

Legal Protections for Transgender Students

I. Title IX

A. Office for Civil Rights and Justice Department enforcement actions

Title IX of the Education Amendments of 1972 provides that no person shall “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity” receiving federal assistance “on the basis of sex.” 20 U.S.C. § 1681(a).

Under Title IX’s implementing regulations, a recipient may not, on the basis of sex, deny any person such aid, benefit, or services; treat an individual differently from another in determining whether the individual satisfies any requirement or condition for the provision of such aid, benefit, or service; provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; subject any person to separate or different rules of behavior; or otherwise limit any person in the enjoyment of any right, privilege, or opportunity.³⁵ Title IX is enforced through administrative actions and litigation initiated by either the Department of Justice, the Department of Education’s Office of Civil Rights (OCR), or both, as well as by private lawsuits.³⁶

³⁵ 34 C.F.R. § 106.31(b).

³⁶ For information on how to file a Title IX complaint with the Department of Education, see Office for Civil Rights, U.S. Dep’t of Educ., *How to File a Complaint with the Office for Civil Rights* (Sept. 2010), available at <http://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf>, and Office for Civil Rights, U.S. Dep’t of Educ., *Discrimination Complaint Form*, available at <http://www2.ed.gov/about/offices/list/ocr/complaintform.pdf>, and Office for Civil Rights, U.S. Dep’t of Educ., *Case Processing Manual* (2015), available at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.pdf>.

For transgender students, there are two pivotal questions: First, does the meaning of “sex” in Title IX include transgender people? And, second, if so, does Title IX’s prohibition on sex discrimination require schools to respect a student’s gender identity by allowing them to wear clothing appropriate to their gender identity and use restrooms and locker rooms consistent with their gender identity, requiring staff to use the student’s chosen name rather than the name on a birth certificate, and allowing transgender students to play on athletic teams that are consistent with their gender identity? An emerging body of caselaw and federal agencies say the answer to these questions is yes.

In construing the meaning of “on the basis of sex” courts and administrative agencies routinely look to cases that construe the meaning of “sex” in analogous federal statutes, most especially Title VII of the Civil Rights Act of 1964, which protects employees from discrimination based on sex, among other things.³⁷ As discussed *infra* subpart I.B, several federal courts of appeals have concluded that discrimination against transgender individuals constitutes discrimination “on the basis of sex” under Title VII and analogous statutes.³⁸

³⁷ See e.g., *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n. 1 (2d Cir. 2000) (“[I]dential standards apply to employment discrimination claims brought under Title VII, Title IX[.]”); *Miles v. New York Univ.*, 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (“Title VII, and hence Title IX, does not prohibit expressing disapproval of conduct involved in the transformation from one gender to another.”).

³⁸ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989); see also *Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573–75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000).

The two federal agencies charged with enforcing Title IX (the Department of Education's Office for Civil Rights and the Justice Department) have both concluded that transgender discrimination in the education context is sex discrimination that violates Title IX. In a Dear Colleague Letter issued jointly by the Justice Department and the Department of Education on May 13, 2016, the Departments offer guidance to districts on compliance with Title IX as it relates to educating transgender students, making clear that schools must treat transgender students consistent with their gender identity in all respects.³⁹

The Dear Colleague Letter makes clear that once a school receives notice from a student (or parent as appropriate for the age and circumstances of the student) of a student's transgender status, that school must treat that student consistent with his or her gender identity without requiring documentation of gender in the form of a birth certificate or evidence of medical diagnosis or treatment.⁴⁰ According to the Letter, schools must remedy any sex-based discrimination based on actual or perceived gender identity, transgender status, or gender transition;⁴¹ must use the student's preferred name and pronoun;⁴² permit participation in sex-segregated activities and use of sex-segregated facilities in a manner consistent with a student's gender identity;⁴³ and protect the privacy of students regarding their transgender status consistent with Title IX and the Family Educational Rights and Privacy Act.⁴⁴

Without endorsing any particular policies, the Department of Education accompanied the Dear Colleague letter with a document providing examples of policies from districts

across the country that seek to protect transgender students and honor their right to equal educational opportunities.⁴⁵ These policies should be consulted closely.

