NETWORK, HUMAN RIGHTS CAMPAIGN, PFLAG NATIONAL, PFLAG PHOENIX NATIVE AMERICAN CHAPTER, SERVICES AND ADVOCACY FOR GAY, LESBIAN, BISEXUAL ELDERNS, NATIVE AMERICAN PROGRAM OF LEGAL AID SERVICES OF OREGON, BASIC RIGHTS OREGON, AND LEWIS & CLARK COLLEGE

Edited by
Se-ah-dom Edmo and Aaron Ridings

Foreword by
Robert Kentta

MARCH 16, 2017



Artwork by Asa Wright, (Klamath/Modoc) Thesebraids Art & Design, Portland, OR.
“Together We Rise”, This peice was inspired by Ledger art, which was some of the first art on paper where Native people told their own stories. I believe we are in a time where Native people are rewriting our history and telling our own stories to determine our own futures. This toolkit is an example of Native people determining the future for Native people.

ACKNOWLEDGMENTS

PAST: Since time immemorial, Indigenous Nations of what now is known as the United States have been Sovereigns; been responsible for the health and wellbeing of our citizenry, an endeavor that is intergenerational and connects each generation to the work of our ancestors. In the spirit of this kinship connection, we respectfully acknowledge the collective wisdom and traditions of our ancestors.

PRESENT: We express our gratitude to our partners, allies and collaborators, specifically:

Members of the National Congress of American Indians for passing the *Standing in Support of our Two Spirit Relatives in our Communities and Nations* resolution. “NCAI supports its member tribes to pursue governmental policy changes such as those outlined in the Tribal Equity Toolkit: Tribal Resolutions and Codes for Two Spirit and LGBTQ Justice.”¹

Members of the National Congress of American Indians for passing the *Creation of Two Spirit Task Force* resolution. “NCAI does hereby establish a Two Spirit Task Force to assist in the coordination, collaboration, and outreach to Indian Country on Two Spirit issues; and to develop and share approaches and solutions to policy issues that affect Two Spirit/LGBTQ community members in a manner consistent with the Indian self-determination.”²

The Confederated Tribes of Siletz Indians, for their intention and action in operationalizing Two Spirit/LGBTQ equity work on behalf of their Tribal Citizens.

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The staff and interns from all of these organizations who reviewed and provided edits for the third edition of the toolkit including Harper Jean Tobin, Heron Greenesmith, Naomi Goldberg, Sharita Gruberg, Kellan Baker, Emily Hecht-McGowan, Austen Brandford, Cathy Sakimura, Tyrone Hanley, Diego Sanchez, Sheila Lopez, Erik Stegman, Josie Raphaelito, Sarah Pytalski, Amber Ebarb, Sarah Warbelow, Arli Christian, Ma'ayan Anafi, Nathan Smith, Denise Brogan-Kator, Megan Bench, Asaf Orr, Carolyn Reyes, Emily Haan, Shannon Minter, Ming Wong, Zsea Beaumonis, Meghan Maury, Victoria M. Rodriguez-Roldan, Robin Maril, Aaron Tax, Liz Owen, Jean-Marie Navetta, Jamie Henkel, Hilary Meyer, Tim Johnston, Sherrill Wayland, Frank Bewkes, Caitlin Rooney, Nicholas Taxera, Steven Soto, Maddy Lincoln, and Sasha J. Buchert (reviewer of *both* the first and third editions of the toolkit).

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FUTURE: In the spirit of this stewardship, we respectfully acknowledge our generations rising; for it is in their interest that we carry forward this work, and it is to them that we entrust it.

-Se-ah-dom Edmo and Aaron Ridings, Co-editors

Two Spirit Organizations

Two Spirit Societies and Organizations Directory:
<http://nativeout.com/twospirit-rc/two-spirit-societies/>

National Congress of American Indians Two Spirit Task Force:
Amber Ebarb at 503-466-7767 or aebarb@ncai.org

Center for Native American Youth at Aspen Institute Native LGBTQ-Two Spirit Youth Project:
Josie Raphaelito at 202-736-2905 or josie.raaphaelito@aspeninstitute.org

Western States Center Two Spirit Justice Programs:
Se-ah-dom Edmo at 503-768-6155 or seahdome@wscpdx.org

PFLAG Phoenix Native American Chapter: <http://www.nativepflag.org>
Sheila Lopez at 602-803-3907 or NativePFLAG@gmail.com

Two Spirit Journal: <http://twospiritjournal.com>
Harlan Pruden at http://twospiritjournal.com/?page_id=4

Native Out: <http://nativeout.com>
Marlon Fixio at <http://nativeout.com/contact-us/>

Two Spirit People: Sex, Gender, and Sexuality in Historic and Contemporary Native America at http://www.ncai.org/policy-research-center/initiatives/Pruden-Edmo_TwoSpiritPeople.pdf

**Partner organization websites are listed on page 91*

FOREWORD

Dear Relatives:

As Native people, we have all experienced, in our own individual and shared way, what it means to be treated as less than human. Our lands were taken, our people slaughtered, we had diseases and poisoning influences injected among us, and our children taken from our homes and placed in institutions of assimilation – in an attempt to conquer and control us, and to make us more like those who thought they had control of us. We have had to survive dehumanizing federal policies that treated us as misbehaving children, as if we were unable to live responsibly or make decisions for ourselves, as if we did not have the right to be treated as equals, as fully human.

Our Tribal societies have been damaged by this onslaught of policies, forced change, and the unspeakable losses and grief we have suffered. In spite of all of that, today we stand stronger than we have for several generations, able to exercise communal and individual decision-making on our own behalf – more than our grandparents and their parents ever dared to hope. Today we are reclaiming and reincorporating those parts of ourselves that it was the goal of federal policies to alienate. Our sense of natural law, and the blessings of our creator's gifts, is restored in the present generations, and all of us - having *been* wronged - have a strong sense of what social justice is, and what it should look like.

Two Spirit is a term in the English Language that attempts to incorporate and honor the hundreds of ancient, respectful, Native Language terms that were used for thousands of years within our Tribal societies. Two Spirit is used to denote people who traditionally have special roles within our communities, our cultures, and our ceremonial life. Our people were strong and beautiful in our traditional understanding of life, and that we all have different gifts. Two Spirit indicates an ability to see the world from both male and female perspectives and to bridge the world of male and female. The concept of balance is important in our traditional views, and balance can be between people, or groups, or within a particular person. "Two Spirit" expresses the concept of balance within a person.

Since the time of contact with Europeans, our Two Spirit people and our societal beliefs surrounding Two Spirit roles and contributions to our communities have been marginalized and stigmatized, resulting in marginalized people and groups of people within our families and tribal communities. This has led to perceptions that unprovoked violence against these unsupported persons is permitted, other times it leads to our unsupported members hurting themselves, whether with one (perhaps final) act; or many, which slice away at the chances of a productive life. When one of our members is oppressed and wrongfully mistreated, we are all made smaller, whether it is through active support for the action, or through neglectful silence, we can all be guilty of contributing to the result.

Many Two Spirit people are well known members of our own and other Tribal communities who have been exemplary carriers of culture, strong political and ceremonial leaders, amazing artisans, perhaps model citizens...perhaps showed human imperfections at times, but who love or loved their people, are, or were, loved by their people. Known to be kind, fair and strong in their beliefs, generously willing to help, and fierce in the defense of their communities... and yet there is the too often unspoken or whispered truth – sometimes out of shame, sometimes out of awkwardness of the speaker, but it all amounts to the same thing – an implied lowering of status as

a good and honest human being - by being silent or quiet in acknowledging that this beloved person is Two Spirit.

Today, some of our traditionalists understand the native language term, know the traditional role(s) and yet struggle with the application of the traditional term to our LGBTQ Tribal Youth. It is damaging to our families and our communities to not share that part of our culture with our youth – whether they are Two Spirit themselves or not. They need to understand the cultural meaning and principles behind the traditional terms and the roles Two Spirits played and still play in our communities. For our Two Spirit Youth, it is an essential lifeline – giving them a healthy sense of purpose and role to fill, to feel [a part] of their community instead of feeling [apart], alone and without purpose or value.

We need to decide if we want our families and communities to be healthy and whole, if we want to be fair and just in our treatment of all our members, whether we all have the ability to live up to the fullest potential that we were born with and are able to develop throughout our lives. This toolkit provides us with an opportunity to reflect on how we, as Tribal Leaders, and Tribal Communities, are either passively or actively perpetuating policies, ordinances, or other bodies of Tribal Law that are damaging to the fabric of our Nations – or whether we are already committed to equity and justice for all members. The work compiled here – with love and understanding, is just what it says it is, - a toolkit - it does not dictate, it does not ask anything of you except to read it and decide what you believe in, and what core principles you stand for. It gives our communities another set of tools for restoring ourselves.

Please be strong in your work for all your people, and help them live long, healthy, and productive lives. Do all you can to see that all of our Tribal people can walk this land without fear, exclusion, or mistreatment, and reach their fullest potential in life. It's a human right.

Respectfully,

Robert Kentta
Siletz Tribal Member
Cultural Resources Director
Tribal Council Member
Gitauk-uahi (Two Spirit)

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INTRODUCTION

Within Tribal communities, family is important, and within most Native families, we know someone who is Two Spirit, lesbian, gay, bisexual, transgender, or queer, or LGBTQ.³ Too often, rejection of Two Spirit/LGBTQ community members by families, peers, and the community breaks families apart and tears at the social fabric of our community. However, by accepting our Two Spirit/LGBTQ family members, we strengthen *all* families in our community. Two Spirit/LGBTQ people face some of the highest disparities across all social and health indicators. These disparities lead to cumulative negative outcomes that affect every area of life. For example:

- 19.1 percent of Native same-sex male couples live in poverty (compared to 2.7 percent of white same-sex male couples), and 13.7 percent of Native same-sex female couples live in poverty (compared to 4.3 percent of white same-sex female couples).⁴
- Nearly 41 percent of children being raised by Native same-sex male couples live in poverty.⁵
- 55 percent of LGBTQ Native Americans are food insecure—having limited or uncertain availability of nutritionally adequate and safe foods.⁶
- American Indian and Alaskan Native, or AI/AN, transgender and gender nonconforming people often live in extreme poverty, with 2 percent reporting a household income of less than \$10,000/year—and they are also more likely to be HIV positive.⁷
- Native Americans have the highest suicide rate of any population in the United States. 56 percent of Native transgender and gender nonconforming respondents in a national transgender survey had attempted suicide.⁸
- Over 50 percent of Native LGBTQ students experience physical violence at school because of their sexual orientation,⁹ and more than one in three reported missing class at least once a month for fear of being bullied or harassed.¹⁰
- Of the estimated 170 HIV diagnoses among AI/AN men in 2014, most (142 or 84 percent) were among gay and bisexual men.¹¹

ABOUT THIS TOOLKIT

Tribal laws reflect our values as a people, define our collective barriers, prioritize our issues, allocate public resources, and identify eligibility for conferred status and public benefits and services. This Toolkit identifies areas in which existing tribal laws may discriminate against Two Spirit/LGBTQ people. The Toolkit also gives tribal legislators a brief overview of legal and policy issues that impact the equal treatment of Two Spirit/LGBTQ community members, and offers sample resolution and code language for tribal lawmakers to consider adopting to maximize equality within their communities.

The purpose of this Toolkit is to protect the most vulnerable among us by facilitating the development of tribal laws that ensure that Two Spirit/LGBTQ people have the same opportunities as other community members. By making simple adjustments to laws and policies—such as expanding nondiscrimination protections—tribal governments can exercise their sovereignty to better protect all of their tribal citizens. Changing tribal laws to bar discrimination in all areas of life will help bridge the economic disparities that Two Spirit/LGBTQ community members experience. Removing barriers will also allow Two Spirit/LGBTQ people to bring their full authentic selves to the community, and will strengthen and enrich the tapestry of our cultures.

This Toolkit is not intended to provide “model” language. Instead, the sample language in this Toolkit is offered as a starting point for promoting discussion. Each tribal government has different needs, resources, values, and policies—all of which should be reflected in a tribe’s laws. The sample language provided in this Toolkit should therefore be tailored to meet the specific requirements of the given tribal sovereign. Moreover, because there are advantages and disadvantages to adopting each sample provision, the sample language should not be adopted without a thorough analysis by the appropriate tribal agencies and legal counsel. This Toolkit is also not a replacement for Two Spirit/LGBTQ equality training. Special training for tribal decision-makers on issues impacting Two Spirit/LGBTQ community members is also essential.

It is important to note that transforming culture is complex work. Values, practices, and rules, having been passed on for generations and by multitudes of people and institutions, are embedded in our daily lives and become resistant to change. As such, policies that perpetuate oppression— including homophobia and transphobia—seem invisible and unremarkable because of how deeply they have become institutionalized. Passage of new, inclusive laws can help create transformative shifts within our communities.

Policy change is never effective without community engagement. It is critical that policy shifts accompany community conversations and engagement that will provide the catalyst for the cultural change needed for Two Spirit/LGBTQ justice to become the prevailing custom of our communities. We recognize that implementation of the suggestions offered in this Toolkit will look differently within each tribal community. For some tribes, where leadership buy-in already exists and there is collective agreement on the way forward, adoption of resolutions and codes to support Two Spirit/LGBTQ justice may seem easy and perfunctory. For other communities, where this conversation is new, engaging the community and de-colonizing gender constructs may be more challenging. The Toolkit provides a powerful lantern that will help light the way. It now awaits your courage, political will, and perseverance to make the change that will create a community that embraces equality and freedom.

This edition of the Toolkit remains a work in progress. We welcome your questions, comments, suggestions, and experiences at seahdome@wscpx.org.

CHAPTER 1: NONDISCRIMINATION PROTECTIONS

WE ENVISION A WORLD WHERE TWO SPIRIT/LGBTQ PEOPLE ARE FREE TO LIVE WITHOUT FEAR OF HARASSMENT OR DISCRIMINATION

Standing in Support of our Two Spirit Relatives in our Communities and Nations

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, prior to contact with settlers, many tribal nations across the country and continent had long and respected histories of respect and inclusion of those in their communities who might now be described as lesbian, gay, bisexual, transgender, third and fourth gender or two spirit; and

WHEREAS, all citizens and members of our member tribes and nations are born free and equal in dignity and rights; and

WHEREAS, many lesbian, gay, bisexual, transgender, third and fourth gender or two spirit ancestors and citizens of our tribes and nations have been targets of homophobia and transphobia, carrying with it extremely harmful and even lethal effects; these disparities lead to cumulative outcomes that affect every area of life; and

WHEREAS, our member tribes and nations are unwaveringly committed to all causes that strengthen the health of our tribal citizens, families, communities, and nations; and

WHEREAS, two spirit youth experience increased levels of bullying, resulting in higher rates of truancy, incarceration, elevated levels of self-harm, attempted suicide, and suicide; and

WHEREAS, 15 to 43 percent of two spirit adults experience some form of harassment in the workplace, 65 percent of American Indian/Alaska Native transgender and gender nonconforming people were harassed, 14 percent were physically assaulted, and 10 percent were sexually assaulted at work; and

WHEREAS, the principle of non-discrimination is embodied in the Charter of the United Nations, in Articles 2, 7, and 10 of the Universal Declaration of Human Rights, in Articles 2, 3, 14, 25 and 26 of the International Covenant on Civil and Political Rights, and Article 2 of the International Covenant on Economic Social and Cultural Rights, and the Declaration of the Rights of Indigenous People; and

WHEREAS, many of our member tribes have taken steps to prohibit discrimination on grounds of sexual orientation in our laws and to address such discriminations; and

WHEREAS, the principles of sovereignty and self-determination dictate that our member tribes have full and authority over issues that impact the health, welfare, preservation of culture, and future for our tribal citizens.

NOW THEREFORE BE IT RESOLVED, that the NCAI hereby declares its support of the full equality of all tribal persons, including two spirit, lesbian, gay, bisexual and transgender tribal citizens, in the interest of furthering the cause of human rights and the principle of non-discrimination for all our citizens wherever they reside; and

BE IT FURTHER RESOLVED, we are committed to promoting the principle of non-discrimination and to supporting and strengthening individuals, families, communities and our member nations; and

BE IT FURTHER RESOLVED, that the NCAI supports its member tribes to pursue governmental policy changes such as those outlined in the Tribal Equity Toolkit: Tribal Resolutions and Codes for Two Spirit and LGBTQ Justice; and

BE IT FURTHER RESOLVED, efforts by the Substance Abuse Mental Health Services Administration, Tribal Training and Technical Assistance Centers Two Spirit Learning Community should be expanded and considered best practice in providing culturally responsive services to our two spirit relatives; and

BE IT FURTHER RESOLVED, because tribal nations, two spirit equality, and decolonization are inextricably linked, one cannot be truly achieved without the other; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2015 Midyear Session of the National Congress of American Indians, held at the St. Paul River Centre, St. Paul, MN, June 28 to July 1, 2015, with a quorum present.

Members of the National Congress of American Indians (NCAI) gathered at the midyear convening in St. Paul, Minnesota on July 1, 2015 and voted unanimously in favor of passing a resolution supporting Two Spirit relatives in communities and nations. It was the first time such a resolution had been introduced, let alone passed, by members. Passage of the resolution reflects growing support within Indian Country to begin conversations about Two Spirit/LGBTQ Justice.

Nearly a month after the passage of the NCAI resolution and celebrations of marriage equality throughout the United States, the Equality Act was introduced in both the United States Senate and House of Representatives. As of 2017, 22 states and the District of Columbia have passed explicit sexual orientation nondiscrimination employment and housing protections and 20 and the District of Columbia have gender identity protections.¹² Passage of the Equality Act would provide nondiscrimination protections in every state in multiple dimensions of life including employment, housing, public accommodations, education, credit, federally funded programs, and jury selection services where all LGBTQ people experience discrimination.¹³

Gainful employment is one of the most important factors in determining our health, our income, and our futures. Without employment,

Fact Sheets on discrimination faced by LGBTQ people

- [Discrimination in the workplace](#)
- [Discrimination in housing](#)
- [Discrimination in accessing public spaces](#)
- [Discrimination in credit](#)
- [Discrimination in education](#)

Available at www.americanprogress.org

Two Spirit/LGBTQ people are more likely to live in poverty and struggle for access to healthcare, housing, and other important basic necessities for survival.¹⁴ The challenges of high unemployment and poverty in tribal communities is a well-documented public policy problem; however, Two Spirit/LGBTQ people also contend with the intersecting impact of discrimination, bias, and harassment which exacerbate economic inequality. Research has provided extensive evidence of employment discrimination against LGBTQ people, including being fired, being denied a promotion and experiencing harassment on the job.¹⁵ To illustrate:

- Fifteen to 43 percent of two spirit adults experience some form of harassment in the workplace;¹⁶
- 65 percent of American Indian/Alaska Native transgender and gender nonconforming people were harassed, 14 percent were physically assaulted, and 10 percent were sexually assaulted at work;¹⁷
- The unemployment rate for AI/AN transgender and gender nonconforming people is 18 percent (over double the rate of the general population (7 percent)).¹⁸
- 1 in 10 lesbian, gay, and bisexual, or LGB, workers report having been fired from a job in the previous five years because of their sexual orientation.¹⁹
- Gay men earn 10-32 percent less than similarly qualified heterosexual males;²⁰
- Almost 60 percent of bisexual people report hearing anti-bisexual jokes and comments on the job.²¹

Tribal governments and economic enterprises provide revenue and services and create employment opportunities for tribal members and non-Indians alike. As employers, business owners, and service providers, tribes benefit from creating a comfortable work environment for employees that fosters recruitment, productivity, retention, and job satisfaction. Since the federal policy of Indian self-determination passed in the 1970s, the trends in tribal economic conditions offer cause for hope, even while many complex disparities remain to be addressed.²² The contributions of Two Spirit/LGBTQ people to tribal communities will assist in the continued strengthening of tribal economies.

Research shows that nondiscrimination laws and policies, including those that include sexual orientation and gender identity protections, are likely to reduce employment discrimination and promote productivity. For example, where laws banning employment discrimination have been adopted, evidence suggests that the laws “have been effective in reducing wage gaps and employment discrimination...state-level sexual orientation nondiscrimination laws reduced the gap in annual earnings for gay men.”²³

Protecting workers from discrimination is also good for business. Economists and businesses “have long argued that businesses will be most successful when they recruit, hire, and retain employees on the basis of talent, not personal characteristics, including sexual orientation, that have no impact on an employee’s ability to perform a job well.”²⁴ In addition, “studies from various academic disciplines suggest that LGBT workers will be healthier and more productive workers if they have legal protection from discrimination.”²⁵

“Perhaps the best evidence that nondiscrimination policies are good for business comes from the fact that many companies have voluntarily adopted policies” prohibiting employment discrimination.²⁶ For example, by 2015, 97 percent of Fortune 500 companies had implemented policies prohibiting discrimination on the basis of sexual orientation, and 75 percent had policies prohibiting discrimination on the basis of gender identity.²⁷ In addition, “large companies report that they adopt these policies to improve employee retention, recruitment, and productivity, as well as to generate the best ideas and a stronger customer base.”²⁸ Updating laws to protect LGBTQ people from discrimination in employment will provide the necessary clarity and uniformity for employees and employers alike.

Many tribes have adopted laws that prohibit discrimination in employment based on sexual orientation. For example, the Shoshone-Bannock Tribes’ Worker Protection Ordinance makes it unlawful to take various types of employment action “wholly or partially for a discriminatory reason based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, *sexual orientation*, or political affiliation of any individual.”²⁹ Similarly, the Mandan Hidatsa and Arikara Nation’s Employment Rights and Contracts Preference Ordinance makes it unlawful for covered employers “to fail or refuse to hire, or to discharge, any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion and training, or to engage in any other action that would deprive or tend to deprive any individual of employment opportunities, on the basis of” various characteristics, including sexual orientation.³⁰

According to the Stockbridge-Munsee Tribe’s Employee Rights Ordinance, the Tribe “recognizes basic human rights in the workplace in regard to age, sex, disability, race, creed, religion, political affiliation, national origin, color, *sexual orientation*, marital status and ancestry.”³¹ Several other tribes’ Tribal Employee Rights Ordinances (TEROs) also make it unlawful to take various actions, such as “refusing to hire, failing to hire, or dismissing any individual with respect to their compensation, terms and condition, or privileges of employment wholly or partially for a discriminatory reason based on actual or perceived: race, color, religion, national origin, sex, age, marital status, *sexual orientation*, *gender identity*, height, weight, pregnancy, disability or political affiliation of any individual.”³²

We have found few tribal provisions specifically addressing Two Spirit/LGBTQ discrimination in the areas of housing, real property transactions, public accommodations, or public services. In one example, the Tribal Court Clearinghouse’s model Tribal Housing Code makes it a defense to an eviction that the landlord “is evicting the tenant because of his/her race, sex, *sexual orientation*, religion, age, marital status, family status, or because the tenant is disabled.”³³ In another example, the Coquille Indian Housing Authority has stated that it: “does not discriminate and does not do business with others who discriminate on the basis of race, color, national origin, sex, religion, age, familial status, disability, marital status, ancestry, *sexual orientation*, or *gender identity* in the employment or provision of services.”³⁴

SAMPLE NONDISCRIMINATION ORDINANCE

The sample Nondiscrimination Ordinance is based primarily on Oregon,³⁵ California,³⁶ Colorado,³⁷ Washington, Hawaii, Connecticut, and the District of Columbia nondiscrimination laws. The sample language allows tribes with existing nondiscrimination laws related to employment, housing, property transactions, public accommodations, and public services to expand the scope of protections to include sexual orientation and gender identity to advance equality.

Nondiscrimination Ordinance

Section 1. Title. This ordinance shall be known as the “Nondiscrimination in Employment, Housing, Real Property Transactions, Public Accommodations, and Public Services Ordinance of the [insert name of Tribe].”

Section 2. Declaration and Policy.

A. The [Tribal Council/Business Committee] finds that:

1. All employees of the [insert name of Tribe] are entitled to a workforce environment that is free from discrimination. The practice of discrimination in employment against people because of their sexual orientation or gender identity deprives those people of the earnings that are necessary to maintain a just and decent standard of living, and adversely affects the workforce, community, and Tribe.
2. Promoting equality in employment is essential to the political integrity, economic security, and health and welfare of the Tribe.

B. The [Tribal Council/Business Committee] declares that it is the policy of the Tribe to secure for persons within the Tribe’s jurisdiction freedom from discrimination because of sexual orientation and gender identity in the areas of employment, housing and real property transactions, public accommodations, and public services.

Section 3. Purpose. The purpose of this ordinance is to prohibit discrimination on the basis of sexual orientation and gender identity in the areas of employment, housing and real property transactions, public accommodations, and public services. Through the adoption of this ordinance, the Tribe seeks to promote equality and to prevent and remedy practices that discriminate on the basis of sexual orientation and gender identity.

Section 4. Addition of Definitions. The Tribe’s [employment/property/housing] [code/ordinance/statute/policy], [cite to definitions provision], is amended by adding four new sections to read as follows:

[citation]. “Domestic partner” means an adult in a committed relationship with another adult, including both same-sex and different-sex relationships.

[citation]. “Committed relationship” means one in which the employee, and the domestic partner of the employee, share responsibility for a significant measure of each other’s common welfare. This includes, but is not limited to, any relationship between people of the same or different sex who are each other’s sole domestic partner (and are not married to or domestic partners with anyone else).

[citation]. “Domestic partnership” means a legal relationship, entered into in person between two eligible persons of the same sex, which has been registered and certified pursuant to Tribal law, or a domestic partnership or civil union that is valid in the jurisdiction in which it was

created.

[citation]. “Place of public accommodation” means a public or private entity that is used by the public, including a business, accommodation, refreshment, entertainment, recreation, social or health service, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public. Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to nonmembers for fee or charge or gratuitously, it shall be deemed a public accommodation during such period.

[citation]. “Public service” means any service that is performed for the benefit of the public or its institutions, including a public facility, department, agency, board or commission, owned, operated or managed by or on behalf of the Tribe, or any entity or subdivision thereof.

[citation]. “Gender Identity” means the actual or perceived gender-related identity, appearance, mannerisms, or other gender-related characteristics of a person, regardless of the person’s designated sex at birth.

[citation]. “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.

Section 5. Prohibiting Employment Discrimination on the Basis of Sexual Orientation and Gender Identity.

The Tribe’s [employment] [code/ordinance/statute/policy], [cite to provision prohibiting discrimination against members of protected classes], is amended by adding “sexual orientation and gender identity” to the list of protected classes. As revised, this Section shall read as follows:

[citation]. [provide language of original provision, with “sexual orientation, gender identity” added]

[citation]. [provide existing description of unlawful employment discrimination, with “including to deny access to a shared facility, including a restroom, locker room, or dressing room, that is in accordance with an employee’s gender identity” added]

Commentary: Tribes may also wish to provide specific protections on the basis of HIV status, (though some tribes’ disability discrimination laws may already protect against discrimination on the basis of HIV status).

NOTE: The federal Americans with Disabilities Act (ADA) gives Federal civil rights protections to people with disabilities and guarantees equal opportunity for people with disabilities in public accommodations, employment, transportation, State and local government services, and telecommunications. A person is considered to have a "disability" if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment. Persons with HIV have physical impairments that substantially limit one or more major life activities and thus are protected by the ADA. Persons who are discriminated against because they are regarded as being HIV-positive are also protected. For example, the ADA would protect a person who is denied an occupational license or admission to a school on the basis of a rumor or assumption that they have HIV or AIDS, even if they do not.

Section 6. Requiring Equality in Employee Benefits. The Tribe’s [employment] [code/ordinance/statute/policy], [cite to code/ordinance/statute/policy], is amended by adding two new sections, to read as follows:

[citation]. Equality in Employee Benefits. Any employment-related privilege, right, or benefit granted by statute, administrative or court rule, policy, common law, or any other law to a person because the person is or was married, or to an person’s spouse or former spouse, shall be granted on equivalent terms, substantive and procedural, to a person because the person is or was in a domestic partnership, or to a person’s domestic partner or former domestic partner. These privileges, rights, and benefits include but are not limited to:

1. An employee shall be granted a leave of absence, with pay, for the death of a domestic partner or family member of a domestic partner to the same extent as for a spouse or family member of a spouse. Use of the term “in-law” in the Tribe’s employee policies shall include the similarly situated relatives of a domestic partner.
2. An employee shall be granted sick leave to care for a domestic partner to the same extent that employees are granted sick leave to care for a spouse, and to care for a dependent of a domestic partner to the same extent permitted to care for a child.
3. An employee shall be entitled to take parental leave to take care of a child born to a domestic partner or a newly fostered or adopted child to the same extent as a married person, and for a child for whom the employee is standing *in loco parentis*.

Commentary: *Most jurisdictions entitle eligible employees to take unpaid, job-protected medical leave and/or leave to care for themselves or for family members with serious health conditions. The provisions above allow tribes with existing family medical leave laws to amend those laws to allow employees to expand the eligible family relationships for which employees can take leave. For example, these provisions allow an employee to take unpaid leave to care for his or her domestic partner with a serious health condition. In addition, an employee could take unpaid leave to provide care for the child of his or her domestic partner, if the child has a serious health condition, even if the employee has no legal or biological relationship with the child. Also, an employee who is having, fostering, or adopting a child with his or her partner but who is not the biological parent of the child could take unpaid leave for the birth or placement of the child and to bond with the child. Federal law also permits an employee to take leave to care for a child for whom the employee has been standing in loco parentis, or to care for a parent who stood in loco parentis to the employee.*

4. The Tribe shall offer and provide health benefits to the domestic partner of an employee to the same extent that such benefits are offered and provided to a spouse of an employee. The Tribe shall offer and provide health benefits to a dependent of an employee’s domestic partner to the same extent that such benefits are offered and provided to a child of an employee.
5. To be eligible for benefits for a domestic partner, the Tribe may require an employee file a declaration of domestic partnership, signed by both partners under penalty of perjury, with the [human resources department/Tribal administration]. On such declaration, the employee shall agree to notify the Tribe promptly of any change in the status of the domestic partnership.
6. Benefits for an employee’s domestic partner and the dependents of an employee’s domestic partner shall terminate:

- a. Upon the death of the employee in the same way that such benefits would terminate upon the death of a spouse.
 - b. Upon the termination of the domestic partnership in the same way that such benefits would terminate upon divorce.
7. As used in this Section, the term “employees” refers to active and retired employees who are eligible for benefits pursuant to the laws or policies of the Tribe.
8. When the term “spouse” or “married” or “marriage” is used in other sections of the Tribe’s [employment] [code/ordinance/statute/policy], and documents, such terms shall be interpreted to include a domestic partner or domestic partnership. When the term “family” or “dependent” is used in other sections of the Tribe’s [employment] [code/ordinance/statute/policy], and documents, it shall be interpreted to include domestic partners and dependents of domestic partners. When the term “divorce” or “legal separation” is used in other sections of the Tribe’s [employment] [code/ordinance/statute/policy], and documents, it shall be interpreted to mean termination of a domestic partnership.

Commentary: *An additional, more comprehensive amendment addressing family and medical leave could read:*

[citation]. Family and Medical Leave Definitions. The Tribe’s [employment] [code/ordinance/statute/policy], [cite to definitions provision for the Tribe’s family medical leave law], is amended by [adding/amending] the followings sections, to read as follows:

1. “Family member” means a person with any of the following relationships to the employee:
 - a. Spouse, and parents thereof;
 - b. Children and spouses thereof;
 - c. Parents, and spouses thereof;
 - d. Siblings and spouses thereof;
 - e. Grandparents and grandchildren, and spouses thereof;
 - f. Domestic partner and parents thereof, including domestic partners of any person in Subsections (b) through (e) of this definition; and

Person related by blood or affinity whose close association with the employee is the equivalent of a family relationship means any person with whom the employee has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship.”