The letter and accompanying materials complements and clarifies earlier positions taken by these agencies. Even before the Letter, OCR had 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."⁴⁶ And the Justice Department has stated that "where a school provides separate restrooms for boys and girls, barring a student from the restrooms that correspond to his or her gender identity because the student is transgender constitutes unlawful sex discrimination under Title IX."⁴⁷

The Fourth Circuit, in *G.G. v. Gloucester County School Board*, upheld OCR and DOJ's interpretation that transgender discrimination is sex discrimination that violates Title IX. In that case, the school board established a policy that restricted students to using sex-segregated bathrooms that were consistent with their "biological gender."⁴⁸ *G.G.*, a transgender student in the district, brought

³⁹ Office of Elementary and Secondary Educ., Office of Safe and Healthy Students, U.S. Dep't of Educ., Examples of Policies and Emerging Practices for Supporting Transgender Students (May 13, 2016), available at <http://www2.ed.gov/about/offices/list/oesse/oshs/emergingpractices.pdf>.

⁴⁰ Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter Title IX and Sexual Violence].

⁴¹ Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, at 8 (4th Cir. Oct. 28, 2015), available at <https://www.justice.gov/crt/file/788971/download>; see also Statement of Interest of the United States, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:14cv54 (E.D. Va. June 29, 2015); Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y of Policy, Office for Civil Rights, U.S. Dep't of Educ., January 7, 2015 (filed with Statement of Interest of the United States) ("The Department's Title IX regulations permit schools to provide sex-segregated restrooms . . . under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.");

⁴² *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 15-2056, ___ F.3d ___, 2016 WL 1567467, at *2 (4th Cir. Apr. 19, 2016 rehearing denied).

³⁹ Dear Colleague Letter, Civil Rights Div., U.S. Dep't of Justice & Office for Civil Rights, U.S. Dep't of Educ., Transgender Students (May 13, 2016), available at <https://www.justice.gov/opa/file/850986/download>.

⁴⁰ *Id.* at 2.

⁴¹ *Id.* at 2-3.

⁴² *Id.* at 3.

⁴³ *Id.* at 3-4.

⁴⁴ *Id.* at 4-5.

suit to enjoin the board policy, but the district court concluded that the board policy was unlikely to violate Title IX.⁴⁹ The Fourth Circuit disagreed, concluding that transgender discrimination violates Title IX, and that the Department of Education's interpretation of its own regulations about sex-segregated facilities is entitled to deference.⁵⁰ The Education Department has made its position clear: "When a school elects to separate or treat students differently on the basis of sex... a school generally must treat transgender students consistent with their gender identity,"⁵¹ and "where a school provides separate restrooms for boys and girls, barring a student from the restrooms that correspond to his or her gender identity because the student is transgender constitutes unlawful sex discrimination under Title IX."⁵² The school board sought rehearing en banc by the full Fourth Circuit, but the court denied that request.⁵³

In addition to the *Gloucester* case, OCR and the Justice Department have brought other actions to enforce that understanding of Title IX's protections for transgender students. To date, OCR has entered into three Resolution Agreements that require districts to accept that Title IX proscribes discrimination against transgender students and that such students are entitled to use facilities, play sports, and

be referred to in ways that are consistent with their gender identities.

In Arcadia Unified School District in California, a transgender student alleged that the District denied him educational opportunities on the basis of sex by prohibiting him from accessing "(1) sex-specific facilities designated for male students at school for use during school and extracurricular activities, and (2) sex-specific student cabins for male students during a school-sponsored overnight academic camp."⁵⁴

Under the Resolution Agreement, the district agreed to work with a consultant to help the district create a safe, nondiscriminatory learning environment for students who are transgender or do not conform to gender stereotypes; amend its policies and procedures to reflect that gender-based discrimination, including discrimination based on a student's gender identity, transgender status, and nonconformity with gender stereotypes, is a form of discrimination based on sex; and train administrators and faculty on preventing gender-based discrimination and creating a nondiscriminatory school environment for transgender students.⁵⁵ Additionally, the school district agreed to treat the complaining student like all other male students in the district's education programs and activities.⁵⁶

In Downey Unified School District in California, the complaint "alleged that the District discriminated against a transgender student by failing to respond adequately to complaints that the student was subjected to verbal harassment by peers and that staff at the student's school disciplined her for wearing make-up, discouraged her from speaking about her gen-

⁴⁹ *Id.* at *3.

⁵⁰ *Id.* at *6.