2. “Immediate relative” means a person with any of the following relationships to the employee:
 - a. Spouse, and parents thereof;
 - b. Children, and spouses thereof;
 - c. Parents, and spouses thereof;
 - d. Siblings, and spouses thereof;

- e. Grandparents and grandchildren, and spouses thereof;
- f. Domestic partner and parents thereof, including domestic partners of any person in Subsections (b) through (e) of this definition; and
- g. Any person related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

3. "Parent" means:

- a. A biological, adoptive, step, or foster parent of the employee, or a person who was a foster parent of the employee when the employee was a minor;
- b. A person who is the legal guardian of the employee or was the legal guardian of the employee when the employee was a minor or required a legal guardian; or
- c. A person who stands in loco parentis to the employee or stood in loco parentis to the employee when the employee was a minor or required someone to stand in loco parentis.
- d. A parent of an employee's spouse or domestic partner.

4. "Child" means:

- a. A biological, adopted, step, or foster child of the employee;
- b. A person who is a legal ward or was a legal ward of the employee when that person was a minor or required a legal guardian;
- c. A child of an employee's spouse or domestic partner; or
- d. A person for whom the employee stands in loco parentis or stood in loco parentis when that person was a minor or required someone to stand in loco parentis.

5. In loco parentis refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. Persons who are in loco parentis include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

6. "Domestic partner" means an adult in a committed relationship with another adult, including both same-sex and different-sex relationships.

7. "Committed relationship" means one in which the employee, and the domestic partner of the employee, share responsibility for a significant measure of each other's common welfare. This includes, but is not limited to, any relationship between people of the same or different sex who are each other's sole domestic partner (and are not married to or domestic partners with anyone else).

9. Nothing in this [code/ordinance/statute/policy] shall be construed to impose liability upon a domestic partner for the health or health expenses of his or her domestic partner or dependents of his or her domestic partner.

Section 7. Requiring Healthcare Benefits. The Tribe’s [employment] [code/ordinance/statute/policy], [cite to code/ordinance/statute/policy], is amended by adding one new section, to read as follows:

[citation]. Equality in Healthcare Benefits. An insurer may not discriminate on the basis of an insured’s or prospective insured’s actual or perceived gender identity, or on the basis that the insured or prospective insured is a transgender person. Prohibited healthcare discrimination includes but is not limited to when an insurer:

1. Denies, cancels, limits, or refuses to issue or renew an insurance policy on the basis of insured’s or prospective insured’s actual or perceived gender identity.
2. Demands or requires a payment or premium that is based in whole or in part on an insured’s or prospective insured’s actual or perceived gender identity.
3. Designates Gender Dysphoria as a preexisting condition for which coverage will be denied or limited.
4. Excludes coverage for Gender Dysphoria or gender transition services, including gender reassignment surgeries and other services or procedures described in the most current version of the recognized professional standard of medical care for transgender people.
5. Denies or Limits coverage or denies claims for procedures provided for Gender Dysphoria or gender transition services if the same procedures are allowed in the treatment of another non-Gender Identity/Gender Dysphoria related conditions or if such denial or limitation otherwise results in discrimination against a transgender person.
6. Denies coverage for appropriate sex-specific preventative care.

Section 8. Requiring Equality by Contractors. The Tribe’s [employment/procurement] [code/ordinance/statute/policy], [cite to code/ordinance/statute/policy], is amended by adding one new section, to read as follows:

[citation]. Equality by Contractors. No Tribal entity may enter into any contract for the acquisition of goods or services in the amount of [one hundred thousand dollars (\$100,000)] or more with a contractor who, in the provision of benefits or otherwise, discriminates between employees with spouses and employees with domestic partners, or discriminates between the domestic partners and spouses of those employees or discriminates on the basis of sexual orientation, gender identity, or gender expression in any of its policies or practices.

1. After taking all reasonable measures to find a contractor that complies with this Section as determined by the Tribal entity, the requirements of this Section may be waived under any of the following circumstances:
 - a. Whenever there is only one prospective contractor willing to enter into a specific contract with the Tribal entity.
 - b. If the contract is necessary to respond to an emergency, as determined by the Tribal entity, which endangers the health, welfare, or safety of the Tribe or its members, or the contract is necessary for the provision of essential services and no entity that complies with the requirements of this is available.
 - c. Where the requirements of this Section violate, or are inconsistent, with the terms or conditions of a grant, subvention, or agreement, provided that a good faith attempt has been made by the entity to change the terms or conditions of

any grant, subvention, or agreement to authorize application of this Section.

- d. Where the contractor is providing wholesale or bulk water, power, or natural gas, the conveyance or transmission of the same, or ancillary services, as required for assuring reliable services in accordance with good utility practice, provided that the purchase of the same may not practically be accomplished through the standard competitive bidding procedures; and further provided that this exemption does not apply to contractors providing direct retail services to end users.
2. A contractor is not deemed to discriminate in the provision of benefits if:
 - a. There is a difference in the cost to provide a certain benefit to a domestic partner or spouse and the contractor permits the employee to pay any excess costs.
 - b. The contractor is unable to provide a certain benefit, despite taking reasonable measures to do so.
 - c. The contractor elects not to provide benefits to employees based on their marital status or domestic partnership status, or elects not to provide benefits to employees' spouses and to employees' domestic partners.
 3. Every contract subject to this Section shall contain a statement by which the contractor certifies that the contractor is in compliance with this Section.
 4. For purposes of this Section, "contract" includes contracts with a cumulative amount of [add appropriate amount, such as one hundred thousand dollars (\$100,000)] or more per contractor in each fiscal year.
 5. The Tribal entity or other contracting agency shall enforce this section pursuant to its existing enforcement powers.

Section 9. Equality in Workplace Appearance, Grooming, and Dress Standards. The Tribe's [employment] [code/ordinance/statute/policy], is amended by adding one new section, to read as follows:

[citation]. Workplace Appearance, Grooming, and Dress Standards. Tribal agencies may adopt reasonable workplace appearance, grooming, and dress standards, provided that an employee shall be permitted to appear or dress consistently with the employee's gender identity or gender expression.

Section 10. Prohibiting Discrimination on the Basis of Sexual Orientation or Gender Identity in Housing and Real Property Transactions. The Tribe's [real property/housing] [code/ordinance/statute/policy], [cite to provision prohibiting discrimination against members of protected classes], is amended by adding one new section, to read as follows:

[citation]. Prohibiting Unfair Discriminatory Practices. It is an unfair discriminatory practice for an owner, lessee, sublessee, assignee, broker, managing agent, or other person having the right to sell, rent or lease any real property or housing accommodation, or any financial institution to whom application is made for financial assistance for the purchase, lease, acquisition, construction, rehabilitation, repair, or maintenance of any real property or housing accommodation, or any agent or employee or any of these:

1. To discriminate against any person or group of persons because of sexual orientation or gender identity in the terms, conditions, or privileges of the sale, rental, or lease of any real property or housing accommodation or in the furnishing of

facilities or services in connection therewith including to deny access to a housing accommodation that is in accordance with a person's gender identity.

2. To refuse to sell, rent, or lease or otherwise deny to or withhold from any person or group of persons any real property or housing accommodation because of sexual orientation or gender identity.
3. To make or to cause to be made any written or oral inquiry concerning the sexual orientation or gender identity of any person seeking to purchase, rent, or lease any real property or housing accommodation.
4. To directly or indirectly advertise, or in any other manner indicate or publicize that the purchase, rental, lease, assignment, or sublease of any real property or housing accommodation by persons of any particular sexual orientation or gender identity is unwelcome, objectionable, not acceptable, or not solicited.
5. To discriminate against the lessee or purchaser of any real property or housing accommodation, or against any prospective lessee or purchaser of the property or housing, because of the sexual orientation or gender identity of persons who may from time to time be present in or on the lessee's or owner's premises, at the invitation of the lessee or owner, as friends, guests, visitors, relatives, or in any similar capacity.
6. To deny placement into a single-sex emergency shelter based on a person's actual or perceived gender identity or sexual orientation.

Section 11. Prohibiting Discrimination on the Basis of Sexual Orientation or Gender Identity in Public Accommodations and Public Services. The Tribe's [nondiscrimination/public accommodations/public services] [code/ordinance/statute/policy], [cite to provision prohibiting discrimination against members of protected classes], is amended by adding one new section, to read as follows:

[citation] Full and Equal Enjoyment of Public Accommodations and Public Services. It is an unfair discriminatory practice:

1. To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation or a public service because of his or her actual or perceived sexual orientation or gender identity including to deny access to a shared facility, including, but not limited to, a restroom, locker room, or dressing room that is in accordance with a person's gender identity.³⁸
2. For a place of public accommodation or a public service to directly or indirectly advertise or in any other manner indicate or publicize that the patronage of persons of any particular sexual orientation or gender identity is unwelcome, objectionable, not acceptable, or not solicited.
3. To discriminate against any person in the access to, admission to, full utilization of, or benefit from any place of public accommodation or any public service because of his or her sexual orientation or gender identity.

Section 12. Sovereign Immunity. Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, employee or representative, which the Tribe expressly asserts.

Section 13. Severability. If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision

shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

Section 14. Effective Date. This ordinance shall take effect [insert date or condition].

CHAPTER 2: EDUCATION

Protecting and encouraging our children is one of the most important and powerful things we can do for the wellbeing of our communities. Our children are our greatest wonders and they carry with them all of our hopes for a better future. Sadly, Two Spirit/LGBTQ children are often marginalized, harassed, and attacked in schools simply for being who they are. Bullying of Two Spirit/LGBTQ students, as well as students perceived to be Two Spirit/LGBTQ or who associate with Two Spirit/LGBTQ students, is widespread—and its impacts are devastating. The Gay, Lesbian & Straight Education Network’s 2013 National School Climate Survey found that the majority of LGBTQ students are faced with obstacles in school affecting their health and educational attainment.³⁹ For example, LGBTQ youth experience bullying at school more frequently than their non-LGBTQ peers, and LGBTQ youth are twice as likely to face verbal harassment, exclusion, and physical attacks at school than non-LGBTQ students.⁴⁰ The study also found that 74.1 percent of LGBTQ students experienced verbal harassment at school in the past year because of their sexual orientation, 55.5 percent felt unsafe at school because of their sexual orientation, and 30.3 percent skipped a day of school in the past month because of safety concerns.⁴¹ Another study found that in Oregon, one in five LGBTQ youth attempted suicide in the previous year, and that more than half were harassed at school in the previous thirty days.⁴²

Transgender students often face even greater harassment than LGB students.⁴³ In one study, 80 percent of transgender students reported feeling unsafe at school because of their gender expression.⁴⁴ Another study found that AI/AN people “expressing a transgender identity or gender non-conformity reported alarming rates of harassment (86 percent), physical assault (51 percent), and sexual assault (21 percent) in K-12; harassment was so severe that it led 19% to leave school. Eleven percent (11 percent) were also expelled due to bias.”⁴⁵

We can change our laws and our culture to support young Two Spirit/LGBTQ people when they are at school. We envision an educational system where all of our children can thrive while being exactly who they are and grow up to be who they are meant to be.

APPROACHES TO PREVENTING DISCRIMINATION IN EDUCATION

Laws that prohibit discrimination and bullying in schools can give administrators, teachers, and staff the tools needed to provide a safe environment for all students. Sound policies set clear expectations and help hold everyone accountable. It has been shown “that effective anti-bullying programs can cut bullying in half. Critical early intervention is ensured by clearly communicated standards, combined with set procedures for dealing with problems as they arise and a designated point person for each school.”⁴⁶

On May 13, 2016 the U.S. Department of Education and the Department of Justice released additional guidance to educators on how to comply with Title IX, the federal law that prohibits sex discrimination in schools.⁴⁷ Past guidance from the Department’s Office of Civil Rights (OCR) stated that “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 and OCR accepts such complaints for investigation.”⁴⁸ The comprehensive guidance issued by the U.S. Department of Justice addressed maintaining confidentiality of legal name, gender assigned at birth, and transgender status; enforcing dress code based on a student’s gender identity and gender expression; using appropriate names and pronouns to address students and in school records

whenever possible; ensuring appropriate bathroom and locker room access; and ensuring access to gender-segregated programs and activities consistent with the student’s gender identity.

On February 22, 2017, the incoming Secretary of Education and Attorney General issued a Dear Colleague letter rescinding the guidance issued in May of 2016. The vast majority of case law has held that transgender people are protected against sex discrimination.⁴⁹ The incoming administration’s decision to eliminate the guidance did not alter Title IX, which still prohibits discrimination based on sex that has been defined to include gender identity and sex stereotyping.⁵⁰

Legislation prohibiting discrimination, bullying, and harassment in schools should explicitly protect students based on their actual or perceived sexual orientation, gender identity, or gender expression, and association with Two Spirit/LGBTQ people.⁵¹ Although we did not find any tribal laws specifically addressing LGBTQ educational issues, 20 states and the District of Columbia have adopted education-related laws covering sexual orientation and gender identity.⁵²

In addition, the federal Student Non-Discrimination Act (SNDA), would prohibit public schools from discriminating against students on the basis of actual or perceived sexual orientation or gender identity.⁵³ Another bill meant to combat anti-LGBTQ discrimination is the federal Safe Schools Improvement Act (SSIA). SSIA would require all states to have LGBTQ-inclusive anti-bullying policies. If a school district failed to meet this requirement, it would be stripped of funding under the Elementary and Secondary Education Act. SSIA was first introduced by Senators Robert Casey and Mark Kirk on January 29, 2015. It was later introduced in the House, on June 25, 2015, by Representatives Linda Sanchez and Chris Gibson.⁵⁴

Care needs to be taken to empower schools to address bullying and harassment while balancing the need for fair disciplinary policies that help students stay connected to school

“Emerging research also suggests that LGBTQ students of color, as well as gender non-conforming girls, are at increased risk because of harsh school disciplinary policies. For example, African American girls and girls who identify as LGBTQ who are perceived to be gender non-conforming in some way, such as dressing in a more stereotypically masculine fashion, speaking out in class, or playing sports, are more likely to be disciplined.”

- Center for American Progress and Movement Advancement Project. “Unjust: How the Broken Juvenile and Criminal Justice Systems Fail LGBT Youth.” (Movement Advancement Project: Denver, CO 2016). Available online at <http://www.lgbtmap.org/file/lgbt-criminal-justice-youth.pdf>.

“Studies suggest that the actions (or inactions) of adults in schools associated with school climate—issues that go beyond bullying—have the potential to derail youth, particularly LGBT youth, and push them into a cycle of unfair criminalization that has lifelong consequences”

- Preston Mitchum and Aisha C. Moodie-Mills. “Beyond Bullying: How Hostile School Climate Perpetuates the School-to-Prison Pipeline for LGBT Youth.” (Center for American Progress: Washington, DC 2014) Available online at <https://www.americanprogress.org/issues/criminal-justice/report/2014/02/27/84179/beyond-bullying/>.

SAMPLE EDUCATION EQUALITY ORDINANCE

The sample Education Equality Ordinance provided below has been compiled from the laws of Oregon, California, Connecticut, and New Hampshire,⁵⁵ the federal Equal Access Act,⁵⁶ and school board policies for Vancouver, Burnaby, and Southeast Kootenay.⁵⁷

Education Equality Ordinance

Section 1. Title. This ordinance shall be known as the “Education Equality Ordinance of the [insert name] Tribe.”

Section 2. Declaration and Policy. The [Tribal Council/Business Committee] recognizes and values the diversity found within the educational institutions of the [insert name of Tribe] (Tribe).

A. The [Tribal Council/Business Committee] finds that:

1. A safe and civil school environment is necessary for students to learn and achieve.
2. One of the Tribe’s highest priorities is to protect our children from physical, emotional, and psychological violence, including in educational institutions within the Tribe’s jurisdiction.
3. Students and school personnel who are Two Spirit, gay, lesbian, bisexual, transgender, or queer (collectively referred to herein as Two Spirit) face a unique set of challenges.
4. All students and school personnel should be protected against discrimination, bullying, and harassment, including discrimination, bullying, and harassment based on actual or perceived sexual orientation, gender identity, or association with Two Spirit people or groups.
5. Schools with bullying prevention and intervention strategies foster a positive learning and teaching environment that supports academic achievement for all students and that helps students reach their full potential.
6. Providing students with the opportunity to learn and develop in a safe and respectful society is a shared responsibility in which the Tribe and our schools play an important role. Promoting equality in education is essential to the political integrity, economic security, and health and welfare of the Tribe.

B. It is the policy of the Tribe to promote, for each student enrolled in an educational institution within the Tribe’s jurisdiction, a safe and caring learning environment that fosters and maintains respectful and responsible behaviors.

Section 3. Purpose. The purpose of this ordinance is to prohibit discrimination, harassment, and bullying, including on the basis of actual or perceived sexual orientation, gender identity, or association with Two Spirit people in educational institutions.

Section 4. Definitions. As used in this ordinance:

A. “Bullying” means any act directed at a student or students, including through electronic communication (cyberbullying):

1. Place the student or students in reasonable fear of harm to the student’s or students’ person or property;

2. Cause a substantially detrimental effect on the student's or students' physical or mental health;
3. Substantially interfere with the student's or students' educational benefits, opportunities, or performance;
4. Substantially interfere with the student's or students' ability to participate in or benefit from the services, activities, or privileges provided by a school;
5. Create a hostile educational environment; or
6. Substantially disrupt the orderly operation of the school.

"Bullying" shall include actions motivated by an imbalance of power based on a student's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the student's association with another person and based on the other person's characteristics, behaviors, or beliefs.

- B. "Cyberbullying" means the use of electronic communication devices to harass, intimidate, or bully.
- C. "Discrimination" means unequal treatment of persons, for a reason that has nothing to do with legal rights or ability, including any act that unreasonably differentiates treatment, whether intended or unintended, or any act that is fair in form but discriminatory in operation.
- D. "Educational institution" means a public or private institution and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery or pre-school system, and a business, nursing, professional, secretarial, technical, or vocational school.
- E. "Electronic devices" include but are not limited to telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites.
- F. "Gender Identity" means the actual or perceived gender-related identity, appearance, mannerisms, or other gender-related characteristics of a person, regardless of the person's designated sex at birth.
- G. "LGBTQ" means Two Spirit, gay, lesbian, bisexual, transgender, and queer people or people perceived to be LGBTQ.
- H. "Perpetrator" means a person who engages in bullying or cyberbullying.
- I. "School personnel" means persons employed by, on contract with, agents of, or who volunteer in an educational institution, including but not limited to administrators, teachers, coaches, guidance counselors, social workers, counselors, psychologists, nurses, cafeteria workers, custodians, bus drivers, school resource officers, and security guards.
- J. "School property" means all real property and grounds, equipment, and vehicles used for school purposes.
- K. "Sexual Orientation" means a person's actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.
- L. "Victim" means a person against whom bullying has been perpetrated.

Commentary: Additional sample ordinances are available from the Gay, Lesbian & Straight Education Network (GLSEN) at <http://www.glsen.org/article/model-laws-policies>:

Section 5. Prohibiting Discrimination in Education.

- A. Each student enrolled in an educational institution within the Tribe’s jurisdiction shall have the right to participate fully in the educational process, free from discrimination, harassment, or intimidation, including discrimination, harassment, or intimidation on the basis of actual or perceived sexual orientation, gender identity, or association with Two Spirit people or groups.
- B. No person shall be excluded from participation in or denied the benefits of any school program or activity on the basis of actual or perceived sexual orientation, gender identity or expression, or association with Two Spirit people or groups.
- C. Nothing in this ordinance shall prohibit an educational institution from using academic qualifications or achievements as criteria for admission or requiring information from applicants that relates to academic qualifications or achievements.

Section 6. Bullying Prevention. Bullying, including on the basis of actual or perceived sexual orientation, gender identity, expression, or association with Two Spirit people or groups, is prohibited in all educational institutions.

- A. No student shall be subjected to bullying:
 - 1. During any school-sponsored education program or activity;
 - 2. While in school, on school property, on school buses or other school vehicles, at designated school bus stops waiting for the school bus, or at school-sponsored or school-sanctioned events or activities;
 - 3. Through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment; or
 - 4. That occurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a student’s educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event.
- B. Bullying prevention and intervention strategies must be modeled by all members of the school community.
- C. If school personnel witness an act of discrimination, harassment, intimidation, or bullying, they shall take immediate steps to intervene when safe to do so.
- D. This Section shall not be interpreted to prevent a victim from seeking redress under any other available civil or criminal law.
- E. Nothing in this Section is intended to infringe upon any right to exercise free expression or the free exercise of religion or religiously based views to the extent protected under applicable law.

Section 7. Policies Required. Within 180 days of the adoption of this ordinance, all educational institutions within the Tribe’s jurisdiction shall adopt written policies prohibiting discrimination, harassment, and bullying on the basis of sexual orientation, gender identity, gender expression and

association with Two Spirit people or groups. The policies shall, at a minimum:

- A. Apply to all school personnel at the educational institution.
- B. Require the educational institution to widely publicize its anti-bullying policy and complaint process, including information about how to file a complaint, to students, parents, and the general public. The anti-bullying policy must be posted in all schools and offices, including staff lounges and student government meeting rooms and distributed, at a minimum, to school personnel, students, and parents and guardians on an annual basis.
- C. Require school personnel to provide educational services in a manner that respects the dignity and rights of all persons, without prejudice as to actual or perceived sexual orientation, gender identity, or association with Two Spirit people or groups.
- D. Set forth a specific process for receiving and investigating complaints of bullying, including a requirement that school personnel intervene if they witness bullying. The process must include a timeline to investigate and resolve complaints and an appeals process for the complainant, require all complaints to remain confidential, as appropriate, and require the school to protect complainants from retaliation.
- E. Require the school to offer materials to support victims of bullying. For students who bully, school personnel should try to avoid punitive, excessive punishments that increase a student's time outside the classroom, if possible. Instead, personnel should focus on positive, restorative approaches.
- F. Be updated every two years and filed with the [Tribal Council/Business Committee/Tribal Administration] after being updated.
- G. Be developed, to the greatest extent practicable, with the involvement of students, parents, school personnel, Tribal leaders, elders, community representatives, and local law enforcement agencies.

Section 8. Repeal of Inconsistent Ordinances. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

Section 9. Severability. If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

Section 10. No Waiver of Sovereign Immunity. Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

Section 11. Effective Date. [This Ordinance shall become effective immediately upon final passage/This ordinance shall take effect [insert date or condition].

SAMPLE SCHOOL POLICY AND PROCEDURE TO ADDRESS BULLYING, HARASSMENT, AND INTIMIDATION

The sample School Policy and Procedure Prohibiting Harassment, Intimidation, and Bullying provided below is based on Washington State’s Model Anti-Bullying Policy and Model Anti-Bullying Procedure.⁵⁸ Please note that the Education Equality Ordinance, above, if adopted, would require the policy to be developed with significant community involvement.

Policy: Prohibiting Harassment, Intimidation, and Bullying

The [name] School (“School”) is committed to providing a safe educational environment for all students, employees, parents/legal guardians, volunteers, and patrons that is free from harassment, intimidation, or bullying. “Harassment, intimidation, or bullying” means any intentionally written message or image—including those that are electronically transmitted—verbal, or physical act, including but not limited to one shown to be motivated by race, color, religion, ancestry, national origin, gender, sexual orientation, gender expression or identity, mental or physical disability or other distinguishing characteristics, when an act:

- Physically harms a student or damages the student’s property;
- Has the effect of substantially interfering with a student’s education;
- Is so severe, persistent or pervasive that it creates an intimidating or threatening educational environment; or
- Has the effect of substantially disrupting the orderly operation of the school.

Nothing in this section requires the affected student to actually possess a characteristic that is a basis for the harassment, intimidation, or bullying.

“Other distinguishing characteristics” can include but are not limited to: physical appearance, clothing or other apparel, socioeconomic status, and weight.

“Intentional acts” refers to the person’s choice to engage in the act rather than the ultimate impact of the action(s).

Behaviors/Expressions

Harassment, intimidation, or bullying can take many forms including, but not limited to slurs, rumors, jokes, innuendos, demeaning comments, drawings, cartoons, pranks, gestures, physical attacks, threats or other written, oral, physical, or electronically transmitted messages or images.

This policy is not intended to prohibit expression of religious, philosophical, or political views, provided that the expression does not substantially disrupt the educational environment. Many behaviors that do not rise to the level of harassment, intimidation, or bullying may still be prohibited by other school policies or building, classroom, or program rules.

Training

This policy is a component of the School’s responsibility to create and maintain a safe, civil, respectful, and inclusive learning community and shall be implemented in conjunction with comprehensive training of students, staff, and volunteers.

Prevention

The School will provide students with strategies aimed at preventing harassment, intimidation, and bullying. In its efforts to train students, the school will seek partnerships with families, law enforcement, and other

community agencies.

Interventions

Interventions are designed to remediate the impact on the targeted student(s) and others impacted by the violation, to change the behavior of the perpetrator, and to restore a positive school climate. The school will consider the frequency of incidents, developmental age of the student, and severity of the conduct in determining intervention strategies. Interventions will include counseling, correcting behavior, and discipline.

Retaliation/False Allegations

Retaliation is prohibited and will result in appropriate discipline. It is a violation of this policy to threaten or harm someone for reporting harassment, intimidation, or bullying. It is also a violation of school policy to knowingly report false allegations of harassment, intimidation, and bullying. Students or employees will not be disciplined for making a report in good faith. However, persons found to knowingly report or corroborate false allegations will be subject to appropriate discipline.

Compliance Officer

The superintendent will appoint a compliance officer as the primary school contact to receive copies of all formal and informal complaints and ensure policy implementation. The name and contact information for the compliance officer will be communicated throughout the School.

Procedure: Prohibiting Harassment, Intimidation, and Bullying

A. Introduction

The [name] school ("School") strives to provide students with optimal conditions for learning by maintaining a school environment where everyone is treated with respect and no one is physically or emotionally harmed.

In order to ensure respect and prevent harm, it is a violation of School policy for a student to be harassed, intimidated, or bullied by others in the school community, at school sponsored events, or when such actions create a substantial disruption to the educational process. The school community includes all students, school employees, school board members, contractors, unpaid volunteers, families, patrons, and other visitors.

Student(s) will not be harassed because of their race, color, religion, ancestry, national origin, gender, sexual orientation, gender expression or identity, mental or physical disability, or other distinguishing characteristics.

Any school staff who observes, overhears, or otherwise witnesses harassment, intimidation, or bullying or to whom such actions have been reported must take prompt and appropriate action to stop the harassment and to prevent its reoccurrence.

B. Definitions

Aggressor – is a student, staff member, or other member of the school community who engages in the harassment, intimidation, or bullying of a student.

Harassment, intimidation, or bullying – is an intentional electronic, written, verbal, or physical act that:

- Physically harms a student or damages the student's property;
 - Has the effect of substantially interfering with a student's education;
 - Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or
 - Has the effect of substantially disrupting the orderly operation of the school.
- Conduct that is "substantially interfering with a student's education" will be determined by

considering a targeted student's grades, attendance, demeanor, interaction with peers, participation in activities, and other indicators.

Conduct that may rise to the level of harassment, intimidation, and bullying may take many forms, including, but not limited to, slurs, rumors, jokes, innuendoes, demeaning comments, drawings, cartoons, pranks, ostracism, physical attacks or threats, gestures, or acts relating to a person or group whether electronic, written, oral, or physically transmitted messages or images. There is no requirement that the targeted student actually possess the characteristic that is the basis for the harassment, intimidation, or bullying.

Incident Reporting Form – may be used by students, families, or staff to report incidents of harassment, intimidation, or bullying. A sample hard copy or link to online form is provided [designate where the form is available].

Retaliation – when an aggressor harasses, intimidates, or bullies a student who has reported incidents of bullying.

Staff – includes, but is not limited to, educators, administrators, counselors, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to extracurricular activities, classified staff, substitute and temporary teachers, volunteers, or paraprofessionals (both employees and contractors).

Targeted Student – is a student against whom harassment, intimidation, or bullying has allegedly been perpetrated.

C. Relationship to Other Laws

The School will ensure its compliance with all applicable laws regarding harassment, intimidation, or bullying. Nothing in this procedure prevents a student, parent/guardian, or the School from taking action to remediate harassment or discrimination based on membership in a legally protected class under Tribal, state, or federal law.

D. Prevention

Dissemination

In each school, and noticed on a school's website if available, the school will prominently post information on reporting harassment, intimidation, and bullying; the name and contact information for making a report to a school administrator; and the name and contact information for the School compliance officer. The School's policy and procedure will be available in each school in a language that families can understand.

Annually, the [superintendent or other administrator] will ensure that a statement summarizing the policy and procedure is provided in student, staff, volunteer, and parent handbooks, is available in School and School offices and/or hallways, or is posted on the School's web site.

Education

Annually, students will receive age-appropriate information on the recognition and prevention of harassment, intimidation, or bullying at student orientation sessions and on other appropriate occasions. The information will include a copy of the Incident Reporting Form [and a link to an online form].

Training

Staff will receive annual training on the School's policy and procedure, including staff roles and responsibilities, how to monitor common area, and the use of the School's Incident Reporting Form.

Prevention Strategies

The School will implement a range of prevention strategies including individual, classroom, and School-level approaches. Whenever possible, the School will implement evidence-based prevention programs that are

designed to increase social competency, improve school climate, and eliminate harassment, intimidation, and bullying in schools.

Commentary: Additional sample policies are available from the Gay, Lesbian & Straight Education Network (GLSEN) at <http://www.glsen.org/article/model-laws-policies>

E. Compliance Officer

The School compliance officer will:

1. Serve as the School's primary contact for harassment, intimidation, and bullying.
2. Provide support and assistance to the principal or designee in resolving complaints.
3. Receive copies of all Incident Reporting Forms, discipline Referral Forms, and letters to parents providing the outcomes of investigations.
4. Ensure implementation of the policy and procedure by overseeing the investigative processes, including ensuring that investigations are prompt, impartial, and thorough.
5. Assess the training needs of staff and students to ensure successful implementation throughout the School, and ensure staff receive annual training.
6. In cases where, despite school efforts, a targeted student experiences harassment, intimidation, or bullying that threatens the student's health and safety, the compliance officer will facilitate a meeting between School staff and the child's parents/guardians to develop a safety plan to protect the student.

Commentary: A sample student safety plan is available at: <http://www.k12.wa.us/SafetyCenter/default.aspx>.

F. Staff Intervention

All staff members shall intervene when witnessing or receiving reports of harassment, intimidation, or bullying. Minor incidents that staff are able to resolve immediately, or incidents that do not meet the definition of harassment, intimidation, or bullying, may require no further action under this procedure.

H. Filing an Incident Reporting Form

Any student who believes he or she has been the target of unresolved, severe, or persistent harassment, intimidation, or bullying, or any other person in the school community who observes or receives notice that a student has or may have been the target of unresolved, severe, or persistent harassment, intimidation, or bullying, may report incidents verbally or in writing to any staff member.

Commentary: Sample Bullying Prevention and Intervention Incident Reporting forms are available at: http://www.doe.mass.edu/bullying/ModelPlan_appxA.docx.

H. Addressing Bullying Reports

Step 1: Filing an Incident Reporting Form

In order to protect a targeted student from retaliation, a student need not reveal his identity on an Incident Reporting Form. The form may be filed anonymously, confidentially, or the student may choose to disclose his

or her identity (non-confidential).

1. Anonymous persons may file a report without revealing their identity. No disciplinary action will be taken against an alleged aggressor based solely on an anonymous report. Schools may identify complaint boxes or develop other methods for receiving anonymous, unsigned reports. Possible responses to an anonymous report include enhanced monitoring of specific locations at certain times of day or increased monitoring of specific students or staff. (Example: An unsigned Incident Reporting Form dropped on a teacher's desk led to the increased monitoring of the boys' locker room in 5th period.)
2. Confidential persons may ask that their identities be kept secret from the accused and other students. Like anonymous reports, no disciplinary action will be taken against an alleged aggressor based solely on a confidential report. (Example: A student tells a playground supervisor about a classmate being bullied but asks that nobody know who reported the incident. The supervisor says, "I won't be able to punish the bullies unless you or someone else who saw it is willing to let me use their names, but I can start hanging out near the basketball court, if that would help.")
3. Non-confidential persons may agree to file a report non-confidentially. Complainants agreeing to make their complaint non-confidential will be informed that due process requirements may require that the School release all of the information that it has regarding the complaint to any persons involved in the incident, but that even then, information will still be restricted to those with a need to know, both during and after the investigation. The School will, however, fully implement the anti-retaliation provision of this policy and procedure to protect complainants and witnesses.

Step 2: Receiving an Incident Reporting Form

All staff are responsible for receiving oral and written reports. Whenever possible, staff who initially receive an oral or written report of harassment, intimidation, or bullying shall attempt to resolve the incident immediately. If the incident is resolved to the satisfaction of the parties involved, or if the incident does not meet the definition of harassment, intimidation, or bullying, no further action may be necessary under this procedure.

All reports of unresolved, severe, or persistent harassment, intimidation, or bullying will be recorded on a School Incident Reporting Form and submitted to the principal or designee, unless the designee is the subject of the complaint.

Step 3: Investigations of Unresolved, Severe, or Persistent Harassment, Intimidation and Bullying

1. All reports of unresolved, severe, or persistent harassment, intimidation, or bullying will be investigated with reasonable promptness. Any student may have a trusted adult with them throughout the report and investigation process.
2. Upon receipt of the Incident Reporting Form that alleges unresolved, severe, or persistent harassment, intimidation or bullying, the School designee will begin the investigation. If there is potential for clear and immediate physical harm to the complainant, the School will immediately contact law enforcement and inform the parent/guardian.
3. During the course of the investigation, the School will take reasonable measures to ensure that no further incidents of harassment, intimidation, or bullying occur between the complainant and the alleged aggressor. If necessary, the School will implement a safety plan for the student(s) involved. The plan may include changing seating arrangements for the complainant and/or the alleged aggressor in the classroom, at lunch, or on the bus; identifying a staff member who will act as a safe person for the complainant; altering the alleged aggressor's schedule and access to the complainant, and other measures.

4. Within two (2) school days after receiving the Incident Reporting Form, the school designee will notify the families of the students involved that a complaint was received and direct the families to the School's policy and procedure on harassment, intimidation, and bullying.
5. In rare cases, where after consultation with the student and appropriate staff (such as a psychologist, counselor, or social worker) the School has evidence that it would threaten the health and safety of the complainant or the alleged aggressor to involve his or her parent/guardian, the School may initially refrain from contacting the parent/guardian in its investigation of harassment, intimidation, and bullying. If professional school personnel suspect that a student is subject to abuse and neglect, they must follow School policy for reporting suspected cases to [name of applicable child protective services department].
6. The investigation shall include, at a minimum:
 - An interview with the complainant.
 - An interview with the alleged aggressor.
 - A review of any previous complaints involving either the complainant or the alleged aggressor.
 - Interviews with other students or staff members who may have knowledge of the alleged incident.
7. The principal or designee may determine that other steps must be taken before the investigation is complete.
8. The investigation will be completed as soon as practicable but generally no later than five (5) school days from the initial complaint or report. If more time is needed to complete an investigation, the School will provide the parent/guardian and/or the student with weekly updates.
9. No later than two (2) school days after the investigation has been completed and submitted to the compliance officer, the principal or designee shall respond in writing or in person to the parent/guardian of the complainant and the alleged aggressor stating:
 - The results of the investigation.
 - Whether the allegations were found to be factual.
 - Whether there was a violation of policy.
 - The process for the complainant to file an appeal if the complainant disagrees with results.
10. Because of the legal requirement regarding the confidentiality of student records, the principal or designee may not be able to report specific information to the targeted student's parent/guardian about any disciplinary action taken unless it involves a directive that the targeted student must be aware of in order to report violations.
11. If the School chooses to contact the parent/guardian by letter, the letter will be mailed to the parent/guardian of the complainant and alleged aggressor by U.S. mail, with return receipt requested, unless it is determined, after consultation with the student and appropriate staff (psychologist, counselor, social worker) that it could endanger the complainant or the alleged aggressor to involve his or her family. If professional school personnel suspect that a student is subject to abuse or neglect, as mandatory reporters they must follow School policy for reporting suspected cases to [name of applicable child protective services department].
12. If the incident is unable to be resolved at the school level, the principal or designee shall request assistance from the [Tribal Council or other applicable entity].

Step 4: Corrective Measures for the Aggressor

After completion of the investigation, the School will institute any corrective measures necessary. Corrective measures will be instituted as quickly as possible, but in no event more than five (5) school days after contact has been made to the families or guardians regarding the outcome of the investigation. Corrective measures that involve student discipline will be implemented according to School policy [name and title of policy]. If the accused aggressor is appealing the imposition of discipline, the School may be prevented by due process considerations or a lawful order from imposing the discipline until the appeal process is concluded.

If in an investigation a principal or principal's designee found that a student knowingly made a false allegation of harassment, intimidation, or bullying, that student may be subject to corrective measures, including discipline.

Step 5: Targeted Student's Right to Appeal

1. If the complainant or parent/guardian is dissatisfied with the results of the investigation, they may appeal to the [superintendent or other applicable person or entity] by filing a written notice of appeal within five (5) school days of receiving the written decision. The [superintendent or other applicable person or entity] will review the investigative report and issue a written decision on the merits of the appeal within five (5) school days of receiving the notice of appeal.
2. If the targeted student remains dissatisfied after the initial appeal to [superintendent or other applicable person or entity], the student may appeal to the [Tribal Council or other applicable person or entity] by filing a written notice of appeal with the [Tribal Council or other applicable person or entity] on or before the fifth (5) school day following the date upon which the complainant received the superintendent's written decision.
3. An appeal before the [Tribal Council or other applicable person or entity] must be heard on or before the tenth (10) school day following the filing of the written notice of appeal to the school board. The [Tribal Council or other applicable person or entity] will review the record and render a written decision on the merits of the appeal on or before the fifth (5) school day following the termination of the hearing, and shall provide a copy to all parties involved. The [Tribal Council or other applicable person or entity]'s decision will be the final School decision.

Step 6: Discipline/Corrective Action

The School will take prompt and equitable corrective measures within its authority on findings of harassment, intimidation, or bullying. Depending on the severity of the conduct, corrective measures may include counseling, education, discipline, and/or, as an absolute last resort, referral to law enforcement.

Corrective measures for a student who commits an act of harassment, intimidation, or bullying will be varied and graded according to the nature of the behavior, the developmental age of the student, or the student's history of problem behaviors and performance. Corrective measures that involve student discipline will be implemented according to [name and title of policy].

If the conduct was of a public nature or involved groups of students or bystanders, the School should strongly consider school wide training or other activities to address the incident.

If staff have been found to be in violation of this policy and procedure, the School may impose employment disciplinary action, up to and including termination. Contractor violations of this policy may include the loss of contracts.

Step 7: Support for the Targeted Student

Persons found to have been subjected to harassment, intimidation, or bullying will have appropriate School

support services made available to them, and the adverse impact of the harassment on the student shall be addressed and remedied as appropriate.

I. Immunity/Retaliation

No school employee, student, or volunteer may engage in reprisal or retaliation against a targeted student, witness, or other person who brings forward information about an alleged act of harassment, intimidation, or bullying. Retaliation is prohibited and will result in appropriate discipline.

J. Other Resources

Students and families should use the School’s complaint and appeal procedures as a first response to allegations of harassment, intimidation, and bullying. However, nothing in this procedure prevents a student, parent/guardian, school, or School from taking action to remediate discrimination or harassment based on a person’s membership in a legally protected class under local, state or federal law.

A harassment, intimidation, or bullying complaint may also be reported to the following Tribal, state or federal agencies:

- [add applicable agencies]
- Department of Justice Community Relations Service: (877) 292-3804, www.justice.gov/crt/

K. Other School Policies and Procedures

Nothing in this policy or procedure is intended to prohibit discipline or remedial action for inappropriate behaviors that do not rise to the level of harassment, intimidation, or bullying as defined herein, but which are, or may be, prohibited by other School or school rules.

SAMPLE SCHOOL POLICY PROHIBITING DISCRIMINATION ON THE BASIS OF GENDER IDENTITY

A number of school districts have created policies to address transgender and gender nonconforming student issues such as updating educational records, providing access to appropriate restrooms, and bullying prevention.⁵⁹ In addition, many states, have adopted laws allowing student athletes to participate in sports consistent with their gender identity, irrespective of the gender listed on their student records.⁶⁰ The sample Policy Prohibiting Discrimination on the Basis of Gender Identity provided below is based on statewide guidance from the Massachusetts and New York State Departments of Education, San Francisco Unified School District Regulations and the Gay, Lesbian, and Straight Education Network’s and National Center for Transgender Equality’s *Model District Policy on Transgender and Gender Nonconforming Students*.⁶¹

Policy Prohibiting Discrimination on the Basis of Gender Identity

A. Introduction

Transgender and gender nonconforming students must be protected from discrimination, harassment, and intimidation in our school. Staff must respond appropriately to ensure that the school is free from any such discrimination, harassment, or intimidation.

This policy is meant to advise school staff regarding transgender and gender nonconforming student concerns, in order to create a safe learning environment for all students and to ensure that every student has

equal access to all components of their educational program.

B. Scope

This policy applies to the entire school community, including educators, school staff, students, parents, and volunteers, and covers conduct that takes place in the school, on school property, at school-sponsored functions and activities, on school buses or vehicles and at bus stops. This policy also pertains to usage of electronic technology and electronic communication that occurs in the school, on school property, at school-sponsored functions and activities, on school buses or vehicles and at bus stops, and on school computers, networks, forums, and mailing lists.

C. Definitions

BULLYING: Written, verbal, or physical conduct that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in, or benefit from, a program or activity of a public school or local educational agency; or to create a hostile or abusive educational environment, adversely affecting a student's education, including acts of verbal, nonverbal, or physical aggression or intimidation. This includes bullying that is based on a student's actual or perceived race, color, national origin, sex, disability, sexual orientation, gender identity or expression, religion, or another distinguishing characteristic. This also includes conduct that targets a student because of a characteristic of a friend, family member, or other person or group with whom a student associates. Bullying is frequently referred to as harassment when it pertains to a characteristic protected by non-discrimination laws.

GENDER EXPRESSION: The manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms.

GENDER IDENTITY: The actual or perceived gender-related identity, appearance, mannerisms, or other gender-related characteristics of a person, regardless of the person's designated sex at birth.

GENDER-NONCONFORMING: A term for people whose gender expression differs from stereotypical expectations, such as "feminine" boys, "masculine" girls, and those who are perceived as androgynous. This includes people who identify outside traditional gender categories or identify as multiple genders. Other terms that can have similar meanings include gender diverse or gender expansive.

NON-BINARY/GENDERQUEER: Terms used by those who identify with neither, both, or a combination of male and female genders.

SEXUAL ORIENTATION: A person's actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.

TRANSGENDER: An adjective describing a person whose gender identity or expression is different from that traditionally associated with an assigned sex at birth. This term is frequently shortened to "trans."

TRANSITION: The process in which a person goes from living and identifying as one gender to living and identifying as another. Transition is a process that is different for everyone, and it may or may not involve social, legal, or physical changes. There is no one step or set of steps that a person must undergo in order to have their gender identity affirmed and respected.

Additional Resources:

The Gay, Lesbian, and Straight Education Network's and National Center for Transgender Equality's "Model District Policy on Transgender and Gender Nonconforming Students" is available online:
http://www.glsen.org/sites/default/files/Trans_ModelPolicy_2015_9-15-15_TOCLIENT_0.pdf

The National Center for Lesbian Rights “Schools In Transition: A Guide for Supporting Transgender Students in K-12 Schools” guide is available online at <http://www.ncrights.org/legal-help-resources/resource/schools-in-transition/>

NOTE: Transgender and gender nonconforming youth use a number of words to describe their lives and gendered experiences (such as trans, transgender, Two Spirit, male-to-female (MTF), female-to-male (FTM), genderqueer, non-binary, gender fluid, trans boy, trans girl, etc.). In general, school staff should employ those terms which the students use to describe themselves or should ask which terms students may prefer—and avoid terms that make these students uncomfortable.

D. Bullying, Harassment, and Discrimination Prohibited

Discrimination, bullying, and harassment on the basis of sex, sexual orientation, or gender identity or expression are prohibited. It is the responsibility of all staff to ensure that all students, including transgender and gender nonconforming students, have a safe school environment.

The scope of this responsibility includes ensuring that any incident of discrimination, harassment, or bullying is given immediate attention, including investigating the incident, taking age and developmentally appropriate corrective action, and providing students and staff with appropriate resources. Enforcement of anti-bullying policies should focus on education and prevention rather than exclusionary discipline.

Complaints alleging discrimination or harassment based on a person’s actual or perceived gender identity or expression are to be taken seriously and handled in the same manner as other discrimination, bullying, or harassment complaints.

E. Names/Pronouns and School Records

Students shall have the right to be addressed by a name and pronoun corresponding to their gender identity. Regardless of whether a transgender or gender nonconforming student has legally changed their name, schools will allow such students to use a chosen name. It is recommended that school staff privately ask transgender or gender nonconforming students how they want to be addressed in class and in communication with the student’s parents or guardians. Some youth may feel most comfortable being addressed by gender-neutral pronouns such as “they” or “ze” or just referred to by their names (without pronouns).

This directive does not prohibit inadvertent slips or honest mistakes, but it does apply to an intentional and persistent refusal to respect a student’s gender identity. The requested name shall be included in the school’s information system, in addition to the student’s legal name, in order to inform teachers of the name and pronoun to use when addressing the student.

If the student has previously been known at school by a different birth name, the principal will direct school personnel to use the student’s chosen name and pronouns consistent with their gender identity. To ensure consistency among administrators and staff, every effort will be made to immediately update student education records (such as attendance reports, transcripts, electronic records, etc.) with the student’s chosen name and appropriate gender markers. Records with the student’s birth name will be kept in a separate, confidential file.

School staff or administrators may be specifically required by law to report a student’s legal name or the gender listed on official documents such as a birth certificate in a narrow set of circumstances. In those instances, school staff and administrators shall adopt practices to avoid the inadvertent disclosure of such confidential information.

F. Privacy / Confidentiality

All persons, including students, have a right to privacy, and this includes the right to keep one's transgender status private at school. Information about a student's transgender status, legal name, or gender assigned at birth constitutes confidential personally identifiable and medical information. Disclosing this information to other students or parents or other third parties may violate privacy laws, such as the federal Family Educational Rights and Privacy Act (FERPA), as well as constitutional privacy protections. Additionally, disclosure or misuse of this information may establish a hostile environment for a transgender or gender nonconforming student, potentially subjecting them to bullying and harassment, by peers, discrimination by school staff, or family rejection.

The District shall ensure that all personally identifiable and medical information relating to transgender and gender nonconforming students shall be kept confidential in accordance with applicable state, local, and federal privacy laws. School staff shall not disclose any information that may reveal a student's transgender status to others, including parents and other school staff, unless legally required to do so or unless the student has authorized such disclosure. In rare instance that a school is legally required to disclose a student's transgender status, the school should provide the student an opportunity to make that disclosure themselves, where practicable. This would include providing the student with any support services the student would need to make the disclosure in a safe and supportive environment.

Students have the right to discuss and express their gender identity and transgender status openly and to decide when, with whom, and how much to share private information. The fact that a student chooses to disclose their transgender status to staff or other students does not authorize school staff to disclose other medical information about the student.

Some students do not disclose their transgender status to their parents. Unless legally required to, school staff cannot disclose a student's transgender to their parents or guardians without the student's authorization. School staff should discuss with students what name and pronouns should be used in communication with their parents and what information about their transgender status or gender identity, if any, can be disclosed to their parents.

G. Access to Gender-Segregated Activities and Facilities

With respect to all restrooms, locker rooms or changing facilities, students shall have access to facilities that correspond to their gender identity. Schools may maintain separate restroom, locker room or changing facilities for male and female students, provided that they allow all students equal access to facilities that are consistent with their gender identity. Students, including non-binary students, should determine which facilities are consistent with their gender identity.

Any student who is uncomfortable using a shared sex-separated facility, regardless of the reason, shall, upon the student's request, be provided with a safe and non-stigmatizing alternative. This may include, for example, addition of a privacy partition or curtain, provision to use a nearby private restroom or office, or a separate changing schedule. However, requiring a transgender or gender nonconforming student to use a separate space threatens to publicly identify and stigmatize the student as transgender and should not be done unless requested by a student. Under no circumstances may students be required to use sex-segregated facilities that are inconsistent with their gender identity.

Where they exist, schools shall designate facilities designed for use by one person at a time as accessible to all students regardless of gender. However, under no circumstances may a student be required to use separate facilities because they are transgender or gender nonconforming. Schools are encouraged to incorporate single-user facilities and greater privacy into new construction or renovation, and to assess ways to increase privacy for all students in existing facilities.

Physical Education and Athletic Activities

All students shall be permitted to participate in physical education classes and intramural sports in a manner

consistent with their gender identity. Furthermore, unless precluded by state interscholastic association policies, all students shall be permitted to participate in interscholastic athletics in a manner consistent with their gender identity.

H. Dress Codes

Schools may enforce dress codes, but any such dress codes may not be based on gender. Students shall have the right to dress in accordance with their gender identity, including maintaining a gender-neutral appearance. School staff shall not enforce the school's dress code more strictly against transgender and gender nonconforming students than other students. While schools can provide multiple options (e.g. allow students to choose between wearing a uniform with a skirt and a uniform with pants), they can't enforce that dress code based on a student's gender or sex assigned at birth.

I. Gender Segregation in Other Areas

As a general matter, schools should evaluate all gender-based activities, rules, policies, and practices — including classroom activities, school ceremonies, and school photos — and maintain only those that serve an important educational purpose. Students shall be permitted to participate in any such activities or conform to any such rule, policy, or practice consistent with their gender identity.

J. Student Transitions

The school shall accept the gender identity that each student asserts. There is no medical or mental health diagnosis or treatment threshold that students must meet in order to have their gender identity recognized and respected. The assertion may be evidenced by an expressed desire to be consistently recognized as the sex consistent with their gender identity. Students ready to socially transition may initiate a process to change their name, pronoun, attire, and access to preferred programs, activities, and facilities consistent with their gender identity. Each student has a unique process for transitioning. The school shall customize support to optimize each student's equal access to the District's educational programs and activities.

A student's need to transition at school can arise in a number of ways. Most commonly, a parent or guardian will approach a school or district administrator about their child's transition. In this case, the administrator should meet with the parents and student to discuss the school's role in supporting the student's transition. This would include the timing of the transition, planning responses to questions from school staff and students, and correcting the student's information in the school records, among many others. This meeting should be conducted without any additional school personnel, unless the family or student specifically requests or consents to their presence.

The student, even elementary-age students, can also be the driving force behind a transition at school. This can first surface at school for a number of reasons, but regardless of the reason, administrators and educators should find ways to create a safe and supportive learning environment for the student. As part of supporting the student, administrators and educators must be mindful of the fact that transgender youth still experience significant levels of family rejection. Thus, in these situations, it is important to speak with the student prior to involving parents, guardians, or other family members to determine whether doing so would be safe and support the student's health and well-being. If the student believes that the family will be supportive, the administrator should arrange a meeting with the family to discuss the student's need to transition. Again, the planning for this meeting should involve the student to determine what role, if any, the student would like to play during the meeting. For example, in some instances the student may want to disclose their transgender status themselves, while in others the student may not want to be at the meeting at all. In either scenario, the administrator should be prepared to discuss how this issue is affecting the student in school and the importance of family acceptance to a child's short- and long-term well-being. In the event that the family is supportive, the administrator should proceed in the same way as if the parents had approached the school about the student's transition.

Schools must still create a safe and supportive school environment for transgender students, even if the

student's family is unsupportive. In those instances, the administrator should meet with the student to discuss the ways that the school can support the student, such as access to the appropriate restroom, or use of a nickname. That discussion should also include what the school and district can do to support the student's safety at home, which could include providing the family with resources to better understand their child's needs and contingency planning for the possibility that the family inadvertently finds out the child's transgender status.

K. Training and Professional Development

The school shall conduct staff training for all school staff on their responsibilities under applicable laws and this policy. Information regarding this policy shall be incorporated into training for new school employees.

To the extent funding is available, the school shall implement ongoing professional development to build the skills of all staff members to prevent, identify and respond to bullying, harassment and discrimination. The content of such professional development shall include, but not be limited to:

- (i) terms, concepts, and current developmental understandings of gender identity, gender expression, and gender diversity in children and adolescents;
- (ii) developmentally appropriate strategies for communication with students and parents about issues related to gender identity and gender expression that protect student privacy;
- (iii) developmentally appropriate strategies for preventing and intervening in bullying incidents, including cyberbullying;
- (iv) classroom-management practices, curriculum, and resources that educators can integrate into their classrooms to help foster a more gender-inclusive environment for all students.
- (v) school and district policies regarding bullying, harassment, discrimination, and suicide prevention and responsibilities of staff.

L. Publication; Updates

This policy will be distributed at least annually to school staff, students, parents or guardians, and the general public, and will also be included in any student codes of conduct, disciplinary policies, student handbooks, and school websites. This policy will also be posted in all school offices, including staff lounges and student government meeting rooms.

This policy will be updated every two years and will be filed with the [Tribal Council/Business Committee/Tribal Administration] after being updated.

CHAPTER 3: HEALTH CARE

Two Spirit/LGBTQ people experience significant health disparities. For example, Two Spirit/LGBTQ people “are at a higher risk for cancer, mental illnesses, and other diseases, are more likely to smoke, drink alcohol, use drugs, and engage in other risky behaviors,”⁶² “are more likely to attempt suicide, and are less likely to have insurance than their heterosexual or cisgender counterparts due to social stigma, culturally incompetent health care services, and other forms of discrimination.”⁶³ By diverting youth who are ready to learn to live independently from costly foster care and juvenile justice programs and addressing substance abuse and other health risk behaviors, youth-serving transitional housing programs allow young people to gain skills while reducing costs. For instance, estimates suggest that the public would save \$5 million to \$20 million if 500 youth from juvenile justice residential facilities were moved to community-based transitional living programs,⁶⁴ where they could access school and employment opportunities.

In addition, “[w]hile HIV and AIDS affect Americans across the country and from all walks of life, the epidemic continues to disproportionately impact gay and bisexual men, transgender women, youth 13-24 and communities of color.”⁶⁵ For AI/AN people in particular, HIV and AIDS “pose a major threat.”⁶⁶ American Indians are diagnosed with HIV/AIDS at rate of 10.4 per 100,000, and 3,492 AI/AN people were diagnosed with AIDS as of 2007. AI/AN persons with HIV/AIDS are also more likely to be younger in age than non-Native persons with HIV/AIDS, and experience the shortest survival time of any race or ethnicity. And, while the majority of AI/AN HIV exposure has been through male-to-male sexual contact or injection drug use, the percentage contracting HIV through heterosexual contact is increasing.⁶⁷

Disability issues are a major issue for AI/AN people. According to the Native American Disability Law Center’s 2007 Needs Assessment, a full 43 percent of people with disabilities that were surveyed had expressed not having enough food, and a further 35 percent expressed not having had a place to spend the night in the previous year.⁶⁸

Aging-related health care issues are also a growing concern for the Two Spirit/LGBTQ community. There are approximately 1.5 million LGBTQ elders in the U.S., and by 2030 there will be 3 million LGBTQ people age 65 and older.⁶⁹ Significant health disparities impact LGBTQ adults as they age, including disability, physical and mental distress, victimization, discrimination, and lack of access to supportive aging and health services.⁷⁰ A recent study found that 50 percent of those living with HIV in the United States are over 50.⁷¹ However, often, “LGBT older people don’t have access to adequate health care, affordable housing and other social services they need. This can be the result of institutionalized heterosexism, racism, ageism and/or transphobia. But for whatever reason, what it means is that many LGBT older adults—especially people of color—have reduced incomes, and they often avoid the very care providers they need to remain healthy and independent due to perceived or real discrimination when seeking services.”⁷²

National Resource Center on LGBT Aging

Available at

<http://www.lgbtagingcenter.org/resources/index.cfm?s=35>

See Soon Kyu Choi and Ilan H. Meyer. “**LGBT Aging: A Review of Research Findings, Needs, and Policy Implications**” (Williams Institute: Los Angeles, CA 2016). Available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-A-Review.pdf>.

HEALTH CARE DISCRIMINATION

LGBTQ people experience high rates of discrimination when attempting to access quality health care,⁷³ including:

- An outright denial of health care services (experienced by 8 percent of LGB people and 27 percent of transgender people);
- Harsh or abusive language from health care professionals (experienced by 11 percent of LGB respondents and 21 percent of transgender respondents);
- A refusal by health care professional to touch them or the use of excessive precautions during treatment (experienced by 11 percent of LGB respondents and 15 percent of transgender respondents);
- Being personally blamed for their health status or problems (experienced by 12 percent of LGB respondents and 20 percent of transgender respondents); and
- Physically rough or abusive treatment from a health care professional (experienced 4 percent of LGB respondents and 8 percent of transgender respondents).⁷⁴

In addition to facing discrimination in the provision of health care services, LGBTQ people and those living with HIV “are especially vulnerable to breaches of confidentiality in medical settings, and to violations of their personal autonomy regarding reproductive decisions, sexual health, gender expression, transition-related care, HIV care and other matters.”⁷⁵

Two Spirit and all LGBTQ people of color experience even greater discrimination. A 2009 Lambda Legal study of national health care fairness showed that “in nearly every category of discrimination covered in this survey, people of color respondents were more likely than their white counterparts to experience discrimination and substandard care.”⁷⁶ According to the study, Native respondents were far more likely to experience discrimination and substandard care: gay, lesbian, and bisexual Native respondents were most likely to be refused care (14 percent); experience harsh or abusive language (22 percent); be blamed for their health status (23 percent); and experience physically rough or abusive treatment (12 percent).⁷⁷ In addition, Native respondents living with HIV were four times more likely than other respondents living with HIV to experience physically rough or abusive treatment (16 percent).⁷⁸

The study shows that discrimination against transgender and gender nonconforming AI/AN respondents is even more prevalent: 46 percent were refused care and 20 percent experienced physically rough or abusive treatment.⁷⁹ In a 2013 study on pregnant transgender men,⁸⁰ many of the participants reported experiencing hostility from healthcare providers during their pregnancies. Based on the the Report of the 2015 U.S. Transgender Survey,⁸¹ 33 percent of respondents reported having at least one negative experience with a healthcare provider related to being transgender and 23 percent avoided seeing a doctor at all due to fear of discrimination. 50 percent of AI/AN transgender and gender non-conforming respondents said they had one or more negative experiences with a health provider in the past year. 37 percent of AI/AN respondents said that when they were sick or injured, they postponed medical care because they feared being mistreated.

APPROACHES TO PREVENTING HEALTHCARE DISCRIMINATION

Some tribal and Indian Health Service (IHS) facilities have adopted policies prohibiting health care discrimination on the basis of sexual orientation. For example, Klamath Tribal Health and Family Services' Patient Rights and Responsibilities states that every patient shall have a right to "[o]btain services without discrimination on the basis of race, ethnicity, gender, age, religion, physical or mental disability, *sexual orientation or preference*, marital status, socio-economic status or diagnosis/condition,"⁸² and the Indian Health Center of Santa Clara Valley "serve[s] people from all walks of life, regardless of race, creed, color, religion, sex, *sexual orientation* or disability and take[s] pride in serving our diverse patients and clients."⁸³

In addition, the Affordable Care Act of 2010 (ACA) prohibits sex-based discrimination—including discrimination on the basis of gender identity and sex stereotypes—in all health programs or and activities receiving federal financial assistance. This protection applies to all IHS facilities, and all health care facilities that accept Medicare, Medicaid, or Children's Health Insurance Program payments or other federal funds. It also applies to all health insurance plans offered or administered by insurance companies that participate in state Health Insurance Marketplaces or accept other federal funds, including Medicaid, Medicare Advantage, and Medicare Part D plans.⁸⁴

It should additionally be noted that discrimination on the basis of disabilities (such as mental illness, developmental disabilities, physical disabilities) is explicitly prohibited by the Americans with Disabilities Act (ADA). Older LGB adults are more likely to have a disability than heterosexual people⁸⁵ and 20 percent⁸⁶ of LGBTQ elders who participated in a recent survey were using special equipment such as a wheelchair or cane due to a health condition. Given these findings and the fact that 41 percent of transgender people have reported attempting suicide at one point or another in their lives, and the discrimination rates faced in the mental health setting, the resources available as a redress for disability discrimination must be taken into account given that LGBTQ people are more likely to face such discrimination. Tribes are excluded from the ADA⁸⁷ and should consider adopting similar protections if they are not already in place.

At the state level, laws in approximately 22 states and the District of Columbia explicitly prohibit health care discrimination based on a person's sexual orientation, and prohibit health care discrimination based on a person's gender identity in approximately 20 states.⁸⁸ Eighteen states and the District of Columbia have also released bulletins explicitly stating that their anti-discrimination laws prohibit discrimination on the basis of gender identity in health insurance.⁸⁹

Finally, the American Medical Association has adopted over 25 rules and opinions calling for the equal treatment of LGBTQ patients, doctors, and medical students, including an AMA ethics opinion, which is a model for how all physicians should practice medicine, states: "Physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity or any other basis that would constitute invidious discrimination."⁹⁰

HEALTHCARE INSURANCE DISCRIMINATION AND TRANSGENDER PEOPLE

Like anyone else, people who are transgender need preventive care to promote health, and medical care when they are sick or injured. Many transgender people also need specific medical services in order to transition from the sex they were assigned at birth to the sex that aligns with

their gender identity. According to the evidence-based standards for transition-related health care maintained by the World Professional Association for Transgender Health, health care services that may be medically necessary in the context of gender transition include hormone therapy, mental health counseling, and a variety of gender affirmation surgeries.

Importantly, the services that transgender people may need as part of gender transition are the same services that are regularly provided to non-transgender people. The same hormone therapy needed by transgender people, for example, is provided to patients with endocrine disorders, and the surgical procedures used in gender transition were originally developed for indications such as cancer prevention or treatment, or for restoring form and function following a traumatic injury.⁹¹

All major U.S. medical associations, including the American Medical Association,⁹² the American Psychiatric Association, and the American Psychological Association, have identified transition-related medical services, including mental health services, hormone therapy, and surgeries, as medically necessary. According to these experts, medical providers, not insurance companies, should determine the medical necessity of any transition-related service.⁹³

The ACA prohibits public and private health insurers and coverage programs from discriminating on the basis of sex, including gender identity and sex stereotypes, or on the basis of health status or health condition. The law's nondiscrimination protections also apply to all health care facilities and programs that receive federal funds, including hospitals, clinics, and mental health facilities that receive Medicare and Medicaid funding, as well as the Indian Health Service. People who face discrimination or are denied access to a federally funded health service or program on the basis of gender identity or any other protected basis may file a complaint with the Office for Civil Rights at the U.S. Department of Health and Human Services.⁹⁴

Nevertheless, many transgender people still experience serious and potentially life-threatening discrimination from insurance companies and health plans solely on the basis of their gender identity.⁹⁵ For example, despite the nondiscrimination requirements introduced by the ACA, many plans continue to use exclusions in their policies that target transgender people for denials of coverage for medically necessary care. Some plans' exclusions apply to surgical treatments but ostensibly permit coverage for other transition-related care, such as hormone therapy and mental health services. Other policies include more sweeping exclusions, denying coverage of any "services, drugs, or supplies related to sex transformation."⁹⁶ These exclusions are not medically sound or financially necessary. Employers and health plans have consistently found that offering coverage that is inclusive of the health needs of transgender people imposes few or no additional costs.