⁵¹ *Id.* at *4. Another court has recognized that a college's decision to exclude a transgender female professor from the women's bathroom could constitute sex discrimination under Title IX and Title VII. See *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. 02-1531PHX-SRB, 2004 WL 2008954, at **2-3 (D. Ariz. June 3, 2004) ("[T]o create restrooms for each sex but to require a woman to use the men's restroom if she fails to conform to the employer's expectations regarding a woman's behavior or anatomy, or to require her to prove her conformity with those expectations, violates Title VII."); see also *Kastl v. Maricopa Cty.*, 325 F. App'x. 492, 493 (9th Cir. 2009) ("After *Hopkins* and *Schwenk*, it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women.").

⁵² Brief for the United States, *supra* note 47 at 8; see also Statement of Interest of the United States, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:14cv54 (E.D. Va. June 29, 2015); Letter from James A. Ferg-Cadima, *supra* note 47.

⁵³ *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 15-2056, __ F.3d __, 2016 WL 1567467 (4th Cir. Apr. 19, 2016, rehearing denied), *rehearing en banc denied*, __ F.3d __, 2016 WL 3080263 (4th Cir. May 31, 2016).

⁵⁴ Resolution Agreement Between the Arcadia Unified Sch. Dist. & the Office for Civil Rights, U.S. Dep't of Educ., and the Civil Rights Division, U.S. Dep't of Justice, OCR Case No. 09-12-1020 1 (July 24, 2013), available at <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf> [hereinafter Arcadia Resolution Agreement].

⁵⁵ *Id.* at 2-6.

⁵⁶ *Id.* at 3-4.

der identity with classmates and suggested that she transfer to another school.⁵⁷

The Resolution Agreement in that case requires the district to, among other things, engage a consultant to help the district develop transgender policies and practices that prevent and remedy transgender discrimination and harassment; treat the student as female for all purposes, including allowing access to sex-segregated facilities; ensure that the student is not disciplined for expressing her gender identity, in appearance or manner; remove all discipline from the student's record; and develop and conduct trainings and conduct annual school climate assessments to evaluate the effectiveness of the antidiscrimination policies.⁵⁸

And, in Township High School District 211 in Palatine, Illinois, the complaint "alleged that the District denied [the transgender] Student access to the girls' locker rooms because of her gender identity and gender nonconformity."⁵⁹ OCR concluded that "as a result of the District's denial of access to the girls' locker rooms, [the student] has not only received an unequal opportunity to benefit from the District's educational program, but has also experienced an ongoing sense of isolation and ostracism throughout her high school enrollment at the School," and hence, Title IX was violated.⁶⁰ This was "the first time that the Department's Office for Civil Rights had found a school district in violation of Title IX over trans-

gender issues."⁶¹ In the other cases detailed above, the Districts had entered into Resolution Agreements under which they did not "admit[] any unlawful conduct" and OCR made no specific finding of unlawful conduct.⁶²

The Resolution Agreement in Township required the District to engage a consultant with expertise in child and adolescent gender identity, including transgender and gender nonconforming youth, to assist the district in implementing the resolution agreement; provide the student with access to the girls' locker rooms and access to a private changing station in those rooms; protect all students' privacy by installing privacy curtains in the girls' locker rooms; provide use of a reasonable alternative for any student requesting additional privacy; ensure that the student has access to facilities for female students at off-campus, district-sponsored activities; adopt and publish a revised notice of nondiscrimination on the basis of sex; and, notify OCR of every gender-based discrimination or harassment complaint or incident.⁶³

B. Developing consensus that transgender discrimination is sex discrimination

Initially, most courts—and three Circuit courts in particular (the Seventh, Eighth, and Ninth)—that considered whether transgender discrimination was proscribed by Title VII's prohibition against sex discrimination concluded

⁵⁷ Press Release, Office for Civil Rights, U.S. Dep't of Educ., U.S. Department of Education's Office for Civil Rights Announces Resolution of Civil Rights Investigation of California's Downey Unified School District (Oct. 14, 2014), available at <http://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-civil-rights-investigation-californias-downey-unified-school-district>.

⁵⁸ See Resolution Agreement between Downey Unified Sch. Dist. & the Office for Civil Rights, U.S. Dep't of Educ., OCR Case No. 09-12-1095 (Oct. 8, 2014), available at <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf> [hereinafter Downey Resolution Agreement].