These exclusions are not only unnecessary and outdated—they are discriminatory. It is time for these exclusions to come to an end as we strive to create a health system where all people can access the care they need to live healthy and productive lives.⁹⁷

Human Rights Campaign Resources on Transgender-Inclusive Benefits for Employees and Dependents

Available at
<http://www.hrc.org/resources/transgender-inclusive-benefits-for-employees-and-dependents>

Many state, local, and private employers are embracing the benefits of offering equal coverage to transgender workers and dependents. A growing cohort of Fortune 100 Companies as

well as many other businesses—large and small—already offer inclusive health care to all employees, including equal healthcare for transgender employees.⁹⁸ In Oregon, for example, businesses offering transgender-related coverage to their employees include: Alcatel- Lucent, American Express, Ameriprise Financial, Bank of America, Chrysler Motors, Kimpton Hotel and Restaurant Group, Kraft Foods, Microsoft, New Seasons Market, and State Farm. These businesses and others have found that providing all employees with the medically-necessary care they need to be healthy is good for employees and their families, is good for business—and is the right thing to do.

Tribes may also wish to adopt the health insurance benefit provision set forth in the sample Nondiscrimination Ordinance. Moreover, where a tribe has the jurisdiction to regulate insurance providers, the tribe could choose to adopt a legislative solution to discriminatory health care coverage. For example, California became the first U.S. state to pass laws to protect against discrimination in insurance and health care access.⁹⁹ The law bars insurance companies and health care service plans from discriminating on the basis of gender in the creation or maintenance of service contracts or the provision of benefits or coverage. Eighteen states and the District of Columbia have applied these or other laws to expressly prohibit transgender exclusions in many insurance plans. Tribes could likewise choose to pass comprehensive legislation regulating insurers.

HOSPITALS AND ELDER CARE FACILITY VISITATION

Many Two Spirit/LGBTQ hospital patients and elder care facility residents face discriminatory treatment with respect to who is permitted to make decisions on their behalf. For example, when no paperwork designates a surrogate decision maker, laws around medical decision-making often limit such rights to a patient's biological family members.

In addition, to promote privacy and protect the security of the facility, hospitals and eldercare facilities place restrictions on who is permitted to visit and when. These rules are often based on the facility's definition of "family" and may exclude same-sex partners if the facility's definition of family is a narrow one. As a result, many Two Spirit/LGBTQ people have been denied the right to visit their dying partner due to the lack of recognition of their status as a couple.

In 2010, President Obama issued a Presidential Memorandum to the HHS Secretary on Hospital Visitation. In the memorandum, the President acknowledged the plight of patients who are denied the comfort and support of loved ones simply because the loved ones do not fit into a traditional concept of "family."¹⁰⁰ HHS has since issued new rules governing the treatment that LGBTQ patients and their families receive in federally funded hospitals. "The new regulations require hospitals to have written visitation policies; to inform patients of their right to designate

SAGE Caring and Preparing provides resources to provide a safe, welcoming community for LGBTQ people and that help caregivers navigate their current and future needs as they provide care for a loved one

Available at

<http://www.sageusa.org/programs/sagecap.cfm>

Know Your Rights! LGBT Older Adults & Older Adults Living with HIV

Available at

<http://sageusa.org/resources/publications.cfm?ID=168>

visitors, including a same-sex spouse or domestic partner; and to not discriminate with respect to visitation rights based on sexual orientation, gender identity, and other characteristics.”¹⁰¹

Although people can complete paperwork to designate a health care decision-maker (advance healthcare directives), and instruct doctors, care providers, and hospital staff about visitation preferences. Legislation and inclusive hospital policies could further equality in these areas. Hospital visitation laws can take the form of relationship recognition laws (laws recognizing same-sex marriage, civil unions, or domestic partnerships),¹⁰² designated healthcare agent statutes,¹⁰³ or designated visitor statutes governing hospital visitation.¹⁰⁴ Such visitation policies must be coupled with strong nondiscrimination policies (see below) to ensure that people feel safe coming out.

SAMPLE NONDISCRIMINATION POLICIES FOR HEALTH AND ELDER CARE FACILITIES

Nondiscrimination policies for hospitals, clinics, medical centers, eldercare facilities, and other health care facilities can demonstrate a “commitment to providing equal treatment and care for all persons, regardless of sexual orientation, gender identity or expression, marital status, or other non-medically relevant factors. Such policies create a safe space in which all patients feel safe and comfortable receiving treatment.”¹⁰⁵

The sample policy below would prohibit health care discrimination based on a person's sexual orientation and gender identity. It can be included in tribal health and elder care facility policies. This sample policy is based on the Gay and Lesbian Medical Association’s *Non-Discrimination Guidelines for Hospitals* and model language developed by the Human Rights Campaign.¹⁰⁶ For tribal health and elder care facilities that have not adopted a patient bill of rights, other examples include Johns Hopkins, Northwestern Memorial Hospital, California Pacific Medical Center, and Oregon Health & Science University.¹⁰⁷

Policy: Health / Elder Care Facility Nondiscrimination

- A. [Name of hospital, medical center, clinic, or eldercare facility] does not discriminate against any person on the basis of sexual orientation, gender identity or expression, marital status, or other non-medically relevant factors. Our nondiscrimination policy applies to admission, treatment, discharge, or other participation in any of [Name of facility]’s programs, services or activities including, but not limited to:
- All [patient/resident] admissions;
 - All care, whether inpatient, outpatient, or emergency in nature;
 - All [patients/residents]’ room, floor, or section assignments or transfers, except in those cases where patient safety or health condition is a necessary consideration;
 - Visitation rights; and
 - Employee assignments to [patient/resident] services.
- B. All [patients/residents] have the right to be treated in accordance with their gender identity, including in access to shared facilities.

- C. No [patient/resident] shall be denied or their access limited with respect to a health service ordinarily associated with on gender, based on the fact that a person's sex assigned at birth, gender identity, or gender otherwise recorded in a medical record is different from the one to which such health services are ordinarily associated.
- D. [Name of facility] will not refer [patients/residents] to hospital-related entities that are known to be in violation of any applicable non-discrimination laws or policies.
- E. [Name of department] is designated to monitor compliance with this policy, to institute a grievance procedure, to investigate allegations of non-compliance involving employees or applicants for employment, and to take action as needed as a result of any such investigation. Questions concerning this policy as they relate to employees or applications for employment should be directed to the [Name of department].
- F. The [patient/resident] Bill of Rights of the [name of health or elder care facility] is hereby amended to include the following:
- The following right applies to all [patients/residents] and includes the parents, legal representatives, and family of these [patients/residents]:
- The [patient/resident] has the right to competent, considerate and respectful care in a safe setting that fosters the [patient's/resident's] comfort and dignity and is free from all forms of abuse and harassment, including abuse or harassment based on sexual orientation, gender identity or expression, marital status, or other non-medically relevant factors.
- E. All [patients/residents] shall have the right to receive visitors, including a same-sex spouse or domestic partner, other family member, friends, or any other person of their choosing, without restriction.

Commentary: Sample hospital visitation policy is available from the Human Rights Campaign at http://www.hrc.org/hei/sample-visitation-policies#.V7S_2k0rLGI.

- F. [Name of facility] adopts the following definition of “family” for purposes of our facility-wide visitation policy:
- “Family” means any person(s) who plays a significant role in an person’s life. This may include a person(s) not legally related to the person. Members of “family” include spouses, domestic partners, and both different-sex and same-sex significant others. “Family” includes a minor patient’s parents, regardless of the gender of either parent. Solely for purposes of visitation policy, the concept of parenthood is to be liberally construed without limitation as encompassing legal parents, foster parents, same-sex parents, step-parents, those serving in loco parentis, and other persons operating in caretaker roles.

Commentary: *The federal Nursing Home Reform Act is a comprehensive federal statute that sets forth standards of care and rights for people living in Medicare and/or Medicaid-certified nursing facilities. Among other things, the NHRA guarantees that: nursing facility staff provide “care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being”; staff maintain patients’ “abilities in activities of daily living,” such as bathing and dressing, unless health problems require changes; patients have “free choice” to choose a physician and to be fully informed about care and treatment; and patients be “free from interference, coercion, discrimination, and reprisal” for exercising their rights under the FNHRA. ¹⁰⁸ Tribal elder care facilities may wish to consider adopting similar protections.¹⁰⁹*

“[R]ights concerning the death of a spouse/partner and the benefits available to a widower are ‘critically important,’ especially for same-sex couples who may or may not be protected pursuant to state [or tribal] law.”¹¹⁰

One of the most powerful and painful times in any person’s life involves the loss of a loved one. Not only can the grief be overwhelming for the survivors, but the end of life can open a floodgate of legal questions. For example, Two Spirit/LGBTQ couples whose relationships are not recognized by law may be denied their late partner’s benefits and pensions and rights to shared property, even if they were together as a couple for many years.

The privileges, immunities, rights, benefits and responsibilities granted to or imposed on members of same-sex couples at the end of life vary by jurisdiction. Some of the critical end-of-life issues facing same-sex couples include:

- Living will/advance directive;¹¹¹
- The right to make medical decisions (including hospital visitation) (*discussed above*);
- Priority in claiming human remains;
- Priority for guardianships/conservatorships;¹¹²
- The right to make anatomical gifts (organ donation);¹¹³
- Inheritance rights during probate;¹¹⁴
- The right to bring a wrongful death action, receive death benefits and crime victim’s compensation benefits, and/or file worker’s compensation death claims;¹¹⁵ and
- The rights of spousal allowance, homestead allowance, and income for the surviving spouse (*i.e.*, life insurance, pension benefits, social security benefits, etc.).¹¹⁶

Some jurisdictions, such as Oregon, have adopted broad domestic partnership laws that treat domestic partners like spouses would be treated for various purposes under the state’s laws.¹¹⁷ Such statutory schemes affect end of life laws in several ways. For example, a decedent’s (the person who has passed) domestic partner would be considered the “surviving spouse” for purposes of intestate succession (the person who has passed did not leave a will), and would take priority over the decedent’s other family (other than issue) in receiving a portion or all of the decedent’s intestate estate.¹¹⁸ Also, a domestic partner would be protected as a spouse to make decisions about whether to continue or cease life-sustaining treatment (unless a guardian or other health care representative has been appointed).¹¹⁹ Other jurisdictions, such as the State of Wisconsin and, have adopted specific provisions extending to domestic partners the end of life privileges, immunities, rights, benefits, and responsibilities that are granted to or imposed on spouses.

We envision a world in which all people, including Two Spirit/LGBTQ people, can experience this final phase of their lives with dignity and with the assurance that their families will be taken care of and provided for. We believe that no one should be prevented from spending life’s final moments with their family by their side.

SAMPLE END-OF-LIFE EQUALITY ORDINANCE

The sample End-of-Life Equality Ordinance provided below is based primarily on the Oregon Family Fairness Act¹²⁰ and Washington law.¹²¹ This draft ordinance allows tribes that have existing end-of-life laws (probate, guardian and conservator, advance directive, etc.), but lack recognition for same-sex marriage to provide end-of-life protections for same-sex domestic partners and their families through one broad ordinance. Tribes could also consider amending the language of each individual ordinance or policy that provides end-of-life related rights, benefits, or protections to a spouse or based on a marriage in order to specifically extend such rights, benefits, or protections to same-sex domestic partners. For example, Wisconsin¹²² and California¹²³ laws specifically address domestic partner rights.

End-of-Life Equality Ordinance

Section 1. Title. This ordinance shall be known as the “End-of-Life Equality Ordinance of the [insert name] Tribe.”

Section 2. Declaration and Policy. It is the policy of the Tribe that for purposes of the end-of-life privileges, immunities, rights, benefits, and responsibilities that are granted or imposed under Tribal law, domestic partners shall be treated the same as married spouses.

Section 3. Purpose. The purpose of this ordinance is to extend to domestic partners the same end-of-life privileges, immunities, rights, benefits, and responsibilities that are granted to or imposed on spouses under Tribal law.

Section 4. Definitions. As used in this ordinance:

A. “Domestic partner” means an adult in a committed relationship with another adult, including both same-sex and different-sex relationships.

B. “Committed relationship” means one in which the employee, and the domestic partner of the employee, share responsibility for a significant measure of each other's common welfare. This includes, but is not limited to, any relationship between people of the same or different sex who are each other's sole domestic partner (and are not married to or domestic partners with anyone else).

C. “Domestic partnership” means a legal relationship, entered into in person between two eligible persons, which has been registered and certified pursuant to Tribal law, or a domestic partnership or civil union that is valid in the jurisdiction in which it was created.

D. “End of life” means related to probate and inheritance, medical decision-making, hospital visitation, guardianships, and conservatorships, as well as rights to:

1. Claim human remains;
2. Make anatomical gifts;
3. Bring a wrongful death action;
4. Receive death benefits;
5. Receive crime victim's compensation benefits;

6. File worker's compensation death claims; and
7. Surviving spouse benefits, including but not limited to rights of spousal allowance, homestead allowance, and income for the surviving spouse (*i.e.*, life insurance, pension benefits, social security benefits, etc.).

Section 5. Health Care and End of Life Privileges, Immunities, Rights, Benefits, and Responsibilities Granted to and Imposed on Domestic Partners.

A. Any privilege, immunity, right, benefit, or responsibility granted or imposed by the Tribe's health care and end-of life laws, including but not limited to the [insert name and reference to the Tribe's probate, guardianship and conservatorship, medical decision-making, etc. codes or policies], to a person because the person is or was a spouse, or because the person is or was an in-law in a specified way to another person, is granted on equivalent terms, substantive and procedural, to a person because the person is or was in a domestic partnership or because the person is or was, based on a domestic partnership, related in a specified way to another person.

B. For the purposes of this ordinance:

1. The terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to domestic partnerships or domestic partners as to marital relationships and married persons.
2. References to dissolution of marriage shall apply equally to domestic partnerships that have been terminated, dissolved, or invalidated.
3. Where necessary to implement this ordinance, gender-specific terms, such as husband and wife, used in any statute, rule, or other law, shall be construed to be gender neutral and applicable to people in domestic partnerships.

Section 6. Repeal of Inconsistent Ordinances. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

Section 7. Severability. If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

Section 8. No Waiver of Sovereign Immunity. Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

Section 9. Effective Date. [This Ordinance shall become effective immediately upon final passage/This ordinance shall take effect [insert date or condition].]

CHAPTER 4: FAMILY

MARRIAGE

Marriage is one of the few times that people reveal their hearts, make a public promise of love and responsibility for each other, and ask their friends and family to hold them accountable. Committed couples, whether they are same or different-sex, hope to marry for similar reasons—to make a lifetime promise to share the joys and sorrows that life brings. Marriage also strengthens families. It provides the tools and the security to build a life together, and to protect the people we love. Marriage can provide mutual support for the financial, physical, and emotional health of the couple and their family. On June 26, 2015 the United States Supreme Court issued a landmark decision in *Obergefell v. Hodges*, 576 U.S. (2015) that granted same-sex couples the freedom to marry in every state, ensuring vital protections for same-sex couples and their families.

Marriage is also a legal status that confers a powerful set of rights, benefits, and protections onto spouses.¹²⁴ For example, although the Social Security Administration may recognize a common law marriage, civil union, or domestic partnership, for the most part unmarried couples are not eligible for spousal and survivor Social Security benefits. As a result, unmarried couples receive approximately \$5,588 less Social Security income per year than married couples.¹²⁵ Unmarried couples also often lack access to the public programs and private benefits available to a person upon the death of a spouse, including: the right to sue for wrongful death of a spouse; Social Security payments based on the spouse's earnings; veteran's benefits available to spouses of veterans; worker's compensation benefits for a spouse killed on the job; and a variety of other pension, disability, and retirement benefits.¹²⁶ There are numerous other financial challenges for same-sex couples, for which legal marriage provides at least a partial shield.¹²⁷

Resources on how marriage can impact financial and legal realities for elders over 65

Available at

<http://www.sageusa.org/talkbeforeyouwalk/>

Marriage equality also appears to financially benefit governments. For example, 96,000 same-sex couples in the U.S. married in the four months following the marriage equality ruling. According to a report published by the *William's Institute*, "wedding spending by these couples and their out-of-state guest have boosted state and local economics by an estimated \$813 million, and has generated an estimated \$52 million in state and local tax revenue."¹²⁸ The same study explains that this spending could support an estimated 9,700 jobs for one full year.¹²⁹

WE ENVISION A WORLD IN WHICH ALL PEOPLE WILL HAVE THE FREEDOM TO MARRY
THE PERSON THAT THEY LOVE, IN ORDER TO STRENGTHEN THEIR PARTNERSHIP
AND TO START THEIR JOURNEY AS A FAMILY TOGETHER

TRIBAL RECOGNITION OF MARRIAGE EQUALITY

In 2017, at least 34 tribes have passed marriage equality.

- Coquille Tribe in Oregon (2009)
- Mashantucket Pequot Tribe in Connecticut (2010)
- Suquamish Tribe in Washington (2011)
- Port Gamble S'Klallam Tribe in Washington (2011)
- Little Traverse Bay Bands of Odawa Indians in Michigan (2013)
- Pokagon Band of Potawatomi Indians in Michigan (2013)
- Santa Ysabel Tribe in California (2013)
- Confederated Tribes of the Colville Reservation in Washington (2013)
- Cheyenne and Arapaho Tribes in Oklahoma (2013)
- Leech Lake Band of Ojibwe in Minnesota (2013)
- Grand Portage Band of Chippewa in Minnesota (2013)
- Puyallup Tribe of Indians in Washington (2014)
- Salt River Pima-Maricopa Indian Community in Arizona (2014)
- Wind River Indian Reservation in Wyoming (2014)
- Blackfeet Indian Reservation in Montana (2014)
- San Carlos Apache Tribe in Arizona (2014)
- Fort McDermitt Paiute and Shoshone Tribes in Oregon and Nevada (2014)
- Fort McDowell Yavapai Community in Arizona (2014)
- Lac du Flambeau Band of Lake Superior Chippewa in Wisconsin (2014)
- Fond du Lac Band of Lake Superior Chippewa (2014)
- Keweenaw Bay Indian Community (2014)
- Pascua Yaqui Tribe (2014)
- Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (2014)

- Central Council of Tlingit and Haida Indian Tribes in Alaska (2015)
- Oneida Nation in Wisconsin (2015)
- Confederated Tribes of Siletz Indians (2015)
- Chemehuevi Indian Tribe (2015)
- Confederated Tribes of Grand Ronde (2015)
- Sault Ste. Marie Tribe of Chippewa Indians (2015)
- Stockbridge-Munsee Tribe (2016)
- Oglala Sioux Tribe (2016)
- Tulalip Tribe (2016)
- Menominee Nation (2016)
- Cherokee Nation (2016)

**Additional tribes choose to follow state marriage laws or informally recognize marriage equality*

**TRIBAL RESOLUTION IN SUPPORT OF TWO SPIRIT EQUALITY
AND THE FREEDOM TO MARRY**

The Tribal Resolution in Support of Two Spirit Equality and the Freedom to Marry provided below was developed in July of 2012 as a tool for tribes in Washington State to support *Why Marriage Matters Washington*, a public education and awareness building campaign which put resources into explicitly reaching out to tribes.

**TRIBAL RESOLUTION IN SUPPORT OF TWO SPIRIT EQUALITY
AND THE FREEDOM TO MARRY**

(Preamble should include Tribe Specific 'WHEREAS' clauses discussing the business, purpose, values and history of the Tribe)

WHEREAS, prior to contact with settlers, many Tribal Nations across the country and continent had long and respected histories of respect and inclusion of those in their communities, who might now be described as Lesbian, Gay, Bisexual, Transgender, Third & Fourth Gender or Two Spirit.

WHEREAS, all citizens of our Nation are born free and equal in dignity and rights; and

WHEREAS, many Lesbian, Gay, Bisexual, Transgender, Third & Fourth Gender or Two Spirit ancestors and Citizens of our Tribe/ Nation have been targets of Homophobia & Transphobia, carrying with it extremely harmful and even lethal effects; and

WHEREAS, Our Nation/ Tribe is unwaveringly committed to all causes that strengthen the health of our

Tribal Citizens, Families, Communities and Nation;

WHEREAS, our Tribal Government is committed to promoting the principle of non-discrimination and to supporting and strengthening people, families, communities and our Nation; and

WHEREAS, the principle of non-discrimination is embodied in the Charter of the United Nations, in Articles 2, 7, and 10 of the Universal Declaration of Human Rights, in Articles 2, 3, 14, 25 and 26 of the International Covenant on Civil and Political Rights, and Article 2 of the International Covenant on Economic Social and Cultural Rights; and

WHEREAS, our Nation/ Tribe has taken steps to prohibit discrimination on grounds of sexual orientation in our laws and to address such discriminations; and¹³⁰

WHEREAS, the principles of Sovereignty and Self-Determination dictate that our Tribal Nation has full and authority over issues that impact the health, welfare, preservation of culture and future for our Tribal Citizens; and

WHEREAS, in August of 2011, the Suquamish Tribe became the first jurisdiction in the state of Washington to recognize marriage for all couples, regardless of gender, by a unanimous vote of their Tribal Council; and

WHEREAS, in November 2012, Washington voters will have an opportunity to approve Referendum 74 extending marriage to all couples, regardless of gender; and

WHEREAS, our Nation/ Tribe believes that marriage and the protection of families is a human right that should be honored and respected regardless of who you love; and

WHEREAS, the social messages sent by Tribal laws and policies directly impact the mental, physical, spiritual and social health of our Tribal Citizens; and

WHEREAS, the laws and policies of the State of Washington have direct impact on our Tribal Citizens living within the borders of Washington State, outside our reservation; and now,

THEREFORE BE IT RESOLVED, that the (NAME OF NATION/ TRIBE HERE) hereby declares its support of the Freedom to Marry in the State of Washington exercising our Sovereignty in the interest of furthering the cause of human rights and the principle of non-discrimination for all our citizens wherever they reside.

The aforementioned resolution is now the official policy of the (NAME OF NATION/ TRIBE) signed this (DATE) of (MONTH), 20(YEAR).

SAMPLE MARRIAGE EQUALITY LAW

The sample Marriage Equality Law provided below has been compiled from the laws of the many of the tribes, states, and countries that recognize same-sex marriage, with the majority of the sample language based on the laws of the Coquille Indian Tribe, New York, and the District of Columbia. This sample ordinance allows tribes with existing marriage laws to amend those laws to promote marriage equality. For tribes that have not yet adopted marriage laws, the marriage laws of Coquille Indian Tribe, Little Traverse Bay Band of Odawa Indians, Pokagon Band of Potawatomi Indians, among others, offer examples of more comprehensive language covering the

issuance of marriage licenses and certificates, void and voidable marriages, solemnization of marriages, etc.¹³¹

Marriage Equality Law

Section 1. Title. This ordinance shall be known as the “Marriage Equality Ordinance of the [insert name] Tribe.”

Section 2. Declaration and Policy.

A. The [Tribal Council/Business Committee] finds that marriage is a fundamental human right, and an institution that strengthens family relationships and preserves the integrity, cohesiveness, and continuity of the [insert name] Tribe (Tribe). The formation and recognition of marriage is thus essential to the Tribe’s political integrity, economic security, and health and welfare.

B. The [Tribal Council/Business Committee] further finds that the right to equality without discrimination requires that all couples, regardless of gender, have equal access to marriage and to the protections, responsibilities, and benefits that result from marriage.

C. To reflect our values of respect and equality, it is the policy of the Tribe that the marriages of all couples, regardless of gender, be treated equally in all respects under Tribal law.

Section 3. Purpose. The purpose of this ordinance is to recognize legal equality in the Tribe’s marriage laws. This ordinance formally recognizes valid marriages without regard to gender.

Section 4. Construction.

A. All provisions of Tribal law that use gender-specific terms in reference to the parties to a marriage, or that in any other way may be inconsistent with this ordinance, shall be construed in a gender-neutral manner and as otherwise necessary to carry out the intent of this ordinance.

B. The omission from this ordinance of changes to other provisions of law shall not be construed as intent to preserve any legal distinction between couples based on gender, with respect to marriage.

Section 5. The Tribe’s [domestic relations; family; marriage] [code; ordinance; statute], [cite to specific provision], is amended by adding three new sections, to read as follows:

[citation]. Parties to a Marriage.

1. Marriage is the legally recognized union of two persons. A marriage that is otherwise valid shall be valid regardless of the gender of the parties involved.

2. No Tribal government treatment or legal status, effect, right, benefit, privilege, protection, or responsibility related to marriage, whether deriving from a statute, resolution, administrative or court rule, regulation, policy, common law, or any other source of law, shall differ based on the gender of the parties who are entering the marriage.

[citation]. Equal Access to Marriage License. No application for a marriage license shall be denied on grounds related to the gender of the parties involved.

[citation]. Recognition of Marriages, Domestic Partnerships, and Civil Unions from Other Jurisdictions. All marriages, domestic partnerships, and civil unions performed under the laws of

another jurisdiction, which are valid under the laws of the jurisdiction when and where performed, shall be recognized as valid by the Tribe, provided that such marriage, domestic partnership, or civil union is not otherwise expressly prohibited by Tribal law.

Commentary: *This provision was included to explicitly recognize valid marriages, domestic partnerships, and civil unions created in other jurisdictions. However, if a tribe wishes to limit its recognition of other jurisdictions' marriages, domestic partnerships, and civil unions, additional language could read:*

- “For the exclusive purpose of providing Tribal and Tribally-administered benefits...”

and/or

- “The Tribe shall recognize marriages, domestic partnerships, and civil unions formed under the laws of another jurisdiction if: 1) At least one party to the marriage, domestic partnership, or civil union is a Tribal member at the time that recognition is requested; and 2) The party requesting recognition of the marriage, domestic partnership, or civil union provides adequate proof of the marriage, domestic partnership, or civil union.”

Section 6. Repeal of Inconsistent Ordinances. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

Section 7. Severability. If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

Section 8. No Waiver of Sovereign Immunity. Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

Section 9. Effective Date. [This Ordinance shall become effective immediately upon final passage/This ordinance shall take effect [insert date or condition]]

DOMESTIC PARTNERSHIPS AND CIVIL UNIONS

APPROACHES TO DOMESTIC PARTNERSHIPS AND CIVIL UNIONS

Tribes and states recognizing domestic partnerships and civil unions have taken various legislative approaches. For example, the Confederated Tribes of the Umatilla Indian Reservation, Coquille Indian Tribe, Fond du Lac Band of Lake Superior Chippewa, and the states of Oregon, California, Nevada, and the District of Columbia still allow same-sex couples to enter into domestic partnerships that provide many of the same rights, benefits, and responsibilities as marriage under tribal/state law.¹³² Colorado, Hawaii, Illinois, and New Jersey still allow couples to enter civil unions, which offer state-level spousal rights and responsibilities. A number of other states previously offered civil unions. These states no longer allow new couples to enter these unions but recognize existing civil unions entered previously. Neither domestic partnerships nor civil unions are recognized under federal law for most purposes.

Other jurisdictions make domestic partners, partners joined in civil unions, or partners joined as reciprocal beneficiaries¹³³ eligible for only specified rights and benefits. For example, Maine's domestic partnership law makes registered domestic partners eligible to inherit without a will, make funeral and burial arrangements, be named a guardian or conservator if a partner becomes incapacitated, be named a representative to administer a deceased partner's estate, make organ and tissue donations, and be protected under the state's domestic violence laws.¹³⁴

Most states with civil unions or domestic partnerships, including Colorado, the District of Columbia, Hawaii, Illinois, and Nevada allow both same-sex and opposite-sex partners to enter into these statuses, which provide some of the same benefits available to married couples, including the right to hospital visitation, control the disposition of a deceased partner's remains, and make medical decisions.¹³⁵

Use of Terms

Although the terms civil marriage, civil union, and domestic partnership are often used interchangeably, there can be significant distinctions between the terms. According to Pawelski et al.:

Civil marriage "is a legal status established through a license issued by a state [or tribal] government. Such status grants legal rights to, and imposes legal obligations on, the 2 married partners."

A domestic partnership "is a relationship between 2 individuals, often but not necessarily of the same gender, who live together and mutually support one another as spouses but who are not legally joined in a civil marriage or a civil union. Some same-gender couples enter into domestic partnership agreements to create legally enforceable contracts involving property, finances, inheritance, and/or health care." [*Note: some domestic partnerships operate under a limited benefit structure.*]

A civil union "is a legal mechanism, sanctioned by civil authority, intended to grant same-gender couples legal status...similar to civil marriage."

SAMPLE DOMESTIC PARTNERSHIP LAW

For tribes that wish to provide all domestic partners, including Two Spirit/LGBTQ couples, with the rights, benefits, and responsibilities afforded to married couples under tribal law, a sample Domestic Partnership Ordinance is provided below. The majority of the sample language is based on the laws of the Confederated Tribes of the Umatilla Indian Reservation, Coquille Indian Tribe, Oregon, California, New Jersey, and Delaware.

Domestic Partnership Law

Section 1. Title. This ordinance shall be known as the “Domestic Partnership Ordinance of the [insert name] Tribe.”

Section 2. Declaration and Policy. The [Tribal Council/Business Committee] finds that:

1. The ability to enter into a legal relationship with another person that is recognized by friends and family as well as the laws of [insert name] Tribe (Tribe), is a significant and fundamental right.”
2. Without the ability to obtain legal status for their relationships, un-married couples face numerous obstacles and hardships in attempting to secure legal protections and other rights and benefits for themselves and their children.
3. The Tribe has a strong interest in supporting families and partnerships, including the families of Two Spirit/LGBTQ partners, their children, and other family members. Legislation that provides for the formation and recognition of domestic partnerships eliminates many legal obstacles that unmarried people face. Such legislation reaffirms the Tribe’s obligation to ensure equality for all of its members, and is essential to the political integrity, economic security, and health and welfare of the Tribe.

Commentary: *Model domestic partnership policies are available online from the American Civil Liberties Union at <https://www.aclu.org/model-domestic-partnerships>*

Section 3. Purpose. The purpose of this ordinance is to establish a domestic partnership system that will provide legal recognition to un-married couples under the laws of the Tribe, thereby ensuring more equal treatment of their families under Tribal law.

Section 4. Interpretation. This ordinance shall be construed liberally in favor of finding that a domestic partnership is a valid civil contract entitled to be treated under Tribal law as a marriage would be treated.

A. A domestic partner shall be included in any definition or use of the terms “dependent,” “family,” “husband and wife,” “immediate family,” “next of kin,” “spouse,” “stepparent,” and other terms, whether or not gender-specific, that denote a spousal relationship or a person in a spousal relationship, as those terms are used throughout Tribal law, including the Tribal Code, administrative rules and regulations, court rules, governmental policies, common law, or any other provisions or sources of the laws of the Tribe.

B. The term “domestic partner” means an adult in a committed relationship with another adult, including both same-sex and different-sex relationships.

C. “Committed relationship” means one in which the employee, and the domestic partner of the

employee, share responsibility for a significant measure of each other's common welfare. This includes, but is not limited to, any relationship between people of the same or different sex who are each other's sole domestic partner (and are not married to or domestic partners with anyone else).

D. "Domestic partnership" means a legal relationship, entered into in person between two eligible persons, which has been registered and certified pursuant to Tribal law, or a domestic partnership or civil union that is valid in the jurisdiction in which it was created.

E. Many of the Tribe's laws are intertwined with federal law and state laws. The [Tribal Council/Business Committee] recognizes that the Tribe does not have the jurisdiction to control federal or state laws. To the extent that provisions of Tribal law adopt, refer to, or rely upon provisions of federal or state law in a way that otherwise would cause domestic partners to be treated differently than spouses, domestic partners shall be treated by Tribal law as if such federal or state law recognized a domestic partnership in the same manner as Tribal law.

Section 5. Definitions. As used in this ordinance:

A. "Domestic partner" means an adult in a committed relationship with another adult, including both same-sex and different-sex relationships.

B. "Committed relationship" means one in which the employee, and the domestic partner of the employee, share responsibility for a significant measure of each other's common welfare. This includes, but is not limited to, any relationship between people of the same or different sex who are each other's sole domestic partner (and are not married to or domestic partners with anyone else).

C. "Domestic partnership" means a legal relationship, entered into in person between two eligible persons, which has been registered and certified pursuant to Tribal law, or a domestic partnership or civil union that is valid in the jurisdiction in which it was created.

Section 6. Eligibility to Enter into Domestic Partnership; Prohibited and Void Domestic Partnerships.

A. Two persons shall be eligible to enter into a domestic partnership if at least one of the persons is a member of the [insert name] Tribe and both persons:

1. Are at least 18 years of age and capable of consenting to the domestic partnership;
2. Are not married to, in a domestic partnership, or in a legal relationship substantially similar to a domestic partnership, with a different person;
3. Have entered into a committed interdependent relationship; and
4. Are not related by blood in a way that would prevent them from being married to each other under the laws of the Tribe.

B. Domestic partnerships are subject to the same limitations and rights under Tribal law as void and voidable marriages.

Commentary: *A more detailed provision could read:*

1. A domestic partnership is prohibited and void when:

- a. Either party to the domestic partnership has a partner; or spouse living at the time of the domestic partnership; or
- b. When either party to a domestic partnership is incapable of making the civil contract or consenting to the contract for want of legal age or sufficient understanding, or when the consent of either party is obtained by force or fraud, the domestic partnership is void from the time it is so declared by a judgment of a court having jurisdiction of the domestic partnership.

Section 7. Formation of Domestic Partnerships. A domestic partnership shall be established under Tribal law when a Certificate of Registered Domestic Partnership is issued by the [Tribal Court/name of other entity issuing certificate].

A. To request a Certificate of Registered Domestic Partnership, both persons wishing to enter into a domestic partnership must jointly file a signed Declaration of Domestic Partnership with the [Tribal Court Clerk/title of other staff issuing certificate], in person, and pay the required filing fee.

Commentary: *This declaration process is based on a similar process used in Oregon and California. Other jurisdictions, such as the Confederated Tribes of the Umatilla Indian Reservation, Nevada, Delaware, and Hawaii, use a more detailed process for establishing domestic partnerships, which requires the issuance of a license and the solemnization of the domestic partnership (similar to the process for entering into a marriage).*

- B. On the Declaration of Domestic Partnership, each person wishing to enter into the partnership shall:
1. Provide their full legal name, tribal affiliation if any, date of birth, age, place of birth, and residence.
 2. Declare that they are at least 18 years of age and otherwise capable of entering into a domestic partnership.
 3. State whether they have previously been married, a partner in a domestic partnership, or in a legal relationship substantially similar to a domestic partnership, and if so, provide a certified copy of the divorce decree or death certificate of the former spouse or partner or other proof that the previous marriage, domestic partnership, or other legal relationship has been terminated.
 4. Declare their desire to enter into the domestic partnership with the other.
 5. Expressly consent to the jurisdiction of the Tribe:
 - a. To authorize the domestic partnership;
 - b. For the purpose of any action for dissolution or annulment of the domestic partnership, or for legal separation of the partners in the domestic partnership; and
 - c. For any other proceeding related to the partners' rights and obligations or governing or concerning family relationships under the laws of the Tribe, even if one or both partners cease to reside or to maintain a domicile within the Tribe's jurisdiction.

6. Indicate the person's name after entering into the domestic partnership.

Commentary: *Some jurisdictions include additional requirements related to domestic partnership name changes. Additional language could read:*

Section x. Surname upon entering into domestic partnership; legal effect.

A. Upon entering into a domestic partnership, either party to the domestic partnership may:

1. Retain their surname as it existed prior to the domestic partnership;
2. Change their surname or middle name to the surname of the other party; or
3. Change their surname to a hyphenated combination or other combination of the surnames of both parties.

B. If a party requests a surname change under this Section, that party may also change their middle name to their surname prior to the domestic partnership.

C. The name of each party, as indicated on the Declaration of Domestic Partnership, shall become the sole legal name of each party after entering into the domestic partnership.

D. A request for a name change other than as described in this Section requires approval of the [Tribal Court or other entity], in accordance with [insert citation to Tribe's name change law].

7. Sign the form with a declaration that: "To the best my knowledge and belief, all representations made on this Declaration of Domestic Partnership are true, correct, and contain no material omissions of fact." The signatures of both partners must be affixed to one Declaration of Domestic Partnership form.

C. Each person wishing to enter into the partnership shall attach satisfactory documentary proof of identification and Tribal membership to the Declaration of Domestic Partnership.

D. Each person wishing to enter into the partnership shall swear or affirm to the declaration before the [Tribal Court Clerk/title of other staff issuing certificate].

E. Upon receipt of a Declaration of Domestic Partnership, in person, from both persons who wish to enter into the partnership, the [Tribal Court Clerk/title of other staff issuing the certificate] shall:

1. Confirm the identities [, residence,] and ages of each person, through examination of their photo identification or other reasonable proof satisfactory to the [Clerk/title of staff person].
2. Collect the filing fee for registering a Declaration of Domestic Partnership, which shall be established by the [Tribal Council/Business Committee].
3. Review the Declaration of Domestic Partnership to ensure that all requirements of this Section are met.

G. If the Declaration of Domestic Partnership meets all requirements of this Section, the [Tribal Court Clerk/title of other staff issuing certificate] shall:

1. Register the Declaration of Domestic Partnership in a domestic partnership registry; and
2. Issue a Certificate of Registered Domestic Partnership to the partners in person or at the mailing address provided by the partners. The registration certificate shall state that the partners have entered into a domestic partnership pursuant to this ordinance.
 - a. If one or both of the partners have chosen to change their name in accordance with the requirements of this ordinance, the registration certificate shall set forth the new name(s) of the partner(s).
 - b. The Certificate of Domestic Partnership shall be presumptive evidence of the domestic partnership in all courts.

H. This ordinance does not require the performance of any solemnization ceremony to enter into a domestic partnership. It is left to the partners entering into a domestic partnership to determine whether to seek a ceremony or other blessing over the domestic partnership.

I. The [Tribal Court Clerk / title of other staff issuing certificate] shall maintain a public record of all Declarations of Domestic Partnership and Certificates of Domestic Partnership issued.

J. Filing an intentionally and materially false Declaration of Domestic Partnership is punishable as a misdemeanor.

Section 8. Consent to Jurisdiction. Each person signing a Declaration of Domestic Partnership consents to the jurisdiction of the Tribal Courts:

A. For the purpose of an action to obtain a judgment of dissolution or annulment of the domestic partnership;

B. For legal separation of the partners in the domestic partnership; and

C. For any other proceeding related to the partners' rights and obligations, even if one or both partners cease to reside or to maintain a domicile within the jurisdiction of the Tribe.

Commentary: *If the tribe lacks a Tribal Court, describe how the tribe will address dissolution, separation, etc.*

Section 9. Rights, Benefits, and Responsibilities of Domestic Partners.

A. Any privilege, immunity, right, or benefit granted by Tribal statute, administrative or court rule, policy, common law, or any other law to any person, and any responsibility imposed by Tribal statute, administrative or court rule, policy, common law, or any other law on any person, because the person is or was married, or because the person is or was an in-law in a specified way to another person, is granted on equivalent terms, substantive and procedural, to any person because the person is or was in a domestic partnership, or because the person is or was, based on a domestic partnership, related in a specified way to another person.

1. Any such privilege, immunity, right, benefit, or responsibility granted or imposed to or on a spouse with respect to a child of either of the spouses is granted or imposed on equivalent terms, substantive and procedural, to or on a partner with respect to a child of either of the partners.

2. Any such privilege, immunity, right, benefit, or responsibility granted or imposed to or on a former or surviving spouse with respect to a child of either of the spouses is granted or imposed on equivalent terms, substantive and procedural, to or on a former or surviving partner with respect to the child of either of the partners.
3. The rights and obligations of domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses.

B. Domestic partners shall have the same rights regarding nondiscrimination as those provided to spouses. No Tribal agency may discriminate against any person or couple on the grounds that the person is a domestic partner rather than a spouse or a party to a domestic partnership rather than a marriage, except as may otherwise be provided by Tribal law.

Section 10. Termination of Domestic Partnerships.

A. A domestic partnership entered into or otherwise recognized under this ordinance may be dissolved in the same form and manner as marriages entered into or recognized under [insert citation to Tribal dissolution provision(s)].

Commentary: *Some jurisdictions, including Fond du Lac Band of Lake Superior Chippewa and the State of Wisconsin, allow domestic partnerships to be terminated through a simplified procedure that involves the filing of a notice with the clerk who issued the Certificate of Registered Domestic Partnership. This type of provision could read:*

Section X. Termination of Domestic Partnership.

A. Either person in a domestic partnership may initiate termination of the domestic partnership relationship, by written notification to the Clerk of Court. The Clerk shall promptly notify the other partner at the address of record by certified mail.

B. A domestic partnership registration terminates when the earlier of the following occurs: (1) One of the partners dies; or (2) Forty-five (45) days after one partner sends the other a written notice of termination that they have terminated the partnership by filing a notice of termination with the Clerk of Court; or (3) Forty-five (45) days after the Clerk notified the non-filing partner of the filing of any notice of termination.

C. If any of the criteria under Section 6 ceases to exist, the parties shall be ineligible for any benefits based upon the domestic partnership unless otherwise provided by law or the employer.

Other jurisdictions, such as Nevada, dissolve domestic partnerships in the same manner as a marriage, but also offer a simplified termination process for some domestic partnerships (such as: domestic partnerships that have been registered for 5 years or less, involve no minor children of the relationship, and involve no community or joint property; or domestic partnerships in which the parties have executed an agreement setting forth the division of property / liabilities), if the parties waive any rights to support (or have executed an agreement re: support) and waive the right to more comprehensive proceedings.

In addition, depending on their divorce laws, tribes may wish to add additional language, such as:

"... ; provided, however, that the Tribal Court shall have, in addition to any other basis for jurisdiction, jurisdiction over all proceedings for termination of domestic partnerships that are entered into pursuant

to this ordinance, notwithstanding that the domicile or residency of the petitioner and the respondent are not within the jurisdiction of the Tribe, if the jurisdiction of domicile or residency of the petitioner and/or the respondent does not by law affirmatively permit such a proceeding to be brought in the courts of that jurisdiction.”

B. A person who has filed a Declaration of Domestic Partnership may not file a new Declaration of Domestic Partnership or enter a marriage with someone other than the person’s partner unless a judgment terminating the recent domestic partnership has been entered. This prohibition does not apply if the previous domestic partnership ended due to the death of one of the partners.

Section 11. Recognition of Domestic Partnerships from Other Jurisdictions. A registered domestic partnership, or other legal relationship substantially similar to a domestic partnership that extends benefits and responsibilities without the status of marriage, which has been legally entered into in another jurisdiction shall be recognized by the Tribe as a domestic partnership if the relationship meets the eligibility requirements of this ordinance and satisfactory proof of the relationship is provided.

Section 12. Repeal of Inconsistent Ordinances. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

Section 13. Severability. If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

Section 14. No Waiver of Sovereign Immunity. Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

Section 15. Effective Date. [This Ordinance shall become effective immediately upon final passage/This ordinance shall take effect [insert date or condition].]

CHILDREN

“Public policy designed to promote the family as the basic building block of society has at its core the protection of children’s health and well-being. Children’s well-being relies in large part on a complex blend of their own legal rights and the rights derived, under law, from their parents.”¹³⁶

Family law in the United States is generally based on the concept of a nuclear family, consisting of a mother, father, and one or more (biological or adopted) minor children.¹³⁷ This view of “family” has been incorporated into the domestic relations laws adopted by many tribes. However, today, “the traditional nuclear family is closer to the exception than the rule” in the U.S.¹³⁸

The nuclear family concept fails to reflect the family structures prevalent within many Native communities. Although family practices within Native cultures are diverse, some common core values and beliefs about family exist across tribal groups, including group sharing of family responsibilities, dependence on extended family supports, and a focus on collective well-being. Many Native families, both traditionally and today, thus include mothers, fathers, grandparents, aunts, uncles, and cousins, as well as more extended or adopted relatives—all of whom may assume childcare responsibilities.

In addition, Two Spirit/LGBTQ people have historically played an important role in tribal communities, including as caretakers and medicine givers. In many cases, families would ask Two Spirit/LGBTQ leaders for help and guidance in rearing their children. It is important that we continue to honor the wisdom that Two Spirit/LGBTQ people have to offer all children in our tribal communities, and it is imperative that we support the bonds that Two Spirit/LGBTQ parents have with their own children.

Many jurisdictions are changing their laws to set forth a broader definition of “family,” and to provide parental rights to those that have taken on the responsibilities of parenthood. These changes reflect a more inclusive view of family, which is grounded in relationships and care—and can help provide stability and protection for the millions of children in the United States who are estimated to have at least one Two Spirit/LGBTQ parent.¹³⁹

Laws governing family relationships, including adoption and parentage laws, “should allow joint adoption by LGBTQ parents, recognize LGBTQ parents using assisted reproduction, and provide avenues such as second-parent adoption to allow children to gain full legal ties to their parents.”¹⁴⁰ In addition, effective laws are needed to prevent discrimination based on Two Spirit/LGBTQ status during custody and visitation disputes, and to protect children involved in the child welfare system.

ADOPTION

Adoption is the process through which “an adult . . . can establish a legal parental relationship to a child.”¹⁴¹ Through adoption, a child’s adoptive parents take on the obligation to support and care for the child, and the child is protected in terms of inheritance or social security if a parent dies.¹⁴²

Adoption of children by Two Spirit/LGBTQ persons may take the form of a joint adoption by a same-sex couple (joint adoption), adoption by a single Two Spirit/LGBTQ person, or adoption by one partner of the other partner’s legal child (known as step-parent or second-parent adoption).¹⁴³ “Adoption provides LGBTQ individuals and couples with a critical way to ensure or create family relationships, whether (1) by bringing unrelated children into the family or (2) by securing the legal relationship of a second parent to the child of his or her partner or spouse.”¹⁴⁴ Supporting the legal recognition of Two Spirit /LGBTQ parents increases the strength of individual families as well as our communities. Keeping Two Spirit/LGBTQ families together also increases the likelihood that important cultural heritage can be passed through the family line.

TYPES OF ADOPTION

A person or couple who are unrelated to a child “may adopt a child (a) who is in the legal custody of a state agency, or (b) who has been placed with a private child welfare agency, or (c) who is secured as the result of a private agreement.”¹⁴⁵ Independent adoptive children may be adopted through a single parent adoption or through a joint adoption.

Single parent adoption occurs when one person adopts a child, as an individual (even if other adults live in the home of the adoptive parent). After the adoption, the child has one legal parent.¹⁴⁶ It is not uncommon for LGBTQ people, *as individuals*, to adopt children through single parent adoption.¹⁴⁷ *Joint adoption* (sometimes known as co-parent adoption) occurs when a couple,

together, jointly adopts a child who was not previously the legal child of either party. After the adoption, the child has two legal parents.¹⁴⁸ A few states allow more than two parents to adopt in some circumstances.

LGBTQ couples have been co-parenting children together for decades.¹⁴⁹ As many as six million people in the United States have at least one LGBTQ parent. There are approximately 125,000 same-sex couples currently raising about 220,000 children under the age of 18 across the United States.¹⁵⁰ Countless LGBTQ couples co-parent children. However, children raised by same-sex couples may have only one legal parent.¹⁵¹ This is because not all states fully protect the relationships between non-biological parents and their children, and many state laws protect only certain family structures.¹⁵² This issue may arise when a couple has a child together, when one partner has a child that he or she previously adopted as a single individual,¹⁵³ or when a couple is adopting a child together in a jurisdiction that prohibits them from adopting children together. In the wake of nationwide marriage equality, married same-sex couples should now be able to complete step-parent adoptions to secure legal ties between children and their second parents. However, children being raised by unmarried same-sex couples are still left without the means by which to secure legal ties to their second parent, in most states.

Second parent adoption provides an opportunity for a child's non-legal parent to create a legal relationship with his or her partner's child.¹⁵⁴ Second parent adoption is "a legal process by which a child who is already the child of one member of an unmarried couple is adopted either through a joint petition by both members of the couple (even though one of them is already the child's parent) or through an individual petition by the member of the couple who is not yet the child's parent, depending on the procedures of the [jurisdiction]. After the adoption, the child has two legal parents."¹⁵⁵

Second parent adoption provides a child with two legal parents—both of whom are legally obligated to provide support and care for the child.¹⁵⁶ In addition, because second parent adoption grants the adoptive parent the same legal rights as a previously recognized legal parent, second parent adoption allows family ties to be maintained upon the separation of a couple or the death of one parent. Without an adoption, an LGBTQ parent "who is not legally recognized as a parent can lose custody or visitation rights, even in instances when that parent is the most suitable caregiver and has acted as a parent for the child's entire life."¹⁵⁷

As one court has recognized, when biological or adoptive parents separate from or predecease non-legal parents:

[T]he children often remain in legal limbo for years while their future is disputed in the courts.... In some cases, children have been denied the affection of a functional parent who has been with them since birth, even when it is apparent that this outcome is contrary to the children's best interests. Adoption serves to establish legal rights and responsibilities so that, in the event that problems may arise in the future, issues of custody and visitation may be promptly resolved by reference to the best interests of the child.¹⁵⁸

Following a second parent adoption, a child's relationship to both parents should be recognized across jurisdictions, which is especially important due to the disparate treatment of same-sex couples and non-biological parents. *Post-Obergefell*, while all states should extend the parental presumption to married same-sex couples, it is not yet clear that all of them will fully

protect non-biological parents. For example, although “a child born to a married same-sex couple or to a couple in a civil union is presumed to be the child of both members of the couple and both should be listed as parents on the birth certificate,¹⁵⁹ another state might not respect that presumption if the couple moves or if they separate and one party relocates.”¹⁶⁰ A court judgment of adoption creates a legal parent-child relationship that must be respected by other tribes and states under the Full Faith and Credit Clause of the U.S. Constitution, regardless of the laws of those tribes or states.

Second parent adoption is thus a win-win situation—and has received broad support.¹⁶¹ For example, the American Academy of Pediatrics has strongly endorsed second parent adoption.¹⁶² In addition, the American Bar Association has adopted a position statement supporting state laws and court decisions permitting second-parent adoptions by unmarried persons who are functioning as a child’s parents, when such adoptions are in the best interests of the child.¹⁶³

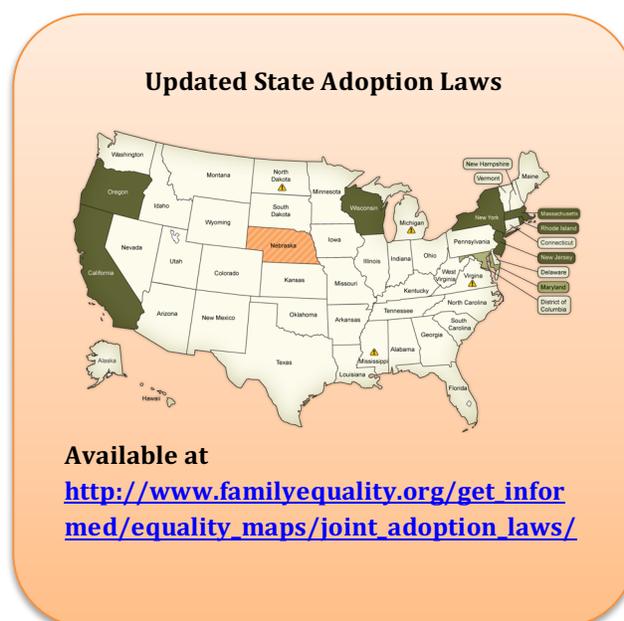
TRIBAL TWO SPIRIT/LGBTQ ADOPTION LAWS

Most tribal laws do not directly address the issue of LGBTQ adoption. Instead, under the laws of most tribes, any person may petition to adopt a child. For example, the Tulalip Tribes and the Confederated Tribes of Grand Ronde allow “[a]ny adult, twenty-one (21) years of age or older [to] file a Petition for Adoption.”¹⁶⁴ Similarly, the Tribal Code of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians permits the following persons to adopt: “(a) Any adult may file a petition to adopt. (b) In the case of married persons, not legally separated, both spouses shall be petitioners except that, if one of the spouses is the natural parent of the minor to be adopted, the natural parent shall not be a party to the petition. (c) A married person legally separated may adopt without the consent of his spouse.”¹⁶⁵ These provisions would permit an LGBTQ person to petition to adopt a child, and appear to permit a married same-sex couple to petition to jointly adopt a child.

We found only one tribal law that specifically addresses adoption by Two Spirit/LGBTQ couples. The Confederated Tribes of Siletz Indians permits domestic partners to petition to adopt a child. According to their Juvenile Code: “Married persons or *domestic partners who maintain a home together shall both petition for adoption*. If one of the spouses is the biological parent of the child to be adopted, the biological parent shall not be a party to the petition.”¹⁶⁶

STATE LGBTQ ADOPTION LAWS

Since the *Obergefell* decision of June 26, 2015, same-sex couples have the right to marry nationwide.¹⁶⁷ Married same-sex couples in all fifty states can jointly adopt and secure a stepparent adoption. However, attempts have recently been made in several states to pass laws that can limit the ability of LGBTQ people and same-sex couples from serving as foster and adoptive parents.¹⁶⁸ For example, Virginia, North Dakota, Michigan, and Mississippi all have religious exemptions, which allow adoption service providers to discriminate against anyone with whom they have a religious or moral objection.¹⁶⁹ Additionally, “religious liberty” laws, including the federal Religious Freedom Restoration Act (RFRA) and state RFRAs may also be used to discriminate against LGBTQ people in adoption or fostering children.¹⁷⁰ Other states, such as Arizona and Utah have laws that preferences married spouses over other adoptive parents.¹⁷¹ And since only a handful of states explicitly prohibit discrimination in the provision of foster and adoptive services against LGBTQ youth in care and prospective foster and adoptive parents,¹⁷² it is likely that significant barriers exist elsewhere.¹⁷³



APPROACHES TO SECOND PARENT/STEPPARENT ADOPTION

Some tribes have adopted laws referencing second parent adoption. For example, as noted above, the Confederated Tribes of Siletz Indians’ Juvenile Code states: “Married persons or *domestic partners who maintain a home together shall both petition for adoption.*”¹⁷⁴ In addition, according to the Tribal Code of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, where two people are married, “both spouses shall be petitioners [for adoption] except that, if one of the spouses is the natural parent of the minor to be adopted, the natural parent shall not be a party to the petition.”¹⁷⁵

It should be noted again that a legally married same-sex couple should be entitled to the same stepparent adoption rights as different-sex couples, now that same-sex marriage is recognized in each state.¹⁷⁶ For example, Vermont law states: “If a family unit consists of a parent and the parent’s partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent’s parental rights is unnecessary in an adoption under this subsection.”¹⁷⁷ In Colorado, a child may be adopted by a specified second adult parent upon the written and verified consent of the child’s sole legal parent if the child has no other legal parent.¹⁷⁸

Stepparent adoption, similar to second parent adoption, is the most common form of adoption.¹⁷⁹ *Stepparent adoption* is the formal, legal adoption of a child by a person who is married to a legal parent of the child or in a marriage-equivalent relationship (such as a domestic

partnership or civil union). In a stepparent adoption, a stepparent adopts a spouse or partner's child and becomes a legal parent to the child.¹⁸⁰ While a same-sex partner who plans the birth or adoption of a child with their partner is a parent to that child – not a stepparent – LGBTQ advocacy groups advise LGBTQ parents to get an adoption or other court judgment to ensure that their parental rights are fully protected in every state.

In many states, a stepparent adoption is easier to complete than other types of adoption because many jurisdictions waive or streamline some steps in the process (such as the waiting period, a home study, and/or an adoption hearing).¹⁸¹ However, in a stepparent adoption, the child's other birth or legal parent must consent to the adoption. If the other parent refuses to consent, the adoption will not be permitted unless that parent's rights are terminated (such as for abandonment, unfitness, failure to support the child, etc.) or the parent is deceased.¹⁸²

THIRD PARENT ADOPTION

In most jurisdictions, one legal parent must give up his or her parental rights before the other parent's new spouse or partner can pursue second parent or stepparent adoption.¹⁸³ However, in a *third-parent adoption*, neither parent relinquishes parental rights; instead, the spouse or partner of one of the parents also becomes an additional legal parent through adoption. For example, a child may be raised by two fathers, but have a strong parental bond and relationship with her biological mother, or may be raised by a mother and a non-biological father but have a parental bond and relationship with her biological father.

A situation could arise where a child has four parents. For example, when both of a child's biological parents has a partner. Countless other scenarios could also arise, for both LGBTQ and non-LGBTQ families. Third parent adoption allows for these relationships to be recognized when to do so is in the best interests of the child.

Courts in California, Oregon, Washington, Alaska, and Massachusetts have permitted third-parent adoptions.¹⁸⁴ In addition, a California law allows judges to recognize more than two legal parents for a child, in limited situations, to protect a child from detriment, and explicitly allows more than two parents to adopt where all parties consent and it is in the best interests of the child. The law gives “judges more flexibility when dealing with parent-child relationships and the custody, visitation and child support issues that often arise when there are more than two parental figures involved.”¹⁸⁵ The also makes it easier to “facilitate children moving into a functional, loving home instead of being forced into the foster care system if both biological parents are unfit.”¹⁸⁶

SAMPLE CHILD ADOPTION EQUALITY ORDINANCE

The sample Child Adoption Equality Ordinance set forth below has been compiled from the tribal and state laws referenced above, and is based primarily on Colorado¹⁸⁷ and California¹⁸⁸ law. This draft ordinance allows tribes that currently provide for adoptions to explicitly permit adoption by Two Spirit/LGBTQ individuals and couples, including second parent adoptions.

Child Adoption Equality Ordinance

Section 1. Title. This ordinance shall be known as the “Child Adoption Equality Ordinance of the [insert name] Tribe.”

Section 2. Declaration and Policy.

A. The [Tribal Council/Business Committee] finds that:

1. The best interests of children are promoted by having persons in each child’s life who manifest a deep concern for the child and the child’s growth and development, and when a child is part of a loving, supportive, and stable family, regardless of the sexual orientation or gender identity of the family’s members.
2. Sexual orientation and gender identity should not affect a person’s legal ability to be a parent.
3. Promoting equality in the adoption process is essential to the political integrity, economic security, and health and welfare of the Tribe.

B. The [Tribal Council/Business Committee] declares that it is the policy of the Tribe that the sexual orientation and gender identity of a prospective adoptive parent shall not be a bar to adoption when the adoption is determined to be in the best interests of the child.

Section 3. Purpose. The purpose of this ordinance is to promote equal treatment of potential adoptive parents under Tribal law by prohibiting discrimination on the basis of sexual orientation and gender identity in the adoption process and second parent authorizing adoptions.

Section 4. Addition of Definitions. The Tribe’s [domestic relations; family law] [code / ordinance / statute / policy], [cite to definitions provision], is amended by adding four new sections, to read as follows:

[citation]. “Domestic partner” means an adult in a committed relationship with another adult, including both same-sex and different-sex relationships.

[citation]. “Committed relationship” means one in which the employee, and the domestic partner of the employee, share responsibility for a significant measure of each other’s common welfare. This includes, but is not limited to, any relationship between people of the same or different sex who are each other’s sole domestic partner (and are not married to or domestic partners with anyone else).

[citation]. “Domestic partnership” means a legal relationship, entered into in person between two eligible persons, which has been registered and certified pursuant to Tribal law, or a domestic partnership or civil union that is valid in the jurisdiction in which it was created.

[citation]. “Gender Identity” means the actual or perceived gender-related identity, appearance, mannerisms, or other gender-related characteristics of a person, regardless of the person’s designated sex at birth.

[citation]. “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.

Section 5. Petition for Adoption. The Tribe’s [domestic relations; family law] [code; ordinance; statute], [cite to specific provision describing who may petition to adopt a child], is amended to read as follows:

[citation]. Who May Petition for Adoption.

1. Single Parent Adoption. Any adult may file a petition to adopt a child.
2. Joint Adoption.
 - a. Any couple in a marriage, domestic partnership, or committed relationships may petition to adopt jointly.
 - b. A person who is legally separated from his or her spouse or domestic partner may petition to adopt a child without the consent of his or her spouse or partner.

Section 6. Non-Discrimination in the Adoption Process. The Tribe’s [domestic relations; family law] [code; ordinance; statute], [cite to specific provision within the adoption chapter], is amended by adding two new sections, to read as follows:

[citation]. Non-Discrimination in the Adoption Process.

1. The process for applying to adopt a child through the [name of tribe’s social services department] or other agency providing adoption services within the jurisdiction of the Tribe shall be available to all persons without regard to sexual orientation, gender identity, or marital status.
2. In determining whether an adoption is in the best interests of a child, the Juvenile Court shall not consider the sexual orientation or gender identity of the petitioner(s).

[citation]. Policies Required. Within 180 days of the adoption of this ordinance, the Tribe’s [insert name of social services department] shall adopt written policies prohibiting discrimination in the adoption process on the basis of sexual orientation and gender identity.

Section 7. Waiver prior to finalization of adoption

1. Except as provided in subdivision (2), the existing parents of an adopted child are, from the time of the adoption, relieved of all duties towards, and all responsibility for, the adopted child, and have no right over the child.
2. The termination of the parental duties and responsibilities of the existing parent or parents under subdivision (1) may be waived if both the existing parent or parents and the prospective adoptive parent or parents sign a waiver at any time prior to the finalization of the adoption. The waiver shall be filed with the court.

Section 8. Repeal of Inconsistent Ordinances. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

Section 9. Severability. If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

Section 10. No Waiver of Sovereign Immunity. Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

Section 11. Effective Date. [This Ordinance shall become effective immediately upon final passage/This ordinance shall take effect [insert date or condition].]

CHILD CUSTODY AND VISITATION FOR TWO SPIRIT/LGBTQ PARENTS

“Even when some legal protections exist, discrimination can still wrongly wrest children from their parents when, for example, custody decisions are driven by anti-gay bias against a parent, rather than by the child’s best interests.”¹⁸⁹

Most child custody and visitation statutes do not specifically address sexual orientation or gender identity.¹⁹⁰ Instead, courts generally make child custody and visitation decisions based on the best interests of the child.¹⁹¹ In several jurisdictions, courts have declined to make custody decisions based on the sexual orientation of a parent, and appellate courts have struck down custody or visitation decisions that incorrectly considered the sexual orientation of a parent. For example, an Oregon appellate court has found that the sexual orientation of a mother could not be a significant factor in determining custody,¹⁹² and a New York appellate court has confirmed that where a parent’s sexual orientation does not adversely affect the children, it is not determinative in a child custody dispute.¹⁹³

Although most courts will not overtly refer to a parent’s sexual orientation or gender identity in custody and visitation disputes, Two Spirit/LGBTQ parents may still face an increased level of scrutiny or discrimination due to homophobia or transphobia. For example, according to an American Civil Liberties Union and National Center for Transgender Equality joint publication:

More and more transgender parents are fighting to protect their relationships with their children in the face of custody challenges. Yet they face significant obstacles. Parents who have come out or transitioned after having a child with a spouse or partner have seen their gender transition raised as a basis to deny or restrict child custody or visitation. Transgender people who formed families after coming out or transitioning have faced challenges to their legal status as parents, often based on attacks on the validity of their marriages.