⁵⁹ Letter of Findings, Office for Civil Rights, U.S. Dep't of Educ., Twp. High Sch. Dist. 211, Palatine, Illinois: OCR Case No. 05-14-1055 (Nov. 2, 2015), available at <http://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf>.

⁶⁰ *Id.* at 10.

⁶¹ Press Release, Office for Civil Rights, U.S. Dep't of Educ., Settlement Reached with Palatine, Ill., Township High School District to Remedy Transgender Discrimination (Dec. 3, 2015), available at <http://www.ed.gov/news/press-releases/settlement-reached-palatine-ill-township-high-school-district-211-remedy-transgender-discrimination>.

⁶² See, e.g., Downey Resolution Agreement, *supra* note 58 at 1 (agreement reached without District "admitting any unlawful conduct" and "without a compliance determination by OCR"); Arcadia Resolution Agreement, *supra* note 54 (reached without the District "admitting any unlawful conduct").

⁶³ See Resolution Agreement between U.S. Dep't of Educ., Office for Civil Rights & Township High Sch. Dist. 211, OCR Case No. 05-14-1055 (Dec. 2, 2015), available at <https://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf> [hereinafter Palatine Resolution Agreement].

that it was not.⁶⁴ These courts reached that conclusion based primarily on two rationales: (1) that the “traditional” or “plain” meaning of the word “sex” means only differences “based on anatomical characteristics,”⁶⁵ and hence Title VII proscribed only discrimination “against women because they are women and against men because they are men.”⁶⁶ And (2) that Congress, in passing Title VII, could not have intended to protect transgender individuals from sex discrimination.⁶⁷

Both of these rationales, however, have long since been “eviscerated” by subsequent Supreme Court decisions.⁶⁸ First, in *Price Waterhouse v. Hopkins*,⁶⁹ the female plaintiff, Hopkins, alleged that the accounting firm Price Waterhouse discriminated against her when it failed to promote her, not because she was a woman per se but because she was insufficiently feminine.⁷⁰ Price Waterhouse had promoted women, but did not promote Hopkins because she was sometimes “aggressive,” “macho,” and used “foul language,” contrary to how a “lady” should act.⁷¹ Hopkins was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁷²

Six members of the Supreme Court in *Price Waterhouse* concluded that Hopkins had alleged sex discrimination because Title VII barred “not just discrimination because of bi-

ological sex.”⁷³ The four-justice plurality⁷⁴ reasoned that the plaintiff had stated a claim because of “Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.”⁷⁵ Title VII “mean[s] that gender must be irrelevant to employment decisions.”⁷⁶ “In the specific context of sex stereotyping,” an employer who “acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”⁷⁷ Justice O’Connor concurred in the judgment, underscoring that discrimination occurs when decisions are made in “consideration of [the plaintiff’s] gender.”⁷⁸ Justice Kennedy likewise agreed, noting that evidence of stereotyping is “quite relevant to the question of discriminatory intent.”⁷⁹ Thus, under *Price Waterhouse*, any time gender is relevant to the challenged decision, sex discrimination occurs.

Second, in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court decided that Title VII proscribes same-sex sexual harassment in certain situations as well as opposite sex harassment, even if “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII.”⁸⁰ “[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”⁸¹ Thus, the notion that transgender discrimination is not covered under Title VII because the Congress that

⁶⁴ See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977), overruling recognized by *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

⁶⁵ *Holloway*, 566 F.2d at 662; see also *Sommers*, 667 F.2d at 749.

⁶⁶ *Ulane*, 742 F.2d at 1085.

⁶⁷ *Id.*; *Sommers*, 667 F.2d at 750; *Holloway*, 566 F.2d at 662.

⁶⁸ *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)).

⁶⁹ 490 U.S. 228 (1989).

⁷⁰ *Id.* at 234–35.

⁷¹ *Id.* at 235.

⁷² *Glenn*, 663 F.3d at 1316 (discussing this aspect of *Price Waterhouse*).

⁷³ *Glenn*, 663 F.3d at 1316 (discussing this aspect of *Price Waterhouse*).

⁷⁴ There was no majority opinion because the Court was divided over the proper causation standard in a mixed-motive case. See *Price Waterhouse*, 490 U.S. at 258–61 (White, J., concurring), 261–62 (O’Connor, J., concurring).