Many transgender people have and raise children without encountering legal challenges to their fitness or legal status as a parent. However, such challenges are still all too common. And many parents have been treated terribly by the courts because judges have a limited understanding of what it means to be transgender and they have very little—and inconsistent—case law to guide them.¹⁹⁴

Effective and enforceable laws are therefore needed to remove barriers to the equal treatment of LGBTQ parents during custody and visitation disputes. The American Bar Association has recognized this need, and adopted a policy supporting the enactment of legislation and policies requiring that “child custody and visitation shall not be denied or restricted on the basis of sexual orientation.”¹⁹⁵ In one example of such legislation, the District of Columbia requires: “In any proceeding between parents in which the custody of a child is raised as an issue, the best interest of the child shall be the primary consideration. The race, color, national origin, political affiliation, sex, sexual orientation, or gender identity or expression of a party, in and of itself, shall not be a conclusive consideration.”¹⁹⁶

SAMPLE CHILD CUSTODY AND VISITATION ORDINANCE AMENDMENT

The sample Child Custody and Visitation Ordinance Amendment set forth below is based primarily on District of Columbia law. This draft language allows tribes with existing custody and visitation laws to amend those laws to promote equal parenting rights for Two Spirit/LGBTQ parents.

Child Custody and Visitation Ordinance Amendment

Section x. The Tribe’s [domestic relations; family; marriage] [code; ordinance; statute], [cite to specific provision], is amended by adding one new section, to read as follows:

[citation]. Best Interests of the Child. In consideration determining the best interests of the child, the sexual orientation or gender identity of a party, in and of itself, shall not be considered. For purposes of this Section:

1. “Gender Identity” means the actual or perceived gender-related identity, appearance, mannerisms, or other gender-related characteristics of a person, regardless of the person’s designated sex at birth.
2. “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.

TWO SPIRIT/LGBTQ FOSTER OR ADOPTIVE HOMES

“As of 2014, there were more than 415,000 children in foster care; with 107,918 of these awaiting adoption. An estimated 14,000 foster children, or 3 percent of all foster children, currently live with LGB foster parents.”¹⁹⁷

Several states have laws that can be used to limit foster parenting by LGBTQ people. In North Dakota, Michigan, Mississippi, and Virginia, laws with religious exemptions exist that allow state-licensed child welfare agencies to refuse to place children with LGBTQ parents if doing so conflicts with their religious beliefs.¹⁹⁸ Discriminating against Two Spirit/LGBTQ parents under the guise of religious freedom compromises these religious values while also leaving children in the foster care system even more vulnerable. By rejecting these religious exemption laws, states can demonstrate renewed support for the freedom of Two Spirit/LGBTQ parents to create families and

parent with dignity while providing stable, permanent homes for the children and youth who most need them.

At the other end of the spectrum, seven states including California, Oregon, Massachusetts, and New Jersey prohibit discrimination against LGBTQ people in the foster parent process.¹⁹⁹ For example, California’s 2003 Foster Care Non-Discrimination Act prohibits discrimination in the foster care system on the basis of several actual or perceived characteristics, including sexual orientation and gender identity.²⁰⁰ This law also includes explicit protections for LGBTQ youth and adults involved with the foster care system, and mandates initial and ongoing training for all group home administrators, foster parents, and department licensing personnel. Some tribal laws specifically address Two Spirit/LGBTQ child welfare issues. The Hoopa Valley Tribe recognizes the right of foster children to be free from discrimination or harassment, including on the basis of actual or perceived sexual orientation or gender identity.²⁰¹

At the federal level, in April 2011, the U.S. Department of Health and Human Services (HHS) issued a memo to state, tribal, and territorial agencies that administer federal child welfare funds. The memo called prospective LGBTQ parents “a largely untapped resource” for providing foster or adoptive homes to LGBTQ young people and recognized that LGBTQ foster and adoptive parents “can provide a loving, stable home, responsive to the needs of LGBT youth in care.”²⁰² In addition, the Every Child Deserves a Family Act, a federal bill which would eliminate state laws and policies that exclude potential foster and adoptive parents on the basis of sexual orientation, marital status, or gender identity, was reintroduced to the 114th Congress in 2015 by Senator Kirsten Gillibrand (D-NY) and Reps. John Lewis (D-GA) and Ileana Ros-Lehtinen (R-FL).

LGBTQ YOUTH IN THE CHILD WELFARE AND JUVENILE JUSTICE SYSTEMS

“During the past decade, [LGBTQ] adolescents have become increasingly visible in our families, communities, and systems of care. A significant number of these youth are in the custody of child welfare or juvenile justice agencies. Yet the public systems that are charged with their care and well-being have been unresponsive to their needs and slow to acknowledge that LGBT children and adolescents are in urgent need of appropriate and equitable care.”²⁰³

An estimated 19 percent of children and youth in the foster care system are—or are perceived to be— LGBTQ, though the “numbers are likely much higher due to the parental abuse, neglect, and rejection too often experienced by LGBTQ children and youth.”²⁰⁴ LGBTQ youth are also significantly represented in the juvenile justice system. A recent report suggests that 20 percent of youth in detention facilities nationwide are LGBTQ.²⁰⁵

All young people in out-of-home custody, whether through the child welfare or juvenile justice system, “are entitled to equal protection of the law and have the right to safety while in care.”²⁰⁶ This safety includes the right to be protected from physical and sexual abuse at the hands of foster parents, facility staff, social workers, and others who provide for their care, as well as the right to protection from mental and emotional harm.

Although LGBTQ youth have the right to the services and protections afforded to other children in public systems of care, and to live in an environment that is safe, understanding, and supportive of their needs, “[c]hild welfare and juvenile justice systems have not incorporated advances in research and understanding related to human sexuality and child and adolescent development [and] these systems continue to deliver misguided, uninformed, second-class care to

LGBTQ youth in their custody.”²⁰⁷ As a result, LGBTQ youth in these systems, including Two Spirit/LGBTQ youth, “often face disapproval and rejection from their caretakers – including foster parents, kinship care providers and group home staff.”²⁰⁸

“[D]iscrimination, neglect, and mistreatment by peers, foster families, caseworkers, and other agency staff compound the problems facing many foster youth, resulting in higher risks of health and mental health problems, school failure, homelessness, and suicide.”²⁰⁹ In addition, statistics show “that LGBTQ youth face higher rates of suicide and suicide attempts than their heterosexual peers,”²¹⁰ are more likely to be bullied and drop out of school, and be pushed into the juvenile justice system.²¹¹ Once in that system, these youths are often targeted for further abuse.

Two Spirit/LGBTQ youth in the child welfare and/or the juvenile justice systems face some of the most oppressive abuse—often experiencing harassment and mistreatment based upon both their heritage or political status and their actual or perceived sexual orientation or gender identity—and have little access to recourse. Effective protections for these vulnerable youth require significant changes to the systems charged with their care.

PROTECTING THE RIGHTS OF TWO SPIRIT/LGBTQ YOUTH IN CHILD WELFARE

Some jurisdictions are taking steps to ensure that their policies address the needs of Two Spirit/LGBTQ children in the child welfare and juvenile justice systems. For example, as mentioned above, the Hoopa Valley Tribe has adopted a Bill of Rights of Foster Children, which includes the following right: “To have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status.”²¹²

In addition, some states have adopted non-discrimination laws that explicitly protect LGBTQ youth in child welfare and juvenile justice systems. For example, California’s Foster Care Non-Discrimination Act makes it unlawful for county child welfare providers, including child welfare departments, group home facilities, and foster family agencies, to discriminate on the basis of actual or perceived sex, sexual orientation, gender identity, or HIV status. Under the law, “all foster children and persons engaged in providing care and services to foster children in California have the right to fair and equal access to all available child welfare services, placements, care, treatment, and benefits, and to be free from discrimination or harassment on these bases.”²¹³ In addition, California has passed legislation clarifying that youth should be placed in foster care settings that are consistent with their gender identity.²¹⁴

Several county agencies have also adopted policies or practice guidelines that include protections for LGBTQ youth in the child welfare system. To illustrate, according to the Alameda County Social Services Agency’s LGBTQ Policy:

Lesbian, gay, bisexual, transgender, and questioning (LGBT) children and youth, or those perceived to be LGBT, are entitled to the same care, support, and protections that are provided to all children and youth served by the Department of Children and Family Services... Sexual orientation and gender identity must be affirmed, respected, and considered in all decisions regarding placement, care, manner of treatment and benefits received. Safety concerns must be considered when evaluating the placement needs of LGBT children and youth. LGBT children and

youth are entitled to support for their positive expression and development of their identities, in the same manner as their peers. Anti LGBT violence, the use of slurs, jokes, name calling or other forms of real or perceived verbal, nonverbal, or emotional harassment based on sexual orientation or gender identity is prohibited. Employees, resource families, care providers, and community members who provide services to children and youth will be treated with respect. Differences will be affirmed and harassment prevented and addressed. Discrimination based on sexual orientation and gender identification will not be tolerated.²¹⁵

Similarly, New York’s Division of Child Protection’s policies include the following:

- “When assessing safety and risk of an LGBT child or young person, Children’s Services staff must, in addition to looking for other safety factors, assess whether a parent’s attitude about the child’s actual or perceived sexual orientation and/or gender identity is contributing to the parent’s behavior, and in turn, whether the parent’s behavior is impacting upon the child’s safety or placing a child at risk.”
- “Division of Child Protection prohibits staff from acting in a discriminatory manner toward LGBT youth.”
- “When interviewing a transgender young person, CPS should take care to address the child by the name that he/she prefers to be called, which may be a name associated with a gender different than the child’s biological gender.”
- “Under no circumstances is any staff member of Children’s Services to attempt to convince an LGBT child or young person to reject or modify his/her sexual orientation or gender identity.” Shelters and programs serving homeless and at-risk transgender youth need clear policies that prohibit discrimination on the basis of gender identity and outline best practices.
- “LGBT young people do not always feel comfortable disclosing information about their sexual orientation and/or gender identity. It is therefore not appropriate to directly ask a young person if he or she is LGBT. Instead, the CPS should use sensitive and inclusive language that signals to all young people that they will be treated with respect and dignity, regardless of how they identify.”²¹⁶

SAMPLE CHILD WELFARE AND JUVENILE JUSTICE NONDISCRIMINATION ORDINANCE

The sample Child Welfare and Juvenile Justice Non-Discrimination Ordinance set forth below is based primarily on California’s Foster Care Non-Discrimination Act.²¹⁷ This draft ordinance allows tribes with existing laws protecting the rights of children in the tribe’s child welfare or juvenile justice systems to expand those laws to promote equality.

Child Welfare and Juvenile Justice Non-Discrimination Ordinance

Section 1. **Title.** This ordinance shall be known as the “Child Welfare and Juvenile Justice Non-Discrimination Ordinance of the [insert name] Tribe.”

Section 2. Declaration and Policy. The [Tribal Council/Business Committee] finds and declares that:

A. Children in the Tribe’s child welfare and juvenile justice systems are harmed by discrimination based on sexual orientation and gender identity and gender expression, whether that discrimination is directed at them, their caregivers, or service providers.

B. The [insert name of Tribal social services agency] (Department) provides programs and services to protect children and families within the Tribe’s jurisdiction, including programs and services related to the care, placement, and supervision of children who have been removed from their homes due to abuse, neglect, or involvement in the juvenile justice system.

C. Two Spirit, lesbian, gay, bisexual, transgender, and queer (collectively referred to herein as Two Spirit) children, or those perceived to be Two Spirit, are entitled to the same level of care, support, and protections that are provided to all children served by the Department.

D. The Tribe is committed to treating all children with respect, valuing and affirming differences, and preventing harassment or discrimination of any kind. The sexual orientation and gender identity and gender expression of a child must be respected in all child welfare and juvenile justice decisions regarding placement, care, manner of treatment, and benefits received.

E. Promoting equality in the Tribe’s child welfare and juvenile justice processes is essential to the political integrity, economic security, and health and welfare of the Tribe.

Section 3. Purpose. The purpose of this ordinance is to protect the rights of children, caregivers, potential foster and adoptive parents, and service providers in the child welfare and juvenile justice systems within the Tribe’s jurisdiction by prohibiting discrimination on the basis of sexual orientation or gender identity and gender expression.

Section 4. Interpretation. Nothing in this ordinance shall be interpreted to create or modify existing Tribal preferences for foster placements or to limit the Department’s ability to make placement decisions for a child based on the child’s best interests.

Section 5. Addition of Definitions. The Tribe’s [juvenile; children’s] [code/ordinance/statute/policy], [cite to definitions provision], is amended by adding two new sections, to read:

[citation]. “Gender Identity” means the actual or perceived gender-related identity, appearance, mannerisms, or other gender-related characteristics of a person, regardless of the person’s designated sex at birth.

[citation]. “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.

Section 6. Nondiscrimination in in Child Welfare and Juvenile Justice Processes. The Tribe’s [juvenile; children’s] [code/ordinance/statute/policy], [cite to definitions provision], is amended by adding a new section, to read:

[citation]. Nondiscrimination in Child Welfare and Juvenile Justice Processes.

1. All children involved in the Tribe’s child welfare and juvenile justice systems, and all adults engaged in the provision of care and services to such children, including but not limited to, caseworkers, facility staff, foster parents and adoptive parents, and relative caregivers, shall have a right to:

- a. Fair and equal access to all available and appropriate services, placements, care, treatment, and benefits: and
 - b. Be free from discrimination or harassment on the basis of sexual orientation or gender identity and gender expression.
 - c. Be placed in foster care or an adoptive home that is affirming of the child's Two Spirit/LGBTQ identity.
 - d. Be placed in and have equal access to programs and facilities, including out of home care placements, according to their gender identity, regardless of the gender or sex listed in court or child welfare records, and otherwise be treated in accordance with their gender identity. (Based on California SB 731, recently passed)
- 2. The application process to become a foster parent, adoptive parent, or relative caregiver for a child through the Department shall be available to all persons without regard to sexual orientation or gender identity or gender expression.
 - 3. Once foster parents, adoptive parents, or relative caregivers accept a child into their home, they have a legal responsibility to provide care to the child without discrimination on the basis of the child's actual or perceived sexual orientation or gender identity or gender expression.

Section 7. Policies Required. Within 180 days of the adoption of this ordinance, the Department shall adopt written policies prohibiting harassment and discrimination on the basis of actual or perceived sexual orientation and gender identity and gender expression. The policies shall:

- A. Apply to all Department personnel, providers who contract to serve children in the Department's custody, and all direct care providers, including foster parents, adoptive parents, relative caregivers, and facility staff.
- B. Include a formal grievance procedure that allows for confidential complaints and neutral third-party investigations.
- C. Be widely distributed to promote understanding and compliance, including, at a minimum:
 - 1. By including a copy of the policies in the staff training or orientation for every new employee, contractor, and caregiver;
 - 2. By posting the policies in Department offices, group care facilities, courtrooms, and other strategic locations; and
 - 3. By discussing the policies with every child who is capable of understanding them;
 - 4. By including the policies in any written handbook or orientation materials provided to youth entering the system; and
 - 5. Including the policies in culturally and developmentally appropriate written materials designed for children and their families.

Commentary: *Tribal policies could include the following types of provisions:*

1. Policies that prohibit all forms of harassment and discrimination, including jokes, slurs, and name calling. “Adopting and enforcing a policy that prohibits violence, name calling, and other harassment or discrimination promotes equitable care for all young people. Such a policy does not infringe on individual beliefs about sexual orientation, gender identity, and gender expression.
2. Policies that “permit youth to: disclose their sexual orientation to other youth, caregivers, and agency personnel; discuss their feelings of attraction to youth of the same sex, consistent with discussion of romantic attachments among heterosexual youth, without being penalized or shamed; participate in social activities that are geared toward or inclusive of LGBT youth; express their sexual orientation and gender identity through their choice of clothing, jewelry, or hairstyle; have access to LGBT-inclusive, supportive books and materials; and post LGBT-friendly posters or stickers in their rooms.”²¹⁸
3. Policies that “ensure that agency employees respect confidential information related to a youth’s sexual orientation or gender identity,” including policies requiring that:
 - All employees working with youth should have a thorough understanding of the situations in which such information must / may be disclosed.
 - Unless disclosure is legally required, no employee should disclose information regarding the sexual orientation or gender identity of a youth unless that person can identify a direct benefit to the youth and has discussed the matter with the youth and obtained their consent.
 - Staff should carefully consider the purpose, nature, and consequences of any contemplated disclosure, and should work with the youth to balance the potential negative consequences against the benefits of disclosure.
 - When disclosure is required or appropriate, the information disclosed and the means of disclosure should be limited to that which is necessary to achieve the specific beneficial purpose.
 - The Department should take affirmative steps to ensure that all employees have a thorough understanding of applicable confidentiality laws and related policies and procedures. ²¹⁹

Section 8. Training Required. Department staff, group home and facility staff, foster parents, adoptive parents, and relative caregivers shall receive training on the rights of children in out of home care to have fair and equal access to all available services, placement, care, treatment, and benefits, and to be free from discrimination and harassment on the basis of sexual orientation and gender identity and gender expression.

Section 9. Repeal of Inconsistent Ordinances. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

Section 10. Severability. If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

Section 11. No Waiver of Sovereign Immunity. Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

Section 12. Effective Date. [This Ordinance shall become effective immediately upon final passage/This ordinance shall take effect [insert date or condition].]

CHAPTER 5: JURY SERVICE

“A diverse and representative jury is an essential component of a fair and impartial legal system. Unfortunately, many minority groups, including LGBT Americans, continue to face discrimination in the courtroom, denying them equal access to the courts and an equal opportunity to participate in civic life.”²²⁰ Discriminatory treatment in the selection of jurors “undermines the justice system and could hurt crime victims by preventing a fair trial by a jury of their peers. This could have particularly negative impacts on victims or defendants who are LGBT.”²²¹

Our research did not uncover any tribal laws, rules, or policies prohibiting discrimination in jury selection on the basis of sexual orientation, gender identity, or gender expression. Without an express statutory prohibition in place, lawyers in tribal courts may disqualify potential LGBTQ jurors on the basis of their sexual orientation and gender identity.

Currently, only California and Oregon have explicit state laws barring discrimination against LGBTQ people in jury service.²²² Oregon law states: “Except as otherwise specifically provided by statute, the opportunity for jury service may not be denied or limited on the basis of race, religion, sex, sexual orientation, national origin, age, income, occupation or any other factor that discriminates against a cognizable group in this state.”²²³

According to the California Code of Civil Procedure: “A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, gender identity, or similar grounds.”²²⁴

Under federal law, discrimination in jury selection is prohibited on the basis of race, color, religion, sex, sexual orientation, national origin and economic status.²²⁵ In 2014, the Department of Justice released a department policy prohibiting the striking of a juror because on sexual orientation and gender.²²⁶ However, proposed federal legislation including the Equality Act and the Jury ACCESS Act would prohibit discrimination against all LGBTQ people in federal jury service. Sample language that could be added to a tribe’s civil procedure or other jury selection rules or law could read: “The opportunity for jury service may not be denied or limited on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, gender identity, or similar grounds,” or: “Exclusion from Tribal Court juries on account of sexual orientation or gender identity is prohibited.”

CHAPTER 6: LAW ENFORCEMENT AND CORRECTIONS

“Institutionalized discrimination dehumanizes its victim, who is deemed to be someone who can be treated inhumanely. Institutionalized discrimination feeds impunity, denies justice and can incite violence against targeted people or groups.”²²⁷

POLICE CONDUCT

“LGBT people continue to be targeted for human rights abuses by the police based on their real or perceived sexual orientation or gender identity.”²²⁸ In a detailed 2005 report, Amnesty International (AI) documented alarming incidences of abuse of LGBTQ people by law enforcement and corrections officers across the country. For example, AI cites numerous reports indicating LGBTQ people have been unduly subjected to “cruel, inhuman and degrading treatment” during searches, arrests, and detention.²²⁹ Although “[s]earches and frisks to determine an individual’s genitally determined sex are never justified and constitute cruel, inhuman and degrading treatment, in contravention of [federal and] international law,”²³⁰ numerous reports have detailed abusive and invasive searches of LGBTQ people—including “gender checks.”

A February 2016 report by the Center for American Progress and the Movement Advancement Project uses recent data to further evidence the discriminatory treatment of LGBTQ people at the hands of police, and provides numerous specific, harrowing examples of cases where LGBTQ people, especially transgender people, were subjected to violence, discriminatory practices, and sexual assault by police officers.²³¹ LGBTQ people, especially transgender people, gender-nonconforming people, and people color, are subject to be disproportionately profiled based on their race and their violation of gender norms, and are sometimes accused by police of “gender fraud.”²³² Transgender women of color are often profiled by police as prostitutes and carrying items such as condoms is considered incriminating evidence.²³³ Further highlighting the way that transgender people are often treated as sexual objects are findings that 59 percent of transgender youth in New Orleans report being asked for sexual favors by the police.²³⁴ Overall, transgender women are 5.8 times more likely to be victims of police violence than the general population. LGBTQ young people as a whole are over twice as likely to experience physical violence by police as other hate crime survivors.²³⁵

Although police departments in some major cities have recently adopted guidelines and policies to safeguard transgender, intersex, and gender non-conforming people or have instituted LGBTQ liaison units,²³⁶ the absence of LGBTQ-specific laws and policies in most jurisdictions and general lack of LGBTQ training for law enforcement personnel leaves many LGBTQ people largely unprotected.

PRISON CONDITIONS

LGBTQ people often experience abuse, inappropriate placement, and disparate treatment in detention. For example, those who do not conform to societal norms surrounding gender and sexual orientation are often subject to violence at the hands of officers, inmates, and institutions. LGBTQ people may also be subject to disparate or limited access to medicine and medical care while imprisoned. State prisons have frequently denied transgender-related medical care to inmates. Denying access to such care, including hormone therapy and gender confirming surgery, constitutes “deliberate indifference to a prisoner’s medical needs.”²³⁷

In addition, most corrections authorities house transgender or gender non-conforming prisoners based on their genitalia, with transgender prisoners sometimes placed in “soft cell” or “protective custody” segregated areas.²³⁸ Genitally determined placements can compromise the safety of transgender or gender non-conforming people, putting them at higher risk of verbal, physical, and sexual abuse by other detainees.²³⁹ Segregated placements can also result in “isolation and torture-like experiences for transgender inmates.”²⁴⁰ Despite these increased risks, courts often support decisions of prison officials concerning housing for transgender prisoners.²⁴¹

Some corrections laws and policies have been adopted to promote protections for LGBTQ inmates, including:

- Federal courts have repeatedly held that prisons and jails must provide medically necessary treatment for Gender Dysphoria, including hormone therapy and surgery based on individual medical needs; the U.S. Department of Justice has also adopted this position in litigation.
- In 2012, the U.S. Department of Justice enacted equality regulations that apply to all correctional facilities receiving federal funding (including most state and local facilities).²⁴² The regulations ban genital searches of transgender inmates for purposes of determining gender, require individualized decisions on whether transgender prisoners are placed with men or women and ban automatic placement based on genitalia, prohibited involuntary placement in LGBTQ-specific housing units, limit the use of other forms of “protective” segregation, require transgender prisoners be given the opportunity to shower separately and require training for corrections personnel.²⁴³
- The National Lawyers Guild and the San Francisco Human Rights Commission have developed a “model protocol” on the treatment of transgender prisoners.²⁴⁴
- A federal district court found constitutional violations where LGBTQ inmates were left unprotected from abuse perpetrated by inmates or were isolated as a form of “protection.”²⁴⁵
- Some prison systems are developing housing policies that address LGBTQ concerns, in particular for transgender, intersex, and gender non-conforming people.

Despite these advances, many police have no policy concerning detention of transgender people.²⁴⁶ Absent formal guidance, law enforcement and corrections actions may continue to deny fair treatment to LGBTQ inmates.

SAMPLE EQUALITY PROTOCOL FOR LAW ENFORCEMENT AND CORRECTIONS

To put an end to human rights abuses related to law enforcement and corrections and to create a justice system that promotes equality and honors diversity, it is essential that police departments and correctional institutions develop policies and mandate training on Two Spirit/LGBTQ issues, including relating to searches, arrests, and detention. And, it is critical that officers, inmates, and institutions be held accountable for failure to adhere to equality requirements.²⁴⁷

It is important to note that human rights abuse against LGBTQ people regularly take place in residential re-entry programs as well as in jails, prisons, juvenile facilities, and immigration detention facilities. Any jurisdiction that receives federal funding is bound to the federal Prison Rape Elimination Act (PREA)²⁴⁸ and should be held accountable for such abuses. As a result, it is critical that efforts aimed at ensuring equal treatment of LGBTQ inmates in jails and prisons include those who have been placed in residential re-entry programs as well. Regulations implementing PREA require the following:

1. Training in effective communication with LGBTQ and gender-nonconforming (GNC) inmates
2. Post-incident reviews consider whether the incident as motivated by perceived or actual LGBTQ identity
3. Prohibits placement decisions solely on the basis of LGBTQ identification or status
4. Bans searches to determine an inmate's genital status
5. Prohibits assignment of transgender or intersex inmates simply based on genital status

The following sample Equality Protocol for Law Enforcement and Corrections is based on consent decrees entered by the U.S. Justice Department in New Orleans and other jurisdictions policies adopted by the Los Angeles Police Department²⁴⁹ and the Chicago Police Department,²⁵⁰ the New York City Police Department, and the San Francisco Police.

Equality Protocol for Law Enforcement and Corrections

A. Purpose. This protocol establishes [name of Department] policies and procedures for stops, searches, arrests, processing, custody, detention, and application to residential reentry of Two Spirit, transgender, intersex, and gender non-conforming (hereinafter collectively referred to as “transgender and intersex”) people. This protocol is intended to recognize and protect the rights of transgender and gender nonconforming people and ensure that all officers:

1. Treat all persons with the courtesy and dignity inherently due every person as a human being. Officers will act, speak, and conduct themselves in a professional manner, recognizing their obligation to safeguard life and property, and maintain a courteous, professional attitude in all contacts with the public; and
2. **Not** exhibit any bias or prejudice or otherwise discriminate against a transgender or intersex person or a group of transgender or gender nonconforming people.

B. Definitions. For purposes of this Section:

1. “Gender expression” means the manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms.
2. “Gender identity” means the actual or perceived gender-related identity, appearance, mannerisms, or

other gender-related characteristics of a person, regardless of the person's designated sex at birth.

3. "Gender non-conforming" may include exhibiting behavior or gender expression that does not conform to societal gender norms of male and female.
4. "Intersex" is a term for biologically/physically not being strictly male or female sex.
5. "LGBTQ" means Two Spirit, gay, lesbian, bisexual, transgender, or queer identified people or people perceived to be Two Spirit, gay, lesbian, bisexual or transgender.
6. "Officers" includes employees of the [name of Department]'s police and corrections departments.
7. "Sexual orientation" means a person's actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.
8. "Transgender" is an umbrella term used by people whose sex assigned at birth is different than their current gender identity.
9. "Two Spirit" is a contemporary umbrella term that refers to the historical and current First Nations people whose individual spirits were a blend of female and male spirits. This term has been reclaimed by Native American LGBTQ communities in order to honor their heritage and provide an alternative to the Western labels of gay, lesbian, bisexual, or transgender.

C. Addressing Transgender and Gender Nonconforming People; Gender Classification for Department Purposes.

1. When addressing transgender people, officers will:
 - a. Respectfully treat transgender and gender nonconforming people in a manner appropriate to the person's gender identity, respecting the person's expressed gender without question;

NOTE: Government-issued identification shall only be acceptable as initial proof of gender identity in the absence of self-identification by the person or some other obvious expression of gender identity.
 - b. Use pronouns as requested by the transgender gender nonconforming person (*e.g.*, "she, her, hers" for a person who self-identifies as a female; "he, him, his" for a person who self-identifies as a male, "they, them, theirs" for a person whose gender identity is not male or female). In instances in which a person refuses to self-identify, use non-gendered pronouns, such as "they/them," whenever possible;

NOTE: If an officer is uncertain about an person's preferred pronoun, the officer will respectfully inquire about which pronoun the person wishes to be addressed with.
 - c. When requested, address a transgender or gender nonconforming people by a name based on the person's gender identity, rather than the name on the person's government-issued identification;

NOTE: If an officer is uncertain about an person's preferred name, the officer will respectfully inquire about which name the person wishes to be addressed with. This name shall be noted as an alias (AKA) if it differs from the person's legal name as indicated on government-issued identification.

- d. Document and provide any information obtained about an person's transgender or gender nonconforming status (*e.g.*, preferred name and pronoun) to relevant Department employees for the purpose of ensuring continuity of appropriate treatment; and,

2. When addressing transgender and gender nonconforming people, officers will **not**:

- a. Stop, detain, frisk, request identification, or search or otherwise initiate contact with any person in whole or in part for the purpose of determining that person's gender or in order to call attention to the person's gender expression; or solely for based on an person's actual or perceived sexual orientation, gender identity, gender expression, or transgender status, or use of a public restroom or other facility designated for a particular gender;

NOTE: The above limitation does not prevent an officer from following the established Department procedures relative to ensuring the proper processing of arrestees.

- b. Use language that a reasonable person would consider demeaning or derogatory, in particular, language aimed at a person's actual or perceived gender identity or expression or sexual orientation;
- c. Consider a person's actual or perceived gender identity, gender expression, the gender associated with a person's preferred or legal name, or use of a public restroom or other facility designated for a particular gender as reasonable suspicion or evidence that the person is or has engaged in a crime, including prostitution; or
- d. Disclose a person's transgender or intersex identity to non-involved persons, including other arrestees, members of the public, or non-officers, absent a proper law enforcement purpose.

3. For Department reporting purposes, an arrestee's gender will be listed as it appears on the person's government-issued identification card; provided, however, that housing and classification decisions for persons identified as transgender or gender nonconforming will be made pursuant to this policy. Officers will note the name and gender pronoun currently used by people "name and pronoun used" in memo books and on departmental forms (recorded separately from any alias or AKA), such as arrest forms, and refer to the person in documents using this pronoun throughout. All officers shall use the "name and pronoun used" when referring to a person police custody.

D. Searches of Transgender and Gender nonconforming People.

1. When conducting searches (including pat and strip searches) of transgender and intersex people, officers will:

- a. Be responsible for conducting a thorough search in accordance with established Department procedures;
- b. Inquire as to a transgender or intersex person's preference for search by a male or female officer, and document this preference in the appropriate log. Absent exigent circumstances the request should be granted;

NOTE: If officer or public safety is compromised and an immediate cursory search is necessary, it may be conducted in the field by an officer of either sex. Officers will not endanger themselves or the public to comply with this requirement.

- c. Perform strip searches only if there is reasonable suspicion, based on specific and articulable facts, to believe the person is concealing a weapon or contraband and a strip search will

result in the discovery of the weapon or contraband.

2. When conducting searches of transgender and gender nonconforming people, officers will **not**:
 - a. Perform a search or frisk for the sole purpose of determining a person's genitalia;
 - b. Subject transgender and gender nonconforming people to more frequent or invasive search procedures than non-transgender or gender nonconforming people;
 - c. Inquire about intimate details of a person's anatomy or surgical status to determine a person's gender;
 - d. Request removal of identity-related items, such as prosthetics, gender-specific clothing, wigs, and cosmetics, inconsistent with requirements for the removal of similar items for non-transgender or gender nonconforming people;
 - e. Presume evidence of criminal misconduct when a transgender or intersex person is in possession of a needle purportedly for hormonal use, especially if the person being stopped or arrested has documentation from a physician for being in the process of a gender transition; or
 - f. Refuse to search a transgender or intersex arrestee based upon an arrestee's transgender or intersex status.

E. Transport and Processing of Transgender and Intersex Arrestees. When transporting transgender people, employees are required to contact dispatch at the beginning and end of transport and to document mileage from start to finish of each trip to transport arrestees. (Some agencies require this for transportation of all different-gender arrestees and all transgender people.)

1. Transgender people shall be transported alone whenever possible.
2. Ensure an officer of the transgender or intersex person's gender identity or expression is present during the transport, when requested by a transgender or intersex arrestee;
3. Record a transgender or intersex arrestee's preferred name and gender information on Department reports in accordance with this protocol;
4. If required, provide immediate medical care or medication, including hormone therapy, consistent with care provided to all other persons under Department control; and

NOTE: Where necessary, the subject will be transported to the nearest approved medical facility, in accordance with established Department procedures, prior to any further arrest processing.

5. Ensure the paperwork accompanying the prisoner adequately describes any gender identity related issues.

F. Incarceration: Placement.

1. Officers will:
 - a. Place all transgender and intersex inmates in housing with males or females based on their gender identity, not their genitalia, unless the inmate objects to such placement based on safety considerations;²⁵¹

- b. A temporary lockup used by a tribal police or court agency may hold a transgender or intersex detainee in a single cell for periods less than 48 hours.
- c. Not place LGBTQ inmates involuntarily in dedicated housing units, or other forms of segregation, solely based on their LGBTQ identification or status
- d. If government-issued identification is not updated or appears inconsistent with the inmate's gender preference, inquire about an inmate's gender preference, and house accordingly;
- e. If the inmate expresses uncertainty about their gender, provide access to an individualized assessment from a social worker to determine appropriate housing; and
- f. Permit transgender and intersex inmates to wear the same clothing and cosmetics.
- g. Provide transgender and intersex inmates the opportunity to shower separately from other inmates.

2. Officers will **not**:

- 1. Use a strip search simply to determine genitalia when assigning the inmate to housing during the intake process;
- 2. House any transgender or intersex inmate in a unit based solely on the inmate's birth-identified gender or genitalia;
- 3. Force any inmate into solitary or other segregated housing based on transgender or intersex status.

G. Incarceration: Medical Treatment.

- 1. Transgender and intersex inmates shall have access to the same level of medical and mental health care afforded all inmates, including psychotherapy if needed.
- 2. Jail medical staff will be trained on evaluation and counseling processes used to determine whether hormones therapy is medically appropriate, so that jail medical staff may:
 - a. Continue the transgender or intersex inmate on his or her evaluation process;
 - b. Begin hormone therapy for an inmate who has been identified as a candidate for hormone therapy but did not begin therapy prior to incarceration; or
 - c. Determine that a previously undiagnosed inmate is a good candidate for hormone therapy and prescribe that therapy.

- 1. **Interpretation.** If this protocol conflicts with any Department directive, this protocol will take precedence.

CHAPTER 7: IDENTITY DOCUMENTS AND NAME CHANGES

IDENTITY DOCUMENTS AND NAME CHANGES

“Identity documents are needed for many activities of daily life—working, voting, traveling, accessing government institutions, and proving that one is who one claims to be. Yet for many transgender people, accessing basic proof of identity that matches who they are is out of reach, pushing them further into the margins of society.”²⁵² Tribal nations possess the sovereignty to determine who are enrolled tribal members and issue tribal identification cards. The process of changing one’s name and gender marker on identification documents to reflect their gender can be extremely difficult for many transgender, intersex, or gender non-conforming people. Federal, state, and tribal agencies follow a patchwork of differing, often highly restrictive and expensive requirements for updating names and gender markers. Transgender people around the world deserve access to gender markers on their documents that uphold their right to bodily autonomy and self-determination.

The lack of identity documents that accurately reflect a person’s current name and gender identity often leads to anxiety and confusion in even basic transactions. Even worse, when transgender people show identification that does not match their gender expression, they may be regarded as suspicious and are at an increased risk of harassment, discrimination, and violence. In some cases, such identification has been confiscated by officers who alleged it was fraudulent.²⁵³

IDENTITY DOCUMENTS AND NAME CHANGES AND THE LAW

Our research has not uncovered any tribal laws specifically addressing transgender rights relating to name changes or identity documents. At the state level, laws and regulations addressing name changes or updating the name and gender on identity documents. Some states allow common law name changes (though less frequently in this age of identity fraud). Most commonly, a person must file a petition in the state court where they live to legally change their name. Depending on the state, that person may have to meet other requirements such as publishing notice of the name change in a newspaper at the person’s expense, obtaining a criminal background check, or appearing in court for a hearing.

National Center for Transgender Equality ID Documents Center

<http://www.transequality.org/documents>

Almost all but not all states allow gender marker changes to birth certificates, and that can usually be done at the same time as a name change. Of those states, most require proof that the person has undergone surgical treatment as part of their transition, which is a substantial and costly requirement that can make updating a birth certificate challenging for transgender people. These surgeries are rarely covered by health insurance, can be very expensive for people, and can be undesirable for various medical, personal or practical reasons, and the majority of transgender people do not have surgery. However, a growing number of states are modernizing this process, making it easier for transgender people to get a birth certificate that matches their gender identity. In those states, a person can obtain a gender marker change based on a certification from a treating healthcare provider (typically, a medical doctor) that the person has undergone “clinically

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appropriate treatment for the purpose of a gender transition.” This language is intentionally broad and includes whatever treatment the person and their healthcare provider decide is appropriate in their case. Some states also require applicants to obtain an order from a court declaring their gender change in order to be able to get the gender marker on their birth certificate updated. As part of that modernizing trend, states are also creating an administrative process to change a person’s gender marker directly with the Vital Statistics department so people don’t have to obtain a court order, because court orders can be costly, intimidating, and unpredictable to obtain from different jurisdictions. Nevertheless, it can be beneficial to obtain a court order because that order may provide a greater level of legal protection for gender recognition in other states or in the event that someone challenges that person’s gender.

Rules also vary from state to state concerning changing gender markers on other state-issued identity documents such as driver’s licenses and state ID cards. More than half of the states no longer require any proof of surgery to change gender markers on drivers’ licenses or state IDs.²⁵⁴ A growing number of states use a standardized form for gender changes on driver’s licenses and state ID cards which requires a signature by the applicant and a health care or social service professional affirming that the gender change is consistent with the person’s gender identity. Some local jurisdictions which issue identification cards, as well as a growing number of other countries, allow the change of gender on identification based solely on the person’s own affirmation.

The U.S. State Department will update passports and consular birth certificates based on certification by a physician of “appropriate clinical treatment for gender transition to the new gender.” This language recognizes that different treatment is necessary for different people, which may include social transition, counseling, medications, or various surgeries—the form of treatment need not be specified. Several other federal agencies (including the Veterans Health Administration, Social Security Administration, and the U.S. Citizenship and Immigration Services) have adopted similar changes.²⁵⁵ The Social Security Administration allows people to change gender markers on Social Security records with a U.S. passport reflecting the gender change, an amended birth certificate, a court order, or a medical certification of appropriate treatment for gender transition.²⁵⁶

SAMPLE POLICY AND LEGISLATION ON IDENTITY DOCUMENTS

While gender change policies are often set internally by the issuing agencies, some tribes may have existing legislation regarding birth certificates or driver’s licenses that requires revision. The following sample language is based on legislation and policies from Washington, DC.

Section x. Issuance of birth certificates with amended gender designation

-The [tribe] [department/agency] shall issue a new certificate of birth that reflects a new gender designation and, if applicable, a new name of a person under the jurisdiction of the [tribe] upon receipt of any one of the following documents:

- a. A written request, signed under penalty of law, for a new certificate of birth with a gender designation that differs from the gender designated on the original certificate of birth, from the person or the person’s parent, guardian, or legal representative. The request shall state, under penalty of the law, that the request is for the purpose of ensuring their identification is consistent with their gender identity and is not for any fraudulent or other unlawful purpose;

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b. An original or certified copy of an order of a court of competent jurisdiction granting a change of gender;

c. A statement, signed under the penalty of law, by a licensed healthcare provider (including a therapist, counselor, social worker or case worker) stating that the person has had treatment appropriate for the person related to gender identity, based on contemporary medical standards. No specified treatments, including hormone therapy or any kind of surgery, are required for a person to have had appropriate treatment related to gender identity;

d. A statement, signed under the penalty of law, by a licensed healthcare provider (including a therapist, counselor, social worker or case worker) stating that the person has an intersex condition, and that in the healthcare provider's professional opinion, the person's gender designation should be changed. The [agency] or its employees shall not require any additional medical information or records other than those listed in this section.

e. or an identification card, driver's license, or passport reflecting the appropriate gender.

-The [agency] shall adopt a Gender Designation Form for the collection of the above information.

-The [agency] shall keep the initial birth certificate under seal unless ordered by a court of competent jurisdiction or requested by the applicant.

-The [agency] shall issue a new birth certificate that reflects the requested gender designation and reflects any legal name change, and the new birth certificate shall not be marked "amended" or show on its face that a change of name or gender has been made.

Section x. Procedure for establishing or changing gender designation on driver's license or identification card

-Applicants establishing or requesting to change the gender designation on their driver's license or identification card must:

- a. Surrender any current license or identification card issued by the tribal government;
- b. Submit a completed Gender Designation form, or present a valid U.S. Passport, driver's license/identification card or birth certificate displaying the requested gender; and
- c. Pay applicable fees for a new or amended license.

-The Gender Designation Form shall include a signed statement by the applicant, under penalty of law, that the request is for the purpose of ensuring their identification accurately reflects their gender identity and is not for any fraudulent or other unlawful purpose.

-Employees shall not request additional gender-related information beyond that required on the applicable form or otherwise inquire about the applicant's private medical history or records.

-Applicants are not required to demonstrate that they have completed any specified treatment, including hormone therapy or any kind of surgery, in order to change or establish the gender designation on their license.

-Applicants are not required to demonstrate that they have changed their gender designation on their birth

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certificate or other forms of identification.

-The Gender Designation form contains private medical information. The form and any record of a change in the gender designation will be kept under seal.

-Name changes can be processed at any time regardless of gender designation.

-The applicant should have a new photograph taken, as the applicant chooses to present themselves, regardless of requested gender identity.

-[Agency] is dedicated to serving customers in a professional, courteous and non-judgmental manner, and is committed to processing Gender Designation requests in a manner that respects the applicant's privacy at all times and does not draw undue attention to the applicant. [Agency] staff will receive training on this process by [date], and any problems or complaints should be directed to [contact person].

Commentary: *Gender markers on driver's licenses or tribal identification cards are rarely, if ever, necessary to determine a person's identity so long as the document includes a current photograph. Some tribes and some local jurisdictions already issue identification cards without any gender designation. Phasing out gender markers on driver's licenses or identification cards eliminates the need to record and processes changes to gender and provides a better option for people whose gender identity is not male or female.*

Section x. Elimination of mandatory gender markers

1. As of [date], agency driver's licenses and identification cards will no longer include a gender designation.

In addition, name change statutes should be reviewed and updated to:

- Ensure fees are no higher than necessary and provide a simple process for fee waivers;
- Eliminate any requirement to publication requirement; and,
- Eliminate categorical barriers to name changes based on criminal record or other reasons.

PARTNER ORGANIZATIONS

- Western States Center at <http://www.westernstatescenter.org>
- LGBT Research and Communications Project at Center for American Progress at <https://www.americanprogress.org/issues/lgbt/view/>
- Basic Rights Oregon at <http://www.basicrights.org>
- Center for Native American Youth at the Aspen Institute at www.cnay.org
- Family Equality Council at www.familyequality.org
- Gay, Lesbian & Straight Education Network (GLSEN) at www.glsen.org
- Human Rights Campaign at www.hrc.org
- Movement Advancement Project at <http://www.lgbtmap.org/>
- National Center for Lesbian Rights at www.nclrights.org and Legal Information Helpline at 1-800-528-6257 or 415-392-6257
- National Center for Transgender Equality at <http://www.transequality.org/>
- National Congress of American Indians at www.ncai.org
- National LGBTQ Task Force at www.taskforce.org
- Native American Program of Legal Aid Services of Oregon at <http://oregonlawhelp.org/organization/native-american-program-legal-aid-services-of?ref=JfdvW>
- PFLAG National at www.pflag.org
- PFLAG Phoenix Native American Chapter at <http://www.nativepflag.org>
- SAGE (Services and Advocacy for GLBT Elders) at www.sageusa.org and the National Resource Center on LGBTQ Aging at www.lgbtagingcenter.org
- Transgender Law Center at <https://transgenderlawcenter.org>

ENDNOTES

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- ² National Congress of American Indians. “Creation of Two Spirit Task Force.” Resolution #PHX-16-046. Available at <http://www.ncai.org/resources/resolutions/creation-of-two-spirit-task-force>.
- ³ Members of our community who identify as Two Spirit, lesbian, gay, bisexual, transgender, questioning, bi-gender, intersex, asexual, queer, genderqueer, or other similar terms will be referred to collectively as “Two Spirit/LGBTQ” in this Toolkit.
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- ⁵ Randy Albelda, M.V. Lee Badgett, Gary J. Gates, and Alyssa Schneebaum. “Poverty in the LGB Community.” (Williams Institute: Los Angeles, CA 2009). Available at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/poverty-in-the-lesbian-gay-and-bisexual-community/>.
- ⁶ Gary J. Gates. “Food Insecurity and SNAP (Food Stamps) Participation in LGBT Communities.” (Williams Institute: Los Angeles, CA 2014). Available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-in-LGBT-Communities.pdf>.
- ⁷ National Center for Transgender Equality and the National LGBTQ Task Force. “National Transgender Discrimination Survey: A Look at American Indian and Alaskan Native Respondents.” (2012). Available at <http://www.transequality.org/issues/resources/national-transgender-discrimination-survey-look-american-indian-and-alaskan-native>.
- ⁸ *Id.*
- ⁹ Elizabeth M. Diaz and Joseph G. Kosciw. “Shared Differences: The Experiences of Lesbian, Gay, Bisexual, and Transgender Students of Color in Our Nation’s Schools.” (GLSEN: New York, NY 2009). Available at <http://www.glsen.org/download/file/MzIzMQ==>.
- ¹⁰ Center for American Progress, *supra* note 2.
- ¹¹ Centers for Disease Control and Prevention. “HIV Among American Indians and Alaska Natives.” (2015). Available at <http://www.cdc.gov/hiv/group/raciaethnic/aian/index.html>.
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- ¹³ Sarah McBride, Laura E. Durso, Hannah Hussey, Sharita Gruberg, and Bishop Gene Robinson. “We the People: Why Congress and U.S. States Must Pass Comprehensive LGBT Nondiscrimination Protections.” (Center for American Progress: Washington, DC 2014). Available at <https://www.americanprogress.org/issues/lgbt/report/2014/12/10/102804/we-the-people/>.
- ¹⁴ M.V. Lee Badgett, Laura E. Durso, and Alyssa Schneebaum. “New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community.” (Williams Institute: Los Angeles, CA 2013). Available at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-poverty-update-june-2013/>.
- ¹⁵ Sarah McBride. “We the People: LGBT Americans in the Workplace.” (Center for American Progress: Washington, DC 2015). Available at <https://cdn.americanprogress.org/wp-content/uploads/2015/04/NonDisc-Employment-4.10.pdf>.
- ¹⁶ National Congress of American Indians. “NCAI Comments to HIS.” (2015). Available at http://www.ncai.org/policy-research-center/news-updates/NCAI_Comments_to_IHS_LGBT_Health.pdf.
- ¹⁷ *Id.*
- ¹⁸ Crosby Burns and Jeff Krehely. “Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment.” (Center for American Progress: Washington, DC 2011), Available at <https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/>; National Center for Transgender Equality and the National LGBTQ Task Force. “National Transgender Discrimination Survey: A Look at American Indian and Alaskan Native Respondents.” (2012). Available at <http://www.transequality.org/issues/resources/national-transgender-discrimination-survey-look-american-indian-and-alaskan-native>.
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- ²⁰ Crosby Burns and Jeff Krehely. “Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment.” (Center for American Progress: Washington, DC 2011), Available at <https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/>.
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- ²² Randall K.Q. Akee and Jonathan B. Taylor. “Social and Economic Change on American Indian Reservations A Databook of the US Censuses and the American Community Survey 1990–2010.” (Taylor Policy Group, Inc.: Sarasota, FL 2014). Available at <http://static1.squarespace.com/static/52557b58e4b0d4767401ce95/t/5379756ce4b095f55e75c77b/1400468844624/AkeeTaylorUSDatabook2014-05-15.pdf>.

²³ Badgett, *supra* note 13. In addition, the gap in differential treatment of gay male job applicants was significantly smaller in states or local areas with nondiscrimination laws that included sexual orientation: 8.7 percent received invitations compared with 5.3 percent in states without such protections. However, the heterosexual applicants still received more favorable treatment than their gay counterparts. *Id.*

²⁴ *Id.*

²⁵ *Id.* “A key link between policies and productivity is disclosure of one’s sexual orientation. Many studies have demonstrated that fear of discrimination keeps LGB workers, particular from revealing their sexual orientation in the workplace... Studies find that people who have come out report lower levels of anxiety, less conflict between work and personal life, greater job satisfaction, more sharing of employers’ goals, higher levels of satisfaction with their co-workers, more self-esteem, and better physical health. So when fear of discrimination causes LGB employees to conceal their sexual orientation or gender identity, employers experience negative costs along with LGB people themselves. The time as well as social and psychological energy that is required to maintain a hidden identity would, from an employer’s perspective, be better used on the job.” *Id.*

²⁶ *Id.*

²⁷ Human Rights Campaign, “Corporate Equality Index 2016: Rating American Workplaces on Lesbian, Gay, Bisexual, and Transgender Equality” (2016); Equality Forum, “FORTUNE 500 Non-Discrimination Project,” Available at <http://www.equalityforum.com/fortune500> (last accessed June 2016).

²⁸ Badgett, *supra* note 13.

²⁹ Shoshone-Bannock Tribes, Worker Protection Ordinance, §401, <http://www.shoshonebannocktribes.com/tero/PDF/Worker%20Protection%20Ordinance.PDF> (emphasis added).

³⁰ Mandan Hidatsa and Arikara Nation, Employment Rights and Contracts Preference Ordinance, §206(a), *See also* Poarch Creek Indians, Tribal Employment Rights Ordinance, §33-4-1, (“The Tribal Council finds ... [t]he practice of unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction records, membership in the national guard, or any other reserve component of the military forces of the United States adversely affects the welfare of the Reservation and deprives those individuals of the earnings that are necessary to maintain a just and decent standard of living.”).

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³² *See, e.g.*, Tulalip Tribes, Tribal Employee Rights Ordinance, <http://www.tulaliptribes.com/>; Bishop Paiute Tribe, Tribal Employee Rights Ordinance, <http://bishoptero.com/PDFs/TERO%20Reference%20Guide.pdf> (emphasis added).

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³⁴ Coquille Indian Housing Authority, Request for Proposals, http://www.coquilletribe.org/docbin/CIHADemoRFP09-14-15_000.pdf (emphasis added).

³⁵ Oregon Equality Act, Pub. L. No. 100, Or. S.B. 2 (2007), <https://olis.leg.state.or.us/liz/2007R1/Downloads/MeasureDocument/SB2/Enrolled>.

³⁶ California Fair Employment and Housing Act, <http://finduslaw.com/california-fair-employment-housing-act-feha-government-code-12900-12996>; California Civil Rights Act of 2007, http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_14_bill_20070919_enrolled.pdf; California Equal Benefits Ordinance, ftp://leginfo.public.ca.gov/pub/03-04/bill/asm/ab_0001-0050/ab_17_bill_20031011_chaptered.pdf.

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⁴⁰ Human Rights Campaign. “Student Non-Discrimination Act.” Available at <http://www.hrc.org/resources/student-non-discrimination-act>. (last accessed June 2016).

⁴¹ GLSEN. “2013 National School Climate Survey.” (2013). Available at http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf.

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⁴⁴ *All Children Matter, supra* note 52.

⁴⁵ National Center for Transgender Equality and the National LGBTQ Task Force. “National Transgender Discrimination Survey: A Look at American Indian and Alaskan Native Respondents.” (2012). Available at <http://www.transequality.org/issues/resources/national-transgender-discrimination-survey-look-american-indian-and-alaskan-native>. In addition, respondents who were harassed and abused by teachers show “dramatically worse health and other outcomes compared to those who do not experience such abuse. Peer harassment and abuse also had highly damaging effects.” *Id.* Nearly half of transgender students report regularly skipping school because of safety concerns, clearly impacting their ability to receive an education, and nearly one in six (15 percent) of transgender and gender

nonconforming students face harassment so severe that they are forced to leave school. Transgender students who experience high levels of harassment had grade point averages about half a grade lower, and were also less likely to plan to go to college. Furthermore, the effects of school victimization may extend into adulthood. LGBT young adults who were targeted with LGBT-biased bullying and victimization in secondary school show elevated rates of depression, suicidal ideation, and risk for STDs and HIV. GLSEN, Model District Policy on Transgender and Gender Nonconforming Students,

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⁵¹ *Id.*

⁵² Movement Advancement Project. "Safe Schools Laws." Available at http://www.lgbtmap.org/equality-maps/safe_school_laws (last accessed June 2016).

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⁵⁴ Human Rights Campaign, "Safe Schools Improvement Act," available at <http://www.hrc.org/resources/safe-schools-improvement-act> (last accessed June 2016).

⁵⁵ Oregon Equality Act, Pub. L. No. 100, Or. S.B. 2 (2007),

<https://olis.leg.state.or.us/liz/2007R1/Downloads/MeasureDocument/SB2/Enrolled>; CAL. ED. CODE § 220,

<http://codes.findlaw.com/ca/education-code/edc-sect-220.html>; CONN. GEN. STAT. § 10-15c,

https://www.cga.ct.gov/current/PUB/chap_164.htm#sec_10-15c; N.H. REV. STAT. § 193-F:1 et. seq.,

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§5/27-23.7, <http://ilga.gov/legislation/ilcs/fulltext.asp?DocName=010500050K27-23.7>; MINN. STAT. §363A.03 et seq.,

<https://www.revisor.mn.gov/statutes/?id=363a.13>.

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- ⁹³ *Id.*
- ⁹⁴ *The Affordable Care Act: Real Benefits for LGBT People* (09/06/2013), http://www.huffingtonpost.com/sean-cahill/the-affordable-care-act-real-benefits-for-lgbt-people_b_3867921.html. In addition to prohibiting public and private health insurers from discriminating on the basis of sexual orientation, gender identity or HIV status, the Affordable Care Act will improve access to health care for LGBT people in other important ways, including:
- Subsidies will allow millions of low and middle-income people, including LGBT people, to afford to buy health insurance. Same-sex partners in states that don't recognize same-sex relationships will have more affordable insurance options.
 - The Patient's Bill of Rights phases out annual and lifetime limits on coverage, ends preexisting condition exclusions, and ends arbitrary rescission of insurance coverage, all of which are especially important for transgender people and people living with HIV/AIDS.
 - Preventive services, including HIV testing, depression screening, and tobacco use screening, which may be particularly important to LGBT people, will be considered Essential Health Benefits and covered by insurance.
- The Secretary of Health and Human Services is authorized to expand the collection of sexual orientation and gender identity data on national health surveys, which will provide greater understanding of LGBT health issues. *Id.*
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⁹⁶ *Id.* NOTE: “Removing transgender-specific exclusions also does not prohibit plans from denying coverage for services that are not medically necessary, that are experimental, or that are comparatively more expensive than other treatments.”

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¹⁰³ For example, in Wisconsin, a same-sex domestic partner has visitation rights in various health-care settings, similar to the visitation rights afforded to a spouse. Howard A. Sweet, *Matters Affected by Creation of a Same Sex Domestic Partnership*, 82 WISCONSIN LAWYER 11 (November 2009),

<http://www.wisbar.org/AM/Template.cfm?Section=Search&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=87323> (citing Wis. STAT. § 1392).

¹⁰⁴ Human Rights Campaign. “Hospital Visitation Laws.” Available at http://www.hrc.org/files/assets/resources/hospital_visitation_laws_062013.pdf. (last accessed on June 2016).

¹⁰⁵ Gay and Lesbian Medical Association. “Non-Discrimination Guidelines for Hospitals.” Available at http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/GLMA-Sample_Non-Discrimination_Policy.pdf. (last accessed on June 2016).

¹⁰⁶ *Id.*; Human Rights Campaign, “LGBT-Inclusive Definitions of Family.” Available at <http://www.hrc.org/resources/entry/lgbt-inclusive-definitions-of-family>. (last accessed on June 2016).

¹⁰⁷ Oregon Health & Science University, *Inclusive Policies and Practices*, <http://www.ohsu.edu/xd/health/services/diversity-and-inclusion/inclusive-policies-and-practices/>; Northwestern Memorial Hospital, Patient Bill of Rights and Responsibilities, <http://www.nmh.org/ccurl/313/974/3953-12-Patient-Rights-2C-F.pdf>; California Pacific Medical Center, Patient Rights & Responsibilities, http://www.cpmc.org/services/pt_rights.html; Johns Hopkins, Patient Bill of Rights and Responsibilities, http://www.hopkinsmedicine.org/the_johns_hopkins_hospital/docs/bill_of_rights.pdf.

¹⁰⁸ Lambda Legal. “Transgender Rights Toolkit: A Legal Guide for Trans People and Their Advocates.” Available at http://www.lambdalegal.org/publications/trt_trans-aging-were-still-here.

¹⁰⁹ For more about the Nursing Home Reform Act, see, e.g., Elder Parent Help, LLC, *Rights Under the Nursing Home Reform Act*, <http://www.elderparenthelp.com/rights-under-the-nursing-home-reform-act>.

¹¹⁰ Bushyhead, *supra* note 24 (internal citations omitted).

¹¹¹ “An advance directive is a written instruction, such as a living will or durable power of attorney for health care... is designed to direct the health care of the patient to whom it applies. An advance directive takes effect when the patient to whom it applies becomes incompetent to make medical decisions... If there is Tribal law that governs advance directives, it will apply for those Tribal members living on that Tribe’s reservation.” Indian Health Service, *Indian Health Manual*, §§3-26, https://www.ihs.gov/ihtm/index.cfm?module=dsp_ihm_pc_p3c26. We did not find any tribal laws regarding advance directives or durable power of attorney for health care. In Oregon, however, a living will or advance directive may be used to appoint a durable power of attorney to make health care decisions and dictate health care instructions concerning life-sustaining treatment. OR. REV. STAT. Ch. 127; Bushyhead, *supra* note 24. An advance directive or living also permits tribal members to express their desire for traditional practices, such as traditional burials and avoidance of autopsy, organ donation, embalming, or burial delays.

¹¹² Jurisdictions differ regarding the order of priority for appointing a guardian or conservator. For example, the Coquille Tribe grants priority to an incapacitated person’s parent, but permits the Tribal Court to appoint someone other than the parent(s) upon a showing that the preference should be rebutted. Bushyhead, *supra* note 24; Coquille Indian Tribe, Ch. 375 – Conservatorship and Guardianship Ordinance, <http://www.coquilletribe.org/documents/375Guardianship.pdf>. The Court may appoint a “conservator and/or guardian who is most suitable and willing to serve,” and may consider factors such as “the relationship by blood or marriage of the proposed conservator and/or guardian of the proposed ward.” *Id.* In contrast, the Uniform Guardianship and Protective Proceedings Act gives a spouse priority for letters of guardianship, if the incapacitated person has not nominated a guardian or appointed a health care proxy. *Id.* (citing Unif. Guardianship & Protective Proc. Act § 5-310, 8II U.L.A. 362-63 (Supp. 2008)). In another approach, Washington permits any “suitable person over the age of eighteen years, or any parent under the age of eighteen years or, if the petition is for appointment of a professional guardian, any individual or guardianship service that meets any certification requirements established by the administrator for the courts” to be appointed guardian of the person and/or the estate of an incapacitated person.” WASH. REV. CODE §11.88.020(1). See also White Mountain Apache, Probate Code, <http://www.wmat.nsn.us/Legal/Probate.html> (outlining preferences for the appointment of a guardian).

¹¹³ For example, in Wisconsin, a domestic partner can consent to organ donations from the deceased partner and can authorize an autopsy of the deceased partner’s body. Sweet, *supra* note 264.

¹¹⁴ Key issues include the right of a same-sex partner to a share of intestate succession where the decedent partner dies intestate, and the right to a forced share election against a will if disinherited. For example, in Oregon, a decedent's domestic partner would be considered the decedent's "surviving spouse" for the purpose of intestate succession. As the surviving spouse, the surviving partner would take priority over the decedent's other family (other than the decedent's issue) in receiving a portion or all of the decedent's intestate estate. In Wisconsin, a surviving domestic partner has certain rights to select personal property and may be can seek the assignment of the decedent's property interest in the home the domestic partners shared. Sweet, *supra* note 264 (citing 2009 WIS. ACT 28, §§3260; 3262 (amending WIS. STAT. §§861.21; 861.33)). For an example of a BIA-approved tribal probate code, see Confederated Tribes of the Umatilla Indian Reservation, Inheritance Code (April 7, 2008), <http://www.umatilla.nsn.us/InheritanceCode.pdf>.

NOTE: The American Indian Probate Reform Act "may find its way into the analysis of same-sex couple spousal rights when [tribes] whose members own 'trust and restricted lands,' pass laws allowing same-sex marriage. In these cases, the AIPRA, as an Act of Congress, discriminates against same-sex spouses by employing the federal definition of spouse for intestate succession." Bushyhead, *supra* note 24 (citing 1 U.S.C. § 7; 25 U.S.C. § 2206(a)(2)).

¹¹⁵ For example, in Wisconsin, a surviving same-sex domestic partner may, maintain a wrongful death action, receive death benefits if the deceased partner was killed as a crime victim and/or was a police officer or firefighter killed in the line of duty, receive victim compensation if the deceased partner was killed or injured while trying to prevent a crime or while assisting a law enforcement officer, and file worker's compensation death claims similar to those available to a surviving spouse. Sweet, *supra* note 264 (citing 2009 WIS. ACT 28, §§ 2159; 3269; 3357-3359).

¹¹⁶ "Regardless of whether the decedent spouse executed a will before his/her death, the surviving spouse may still be entitled to benefits such as wage benefits, spousal allowance, and homestead rights. First, a surviving spouse has a right to recover wages earned by his/her deceased spouse but not yet paid for, in an amount not exceeding \$10,000. Second, a surviving spouse has a right to spousal allowance, which is a benefit granted by a presiding probate court when the exempt property retained by a surviving spouse is insufficient for his/her care and maintenance. Finally, a spouse retains 'probate homestead' rights to possess the (non-trust) property until his/her death without threat that the homestead will be sold to satisfy a lien or judgment against it." Bushyhead, *supra* note 24 (citing OR. REV. STAT. §652.190; OR. REV. STAT. §18.395; OR. REV. STAT. § 18.395).

¹¹⁷ See, e.g. Oregon Family Fairness Act, OR. REV. STAT. §§ 106.300 - 106.340.

¹¹⁸ Bushyhead, *supra* note 24.