⁷⁵ *Id.* at 239.

⁷⁶ *Id.* at 240.

⁷⁷ *Id.* at 250.

⁷⁸ *Id.* at 261 (O’Connor, J., concurring).

⁷⁹ *Id.* at 294 (Kennedy, J., dissenting).

⁸⁰ 523 U.S. 75, 79 (1998).

⁸¹ *Id.*

passed Title VII did not specifically contemplate that result is likewise untenable.

Since the decisions in *Price Waterhouse* and *Oncale*, federal appellate courts have recognized with near-total uniformity that “the approach in *Holloway*, *Sommers*, and *Ulane* . . . has been eviscerated’ by *Price Waterhouse*’s holding that ‘Title VII’s reference to “sex” encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.’⁸² Based on this, the First, Fourth, Sixth, Ninth, and Eleventh Circuits, as well as several district courts, have all held that transgender discrimination can be discrimination based on “sex.”⁸³

In light of and preceding some of these decisions, in 2012, the U.S. Equal Employment Opportunity Commission—which had previ-

ously followed the *Holloway*, *Sommers*, and *Ulane* line of cases—likewise concluded that discrimination against transgender individuals is sex discrimination under Title VII.⁸⁴ And soon thereafter, the other federal agencies that enforce laws that proscribe sex discrimination followed suit, including the Department of Education,⁸⁵ the Department of Justice,⁸⁶ the Department of Labor,⁸⁷ the Department of Health and Human Services,⁸⁸ the Department of Housing and Urban Development,⁸⁹ and

⁸⁴ See *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1 (EEOC April 20, 2012), available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

⁸⁵ Title IX and Sexual Violence, *supra* note 46 at 5 (“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.”); Office for Civil Rights, U.S. Dep’t of Educ., Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (Dec. 1, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf> [hereinafter Title IX and Single-Sex] (“Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.”).

⁸⁶ Memorandum from the Office of the Att’y Gen., Dep’t of Justice to U. S. Att’y’s and Justice Dep’t Component Heads at 2 (Dec. 15, 2014) (“After considering the text of Title VII, the relevant Supreme Court case law interpreting the statute, and the developing jurisprudence in this area, I have determined that the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status. . . . [T]he Department will no longer assert that Title VII’s prohibition against discrimination based on sex does not encompass gender identity per se (including transgender discrimination).”), available at <https://www.justice.gov/file/188671/download>.

⁸⁷ U.S. Dep’t of Labor, Training and Employment Guidance Letter No. 37-14 at 2 (May 29, 2015), available at http://wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14.pdf (“Although gender identity is not an explicitly protected basis under the applicable federal laws, discrimination based upon gender identity, gender expression, and gender stereotyping has been interpreted to be a form of prohibited sex discrimination, including under laws that apply to federally financially assisted employment, training, and education programs and activities.”).

⁸⁸ HHS’s proposed rule construes Section 1557 of the Affordable Care Act’s prohibition on sex discrimination, see 42 U.S.C. § 18116, to include transgender discrimination. See Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54,172-01 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92), available at <https://www.regulations.gov/#!documentDetail;D=HHS-OCR-2015-0006-0001>; see also *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *7 (D. Minn. Mar. 16, 2015) (concluding, even before the proposed rule, that the Affordable Care Act’s prohibition on “sex” discrimination banned gender identity discrimination).

⁸⁹ Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,662-01 (final rule Feb. 3, 2012) (to be codified at 24 C.F.R. pts. 5, 200, 203, 236, 400, 570, 574, 882, 891, 982) (declaring that housing discrimination based on gender nonconformity violates the federal Fair Housing Act, and adopted regulations prohibiting discrimination on the basis of gender expression or identity in federally funded housing programs), available at <https://portal.hud.gov/hudportal/documents/huddoc?id=12lgbtfinalrule.pdf>.