¹¹⁹ OR. REV. STAT. ch. 127; Bushyhead, *supra* note 24. Unless an individual designates a health care representative in an advance directive or living will (or other document valid under applicable law), tribal or state law will determine who is entitled to make those decisions. Bushyhead, *supra* note 24. Where one domestic partner is incapacitated and has a terminal condition, is permanently unconscious, etc., and does not have an advance directive or appointed health care representative, guardian, or other person authorized to make health care decisions, the other domestic partner would have priority to serve as the incapacitated partner's health care representative. OR. REV. STAT. §127.635.

¹²⁰ Oregon Family Fairness Act, OR. REV. STAT. §§ 106.300 - 106.340.

¹²¹ WASH. REV. CODE, Title 11, <http://apps.leg.wa.gov/rcw/default.aspx?cite=11.04.015>.

¹²² 2009 WIS. ACT 28, <https://docs.legis.wisconsin.gov/2009/related/acts/28/3247>.

¹²³ CAL. PROBATE CODE, §§ 20-88; 8461; 8462; 6401; 6402; 1813.1; 1895, http://www.leginfo.ca.gov/html/prob_table_of_contents.html.

¹²⁴ Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 PEDIATRICS 1, 349-364 (July 1, 2006), <http://pediatrics.aappublications.org/content/118/1/349.full>; GLAD, *Marriage: Tips and Traps*, <http://www.glad.org/uploads/docs/publications/marriage-tips-traps.pdf>.

¹²⁵ *Same-Sex Marriage in the United States*, *supra* note 10 (citing Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, *supra* note 10); M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN (Chicago: University of Chicago Press 2003)).

¹²⁶ For a more comprehensive list of benefits available to spouses but not same-sex couples, see *Marriage: Tips and Traps*, *supra* note 9; Pawelski et al., *supra* note 9, at 349-364.

¹²⁷ For a more comprehensive list of these challenges, see Pawelski et al., *supra* note 9, at 349-364; *Marriage: Tips and Traps*, *supra* note 9; *Same-Sex Marriage in the United States*, *supra* note 10 (internal citations omitted); Human Rights Campaign, *Domestic Partner Benefits: Related Laws and Regulations*, <http://www.hrc.org/resources/entry/domestic-partner-benefits-related-laws-and-regulations>. For a more comprehensive list of benefits available to spouses but not same-sex couples, see *Marriage: Tips and Traps*, *supra* note 9; Pawelski et al., *supra* note 9, at 349-364.

¹²⁸ Christy Mallory. "Estimating the Economic Impact of Marriage for Same-Sex Couples after Obergefell." (Williams Institute: Los Angeles, CA 2015). Available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Estimating-the-Economic-Impact-of-Marriage-for-Same-Sex-Couples-after-Obergefell.pdf>.

¹²⁹ *Ibid*

¹³⁰ Insert this WHEREAS only if your Tribe/Nation has adopted such laws and measures.

¹³¹ See Coquille Indian Tribal Code, Chapter 740: Marriage and Domestic Partnership, <http://www.coquilletribe.org/documents/740MarriageandDomesticPartnership.pdf>; Waganakising Odawa Tribal Code: Little Traverse Bay Bands of Odawa Indians, Title XIII, Chapter 1. Marriage, <http://www.narf.org/nill/Codes/ltraverse/t13.pdf>; Pokagon Band of Potawatomi Indians, Marriage Code, <http://www.pokagon.com/sites/default/files/assets/group/tribal-council/form/2013/marriage-code-3-9-13-1369-1173.pdf>; Vt., S.115: An act relating to civil marriage, www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf.

¹³² Statutes of the Confederated Tribes of the Umatilla Indian Reservation, Family Law Code, Chapter 13: Domestic Partnerships, <http://www.umatilla.nsn.us/Family%20Law%20Code.pdf>; Coquille Indian Tribal Code, Chapter 740: Marriage and Domestic Partnership, <http://www.coquilletribe.org/documents/740MarriageandDomesticPartnership.pdf>. Fond du Lac Band of Lake Superior Chippewa, Ordinance #4/10, as amended: Marriage, Domestic Partnership & Divorce, <http://www.fdlrez.com/ordpdfs/2010/04-10%20Marriage%20Domestic%20Partnership%20&%20Divorce%202013.04.10.pdf>; Oregon Family Fairness Act,

<http://www.leg.state.or.us/07reg/measures/hb2000.dir/hb2007.en.html>; WASH REV. CODE, Ch. 26.60, <http://apps.leg.wa.gov/RCW/default.aspx?cite=26.60&full=true>; Cal. Assembly Bill 205, http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.html; Cal. Fam. Code, § 297-297.5, <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam&group=00001-01000&file=297-297.5>; NRS Chapter 122A, <http://www.leg.state.nv.us/NRS/NRS-122A.html> (Domestic partners in Nevada are eligible for benefits that are similar to the rights and responsibilities of marriage, except that employers are not required to provide health care coverage for domestic partners). These rights, benefits, and responsibilities include: hospital visitation rights and medical decision-making for partners; automatic parentage of non-biological parents for children born after the Domestic Partnership is established; significant legal and financial obligations for partners; and dissolution provisions similar to legal divorce. Basic Rights Oregon, *Domestic Partnership Resource Guide* (2007), <http://www.basicrights.org/wp-content/uploads/2011/09/BRO-Domestic-Partnership-Resource-Guide-2008.pdf>.

¹³³ Hawaii's Reciprocal Beneficiaries law provides limited state rights to two parties bound as reciprocal beneficiaries, including same-sex couples, relatives, and friends. Haw. Rev. Stat., Ch. 572C, <http://www.capitol.hawaii.gov>.

¹³⁴ ME. REV. STAT., Ch. 701, Tit. 22, §2710, <http://www.mainelegislature.org/legis/statutes/22/title22sec2710.html>. In Wisconsin, registered domestic partners are eligible for inheritance and survivor protections, family and medical leave, medical/hospital visitation rights, and exemption from the real estate transfer fee. Wis. Stat., Ch. 770: Domestic Partnership, <https://docs.legis.wisconsin.gov/statutes/statutes/770>.

¹³⁵ National Conference of State Legislators, *supra* note 21 (citing Illinois Religious Freedom Protection and Civil Union Act, S.B. 1716 (Pub. Act 96-1513)).

¹³⁶ Pawelski et al., *supra* note 9, at 349 -364.

¹³⁷ See, e.g., Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. Mich. J.L. Reform 683, 690 (2001) ("The notion of families during the formative periods of the United States Constitution, the Bill of Rights and the Thirteenth and Fourteenth Amendments, contemplated a patriarchal household in which the father presided over and controlled his wife and their children.").

¹³⁸ Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights*, 41 Colum. Hum. Rts. L. Rev. 509, 522 (2010) (citing Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family, 1996 Utah L. Rev. 569, 570 (1996)).

¹³⁹ Committee on Psychosocial Aspects of Child and Family Health, Am. Acad. of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 3 (2002), <http://pediatrics.aappublications.org/content/109/2/339.full>. However, where laws have not been improved to recognize the rights and responsibilities of LGBT and other non-traditional families, children may be "denied legal ties of one of their parents, undermining family stability and permanency—and parents' ability to act as effective guardians of their children." *All Children Matter: How Legal and Social Inequities Hurt LGBT Families*, <http://action.familyequality.org/site/DocServer/AllChildrenMatterCondensedFinal10192011.pdf?docID=2403>.

¹⁴⁰ *Id.*

¹⁴¹ GLAD, *Adoption Questions & Answers*, at 1 (November 2011), <http://www.glad.org/uploads/docs/publications/adoption.pdf>.

¹⁴² *Id.*

¹⁴³ LifeLong Adoption, "LGBT Adoption," available at <http://www.lifelongadoptions.com/lgbt-adoption>. (last accessed June 2016).

¹⁴⁴ *Adoption Questions & Answers*, *supra* note 54, at 1.

¹⁴⁵ GLAD Answers for the LGBTQ Community, *Adoption Questions & Answers*, *supra* note 54, at 2.

¹⁴⁶ *Id.*, at 3.

¹⁴⁷ *Id.* For example, single parent adoption by LGBT individuals now happens in every New England state. *Id.*

¹⁴⁸ *Ibid*

¹⁴⁹ Dana Rudolph, "Milestones in LGBT parenting history," *The Washington Blade*, October 11, 2012, available at <http://www.washingtonblade.com/2012/10/11/milestones-in-lgbt-parenting-history/>.

¹⁵⁰ Gary J. Gates. "LGBT Parenting in the United States." (Williams Institute: Los Angeles, CA 2013). Available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>

¹⁵¹ "According to a report by the Williams Institute, in 2007 there were 270,000 children in the United States who lived with same-sex couples. Of these, one-quarter, or 65,000, were adopted." *Census Snapshot*, Williams Institute, December 2007).

¹⁵² National Center for Lesbian Rights, "Legal Recognition of LGBT Families," (2015).

¹⁵³ *Census Snapshot*, *supra* note 57.

¹⁵⁴ *Id.*

¹⁵⁵ *Adoption Questions & Answers*, *supra* note 54, at 9.

¹⁵⁶ *Id.*, at 11-12.

¹⁵⁷ *All Children Matter*, *supra* note 52.

¹⁵⁸ *Adoption of Tammy*, 416 Mass. 205, 215 (1993).

¹⁵⁹ For example, in states that recognize same-sex marriages, "a child born during a marriage is presumed to be the child of both spouses, including a child born to a married woman with the use of donor sperm, who is presumed to be the child of the 'husband,' and therefore presumably of the partner." *Marriage: Tips and Traps*, *supra* note 9 (citing MASS. GEN. LAWS ch. 209C, § 6). However, this presumption does not provide the same level of protection as a family would gain by going through the legal process of jointly adopting a child born during the marriage. For more discussion of the presumption of paternity, see, e.g., Lambda Legal, *Gartner v. Newton*, <http://lambdalegal.org/in-court/cases/gartner-v-newton>; Zack Ford, *Iowa Judge: Both Same-Sex Parents' Names Belong On Birth Certificates* (January 5, 2012), <http://thinkprogress.org/lgbt/2012/01/05/398283/iowa-judge-both-same-sex-parents-names-belong-on-birth-certificates/>.

¹⁶⁰ *Adoption Questions & Answers*, *supra* note 54, at 12. For example, in *Miller-Jenkins v. Miller-Jenkins*, Janet and Lisa, parties to a civil union in Vermont, had a child named Isabella. Janet did not adopt Isabella, and when Janet and Lisa separated, Lisa moved to Virginia and

used the lack of an adoption—and Virginia’s laws hostile to same-sex relationships—to prevent Janet from having contact with Isabella. The resulting litigation, which began in 2004, has involved two state Supreme Courts, and made several trips to the U.S. Supreme Court. *Id.*

¹⁶¹ *Id.* at 11-12.

¹⁶² *Id.* (citing *Coparent or Second-Parent Adoption by Same-Sex Parents*, *supra* note 52, at 339-40).

¹⁶³ American Bar Association, 2003 AM 112, (Aug. 11-12, 2003), available at:

<http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/journal/112.authcheckdam.pdf>.

¹⁶⁴ *Ibid*

¹⁶⁵ Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, Tribal Code, §4-8-3, <http://ctclusi.org/sites/default/files/4-8.pdf>.

¹⁶⁶ Confederated Tribes of Siletz Indians, Juvenile Code, §8.039(c)(2),

<http://www.ctsi.nsn.us/uploads/downloads/Ordinances/Juvenile%20Code%20Final%202007-16-10.pdf>.

¹⁶⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584 (U.S. 2015)

¹⁶⁸ Carolyn Davis and Hannah Hussey. “Strengthening Child Welfare Systems by Resisting LGBT Discrimination.” (Center for American Progress: Washington, DC 2015). Available at

<https://www.americanprogress.org/issues/religion/news/2015/06/03/114387/strengthening-child-welfare-systems-by-resisting-lgbt-discrimination/>.

¹⁶⁹ Michigan: 2015 Public Act No. 53 (introduced as MI H.B. 4188); 2015 MI Public Act No. 54 (introduced as MI H.B. 4189); 2015 MI Public Act No. 55 (introduced as MI H.B. 4190); Virginia: Va. Code Ann. § 63.2-1709.3 ;North Dakota: N.D. Cent. Code § 50-12-07.1 ADD MISSISSIPPI

¹⁷⁰ Southern Poverty Law Center. “Religious Liberty’ and the Anti-LGBT Right.” Available at

<https://www.splcenter.org/20160211/religious-liberty-and-anti-lgbt-right>. (last accessed on September 2016)

¹⁷¹ Ariz. Rev. Stat. § 8-103

¹⁷² Movement Advancement Project. “Foster and Adoption Laws.” Available at http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws. (last accessed on September 2016).

¹⁷³ National Center for Lesbian Rights. “Legal Recognition of LGBT Families.” Available at http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf.

¹⁷⁴ Confederated Tribes of Siletz Indians, Juvenile Code, §8.039(c)(2),

<http://www.ctsi.nsn.us/uploads/downloads/Ordinances/Juvenile%20Code%20Final%202007-16-10.pdf>.

¹⁷⁵ Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, Tribal Code, §4-8-3(b), <http://ctclusi.org/sites/default/files/4-8.pdf>.

¹⁷⁶ National Center for Lesbian Rights. “Adoption by LGBT Parents.” (2015). Available at http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf.

¹⁷⁷ VT. STAT. ANN. TIT. 15A, §1-102(B)-

¹⁷⁸ Colorado Statutes § 19-5-203. Availability for adoption.

¹⁷⁹ Child Welfare Information Gateway. “Stepparent Adoption.” Available at <https://www.childwelfare.gov/pubs/f-step/>. (last accessed on September 2016).

¹⁸⁰ *Id.*

¹⁸¹ *Nolo, Stepparent Adoptions*, <http://www.nolo.com/legal-encyclopedia/stepparent-adoptions-29643.html>.

¹⁸² *Id.*

¹⁸³ Swan, *supra* note 94.

¹⁸⁴ Nancy Polikoff, *Beyond (Straight and Gay) Marriage*, <http://beyondstraightandgaymarriage.blogspot.com/2012/07/where-can-child-have-three-parents.html>.

¹⁸⁵ Ian Lovett. “Measure Opens Door to Three Parents, or Four.” (July 13, 2012) Available at

<http://www.nytimes.com/2012/07/14/us/a-california-bill-would-legalize-third-and-fourth-parent-adoptions.html?pagewanted=all>.

¹⁸⁶ Aaron Sankin, “California Multiple Parents Bill: Proposed Legislation Would Allow Children To Have Three Or More Parents.” (July 2, 2012), http://www.huffingtonpost.com/2012/07/02/california-multiple-parents-bill_n_1644613.html.

¹⁸⁷ Co. HB 07-1330, [http://www.leg.state.co.us/clics/clics2007a/csl.nsf/b404d50252f9cdcf85256d6d000d18cb/02f7babc52f718bd87257268007869de/\\$FILE/wptemp.txt](http://www.leg.state.co.us/clics/clics2007a/csl.nsf/b404d50252f9cdcf85256d6d000d18cb/02f7babc52f718bd87257268007869de/$FILE/wptemp.txt).

¹⁸⁸ State of California. Code 8617. Available at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam&group=08001-09000&file=8600-8622>.

¹⁸⁹ *All Children Matter*, *supra* note 52.

¹⁹⁰ Human Rights Campaign. “Laws and Regulations.” http://www.hrc.org/state_maps. *See id.* for a more complete discussion of state custody and visitation laws.

¹⁹¹ *See, e.g.*, Swinomish Tribal Code, §7-04.010 (“In any proceeding between parents under this Chapter, the best interest of the child shall be the standard by which the Tribal Court determines and allocates parental responsibilities. The Tribe recognizes the fundamental importance of the parent-child relationship and that the relationship between the child and each parent should be fostered unless inconsistent with the best interest of the child. The best interests of the child are served by a parenting arrangement that best maintains a child’s emotional growth, tribal and cultural ties, health and stability, and physical care.”); Coquille Indian Tribal Code, §743.100 (similar language); NY CLS DOM. REL. §70 (“In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.”); MASS. GEN. LAWS, ch. 208, § 28; § 31 (“In making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their

custody. When considering the happiness and welfare of the child, the court shall consider whether or not the child's present or past living conditions adversely affect his physical, mental, moral or emotional health.”).

¹⁹² *Id.* (citing *In re Marriage of Collins*, 51 P.3d 691 (Or. Ct. App. 2002)). The court reversed a trial court's modification of custody in favor of a heterosexual father, finding that the trial court relied too heavily on a non-exhibitionist display of intimacy (kissing in bed) between the child's mother and her same-sex partner. *See also Id.*, citing *A. v. A.*, 514 P.2d 358 (Or. Ct. App. 1973) (refusing to modify a lower court's award of custody to a gay father, finding that there was no evidence that the children were exposed to deviant sexual acts or that the welfare of the children was being adversely affected in any substantial way by their father's sexual orientation.); *In re Marriage of Ashling*, 599 P.2d 475 (Or. Ct. App. 1979) (“finding that a visitation agreement that restricted the mother's visitation to ‘times and places that petitioner does not have with her, in her home, or around the children, any lesbians,’ was not justified. The court reasoned that as long as the mother's sexual life remained discreet, regardless of her sexual orientation, there was no reason to restrict visitation.”).

¹⁹³ *Laws and Regulations*, *supra* note 127 (citing *Paul C. v. Tracy C.*, 209 A.D.2d 955 (N.Y. App. Div. 1994)). *See also Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980) (“Natural parents should be denied custody only if they are unfit to further the welfare of their children. ... In the total absence of evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent, we believe that the [trial] judge's finding that a lesbian household would adversely affect the children to be without basis in the record.”).

¹⁹⁴ American Civil Liberties Union and the National Center for Transgender Equality, *Protecting the Rights of Transgender Parents and Their Children: a Guide for Parents and Lawyers*, at 5, <http://www.aclu.org/transgender-parent-guide>. Sadly, we know that Two Spirit people who identify as transgender are far more likely to face obstacles as parents within our legal system due to transphobia. While we are not able to cover the full scope of those challenges in this Toolkit, the American Civil Liberties Union (ACLU) and the National Center for Transgender Equality (NCTE) have co-authored a short guide for transgender parents and their children. *See* American Civil Liberties Union and the National Center for Transgender Equality, *Protecting the Rights of Transgender Parents and their Children: A Guide for Parents and Lawyers*, <https://www.aclu.org/transgender-parent-guide>.

¹⁹⁵ American Bar Association, *Sexual Orientation as a Factor in Child Custody & Visitation Cases* (1995), http://www.americanbar.org/groups/child_law/policy/child_custody_and_support.html.

¹⁹⁶ D.C. CODE § 16-914(a)(1)(A), <http://government.westlaw.com/linkedslice/default.asp?SP=DCC-1000>.

¹⁹⁷ *LGBT Families: Facts at a Glance* (October 2011), http://www.americanprogress.org/issues/2011/10/pdf/all_children_facts.pdf.

¹⁹⁸ Movement Advancement Project. “*Foster and Adoption Laws*.” Available at http://lgbtmap.org/equality-maps/foster_and_adoption_laws. (last accessed on September 2017).

¹⁹⁹ *LGBT Adoptive and Foster Parenting*, *supra* note 60.

²⁰⁰ National Center for Lesbian Rights, *AB 458 FACT SHEET: California Foster Care Non-Discrimination Act*, http://www.nclrights.org/site/DocServer/ab458_fact_sheet.pdf?docID=1321.

²⁰¹ Hoopa Valley Tribe, Child / Family Assistance Code, §14.19.06,

<http://www.narf.org/nill/Codes/hoopacode/Title%2014%20Child%20Family%20Assistance%20Code%20June%2019%202008.pdf>.

²⁰² *Id.*

²⁰³ Child Welfare League of America, *CWLA Best Practice Guidelines: Serving LGBT Youth in Out-of-Home Care* (2006), <http://www.nclrights.org/site/DocServer/bestpracticeslgbtyouth.pdf?docID=1322>. *See also* Rudolph, *supra* note 61 (noting that a higher percentage of LGBT youth exist in the child welfare system and among those living on the streets than would be expected based on the estimated percentage of LGBT people in the general population).

²⁰⁴ Bianca D.M. Wilson, Khush Cooper, Angel Kastanis, Sheila Nezhad. “Sexual and Gender Minority Youth in Foster Care”. The William's Institute. 2014

²⁰⁵ Angela Irvine, Ph.D., Aisha Canfield M.P.P.. *Fact Sheet: The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming, and Transgender Youth in the Juvenile Justice System*. 2015.

²⁰⁶ *Id.*

²⁰⁷ *CWLA Best Practice Guidelines*, *supra* note 149.

²⁰⁸ Rudy Estrada and Jody Marksamer, *The Legal Rights of Young People in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know When Working with LGBT Youth*, <http://www.nclrights.org/legal-help-resources/resource/the-legal-rights-of-young-people-in-state-custody-what-child-welfare-and-juvenile-justice-professionals-need-to-know-when-working-with-lgbt-youth/>.

²⁰⁹ North American Council on Adoptable Children, *NACAC Position Statements: LGBTQ Children and Youth in Foster Care*, <http://www.nacac.org/policy/positions.html#LGBTQyouth>.

²¹⁰ North American Council on Adoptable Children, *NACAC Position Statements: LGBTQ Children and Youth in Foster Care*, <http://www.nacac.org/policy/positions.html#LGBTQyouth>.

²¹¹ Neal A. Palmer, Emily A Greytak, Joseph G. Kosciw, Ph.D. “Educational Exclusion Drop Out, Push Out, and the School-to-Prison Pipeline among LGBTQ Youth.” (GLSEN: Washington DC 2016). Available at <http://www.glsen.org/article/drop-out-push-out-school-prison-pipeline>.

²¹² Hoopa Valley Tribe, Child/Family Assistance Code, §14.19.06(23),

<http://www.narf.org/nill/Codes/hoopacode/Title%2014%20Child%20Family%20Assistance%20Code%20June%2019%202008.pdf>.

²¹³ Estrada et. al, *supra* note 153.

²¹⁴ Foster children: housing: gender identity. Senate Bill No. 731. (California State Legislature, 2015).

Congressional Record, daily ed., October 21, 1988, p. S17319.

²¹⁵ Alameda Co. Soc. Serv. Agency, *Department of Children and Family Services LGBT Policy*,

<http://pathwaytohome.org/adoption/LGBTPolicyFinalapproved3-6-07.pdf>. *See also* Children's Aid Soc. of Toronto, *Board Governance Policy: Equitable Child Welfare Services Relating to Sexual Orientation and Gender Identity/Expression*,

<http://www.torontocas.ca/files/Equitable%20Child%20Welfare%20Serv%20Rel.%20S-0%20&%20Gender%20Policy.adopted.mar-08.pdf>.

²¹⁶ City of N.Y., Div. of Child Prot. (2009), http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/assessing_safety_LGBT_youth_signed_0522009.pdf. Similarly, “Connecticut policy provides: ‘The Department of Children and Families has an obligation to ensure fair, equal, and non-discriminatory treatment of all individuals who identify themselves as Lesbian, Gay, Bisexual, Transgender, Questioning and Intersex....’ This policy, and others like it in Illinois and Massachusetts, as well as in the cities of New York and Los Angeles, serve as clear statements of support for LGBT youth and demonstrate a commitment to providing non-discriminatory care.” Estrada et. al, *supra* note 153.

²¹⁷ California, AB 458: California Foster Care Non-Discrimination Act, http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0451-0500/ab_458_bill_20030908_chaptered.html.

²¹⁸ *Id.*, at 28.

²¹⁹ *Id.*, at 38-39.

²²⁰ Eric Lesh, *A Measure to Ban LGBT Discrimination in Jury Selection Advances in the Senate* (July 29, 2013), <http://www.lambdalegal.org/blog/measure-to-ban-lgbt-discrimination-in-jury-selection-advances-senate>.

²²¹ Human Rights Campaign, *Juror Non-Discrimination Act/Jury ACCESS Act*, <http://www.hrc.org/laws-and-legislation/federal-legislation/juror-non-discrimination-act-jury-access-act>.

²²² Andy Birkey, *Minnesota Senators offer bill to end anti-LGBT discrimination in jury service* (January 17, 2013), <http://www.tcdailyplanet.net/news/2013/01/17/minnesota-senators-offer-bill-end-anti-lgbt-discrimination-jury-service>.

²²³ ORS § 10.030(1), <http://www.oregonlaws.org/ors/10.030>.

²²⁴ California Code of Civil Procedure, §231.5, http://www2.courtinfo.ca.gov/protem/courses/jury/stats/ccp_231_5.htm.

²²⁵ In *SmithKline v. Abbot*, the 9th circuit found that discrimination on the basis of sexual orientation is unconstitutional.

²²⁶ http://cdn.ca9.uscourts.gov/datastore/general/2013/09/12/11-17357_Document.pdf

²²⁷ Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual, and Transgender People in the U.S. 2* (2005).

²²⁸ *Id.*

²²⁹ *Id.* at 2-4, 36, 45-46, 49, 89. For example, in one New York City survey of LGBT youth, 59 out of 60 respondents reported they had experienced police harassment or violence and over one quarter of respondents felt they had been targeted based on their sexual orientation. A 2001 Los Angeles survey of transgender women revealed that 14% of respondents experienced physical abuse by a police officer and 37% experienced verbal abuse by a police officer.

²³⁰ *Id.* at 54, 58.

²³¹ Center for American Progress and the Movement Advancement Project, “Unjust: How the Broken Criminal Justice System Fails LGBT People” (2016) at 45, 47, 51, 57-58, 61-62.

²³² *Id.* at 45-49.

²³³ *Id.* at 49-51

²³⁴ *Id.* 60.

²³⁵ *Id.* 55-57

²³⁶ Karen Ocamb, *LAPD Announces Historic New Trans Guidelines and Policies*, LGBT POV (Apr. 13, 2012), http://lgbtpov.frontiersla.com/2012/04/13/lapd-announces-historic-new-trans-guidelines-and-policies/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+lgbtpov%2FhMHW+%28LGBT+POV%29; Kate Sosin, *Chicago Police Department adopts transgender policy*, WINDY CITY TIMES (Sep. 4 2012), <http://www.windycitymediagroup.com/lgbt/Chicago-Police-Department-adopts-transgender-policy/39316.html>; *Boston Police Department Issues Guidelines for Interactions with Transgender Individuals*, THE RAINBOW TIMES (June 11, 2013), <http://www.therainbowtimesmass.com/2013/06/11/boston-police-department-issues-guidelines-for-interactions-with-transgender-individuals/#>; LGBT Liaison Unit, ATLANTA POLICE DEPARTMENT, <http://www.atlantapd.org/lgbtliaison.aspx>.

²³⁷ ACLU, *Know Your Rights - Transgender People and the Law*, <https://www.aclu.org/translaw>. Such neglect has been found to be in violation of U.S. Constitutional protections against cruel and unusual punishment under the Eighth Amendment. For instance, the Seventh Circuit recently recognized rights of transgender prisoners when it affirmed a ruling striking down a Wisconsin state law banning hormone therapy and surgery for transgender inmates. *Id.* However, most courts have been reluctant to order prisons to provide the care—especially if prison medical officials do not consider the care to be “medically necessary.” *Id.*

²³⁸ Transgender Law Center, *California Transgender Law 101*, http://icenter.ucsd.edu/_files/pao/diversity-abroad/ca_trans_law_101_overview.pdf; ACLU, *supra* note 363; Amnesty International, *supra* note 355, at 59.

²³⁹ AMNESTY INTERNATIONAL, *supra* note 355, at 3, 60.

²⁴⁰ ACLU, *supra* note 363.

²⁴¹ *Id.*

²⁴² 42 USC § 15601 *et seq.*

²⁴³ 28 CFR Part 115; ACLU, *supra* note 363.

²⁴⁴ Murray D. Scheel and Claire Eustance. “Model Protocols on the Treatment of Transgender Persons by San Francisco County Jail.” (National Lawyers Guild and City and County of San Francisco Human Rights Commission 2002). Available at www.transgenderlaw.org/resources/sfprisonguidelines.doc.

²⁴⁵ See, e.g., *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006) (finding due process violations where officials failed to respond to LGBT inmates’ complaints of harassment and abuse and where the “protection” provided was placement in isolation).

²⁴⁶ AMNESTY INTERNATIONAL, *supra* note 355, at 14, 59, 92.

²⁴⁷ *Id.* at 58.

²⁴⁸ Prison Rape Elimination Act Final Rule. Available at http://ojp.gov/programs/pdfs/prea_final_rule.pdf

²⁴⁹ Los Angeles Police Department, *Police Interactions with Transgender Individuals* (Apr. 10, 2012), www.lapdonline.org/police_commission/pdf_view/50773.

²⁵⁰ Chicago Police Department, *General Order G02-01-03: Interactions with Transgender, Intersex, and Gender Nonconforming (TIGN) Individuals* (Aug. 21, 2012), <http://directives.chicagopolice.org/directives/data/a7a57b38-1394a4ae-75313-94a4-b606a68cfab99615.html?hl=true>.

²⁵¹ Based on federal PREA rules, 28 CFR section 115.42(c)-(e), and Massachusetts Department of Youth Services LGBTQ policy.

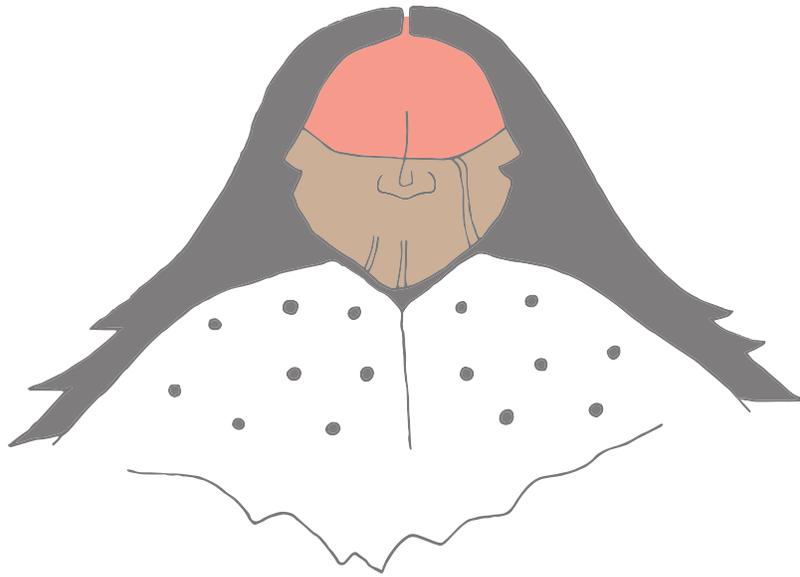
²⁵² Andrew Cray and Jack Harrison, *ID Accurately Reflecting One's Gender Identity Is a Human Right* (December 18, 2012), <http://www.americanprogress.org/issues/lgbt/report/2012/12/18/48367/id-accurately-reflecting-ones-gender-identity-is-a-human-right/>.

²⁵³ *Id.*

²⁵⁴ Lambda Legal, *Know Your Rights FAQ About Identity Documents*, <http://www.lambdalegal.org/know-your-rights/transgender/identity-document-faq>. In some instances, it is easier to change gender markers on identification if one's physician or social worker fills out standardized forms from the identification-issuing agency rather than submitting separate letters concerning medical treatment. This standardizes the process and eliminates some subjectivity in agency decision-making. *Id.*; National Center for Transgender Equality. "How Trans-friendly is the Driver's License Policy in Your State?" Available at <http://www.transequality.org/sites/default/files/DL%20Grades%20Jan%202016.docx>.

²⁵⁵ Lambda Legal, *supra* note 384.

²⁵⁶ U.S. Social Security Administration. "FAQs: Changing Gender on Social Security's records." Available at http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1667/~/~/changing-gender-on-social-security%27s-records.



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