⁸² *Glenn*, 663 F.3d at 1318 n.5 (quoting *Smith*, 378 F.3d at 573); see also *Schwenk*, 204 F.3d at 1201-02. The conclusions reached by these courts is not in reality a “new” interpretation of the meaning of “sex.” The term has always encompassed something more than just biological differences. See *Fabian v. Hosp. of Cent. Connecticut*, No. 3:12-CV-1154 (SRU), ___ F. Supp. 3d ___, 2016 WL 1089178, at *13 (D. Conn. Mar. 18, 2016). And the history of gender discrimination shows that the discrimination was motivated not by a desire to treat women differently because of anatomical differences, but was in fact motivated by a desire to enforce certain gender norms against women. “Historically, women’s capacity to become pregnant and their status as mothers have served as central justifications for their exclusion from the workforce.” Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 Harv. L. Rev. 1307, 1360 (2012). And women were routinely denied civic and economic opportunities based on the stereotype that a woman’s primary role was in the home. See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 62-63 (1961) (excusing women from jury service constitutional because a woman’s role “as the center of home and family life” is incompatible with full participation in the public sphere); *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (upholding a “protective” labor law on the grounds that ensuring “the proper discharge of [women’s] maternal functions” justifies the restriction on their right to work).

⁸³ *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (holding there is sex discrimination under federal law banning sex discrimination in banking when a “Bank . . . treat[s] . . . a woman who dresses like a man differently than a man who dresses like a woman”); *Smith*, 378 F.3d at 574-75 (transgender employee had cause of action under Title VII, “because Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination” regardless whether that person’s gender nonconformity can also be labeled transsexual or transgender); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (same); *Schwenk*, 204 F.3d at 1201-02 (same); *Glenn*, 663 F.3d at 1317 (same); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305-06 (D.D.C. 2008) (concluding the same); *Schroer v. Billington*, 424 F. Supp. 2d 203, 212 (D.D.C. 2006) (endorsing the notion that “discrimination against transsexuals because they are transsexuals is ‘literally’ discrimination ‘because of...sex’” as a “straightforward way to deal with the factual complexities that underlie human sexual identity.”).

the Occupational Safety and Health Administration.⁹⁰ President Obama similarly issued an executive order announcing that discrimination based on gender identity is prohibited for purposes of federal employment and government contracting.⁹¹

Some of the transgender court decisions explicitly recognize that sex discrimination occurs anytime disparate treatment takes someone's gender into account and thus transgender discrimination is per se sex discrimination. The Ninth Circuit in *Schwenk*, for example, both made clear that "cases such as *Holloway* have been overruled by the logic and language of *Price Waterhouse*" and that "[w]hat matters, for purposes of... the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim," and discrimination against transgender individuals is so related.⁹² As the Eleventh Circuit put it in *Glenn*, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes" and "[t]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior."⁹³ Transgender discrimination is quite obviously discrimination "related to the sex of the victim,"⁹⁴ and thus is contrary to the Su-

preme Court's admonition "that gender must be irrelevant to employment decisions."⁹⁵

And the EEOC made the same point this way:

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision."⁹⁶

Some courts, however, have characterized the sex-stereotyping theory as a distinct type of claim that requires specific types of proof. Most of these courts have nonetheless concluded that transgender discrimination is sex

⁹⁰ OSHA, A Guide to Restroom Access for Transgender Workers (June 1, 2015) ("All employees should be permitted to use the facilities that correspond with their gender identity."), available at <https://www.osha.gov/Publications/OSHA3795.pdf>.

⁹¹ Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

⁹² *Schwenk*, 204 F.3d at 1201-02. *Schwenk* involved a claim by a transgender female prisoner under the Gender Motivated Violence Act seeking relief for a sexual assault she suffered at the hands of a prison guard. *Id.* at 1194. Congress intended the GMVA's sex provisions to be construed the same way as Title VII's. *Id.* at 1200-01. The Eighth Circuit also may have recognized that *Holloway* was overruled or at least abrogated. See *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 702-03 (8th Cir. 2012) (dismissing a claim brought a transgender person, not because of *Holloway's* reasoning, but because there was no evidence that the decisionmaker knew that the plaintiff was "transgendered or perceived him as transgendered and discriminated against him on that basis"). The Seventh Circuit has not yet decided *Ulane's* continuing viability.

⁹³ *Glenn*, 663 F.3d at 1316 (quoting Ilona Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007)).

⁹⁴ *Schwenk*, 204 F.3d at 1202.

⁹⁵ *Price Waterhouse*, 490 U.S. at 240.

⁹⁶ *Macy*, 2012 WL 1435995 at *7 (quoting *Price Waterhouse*, 490 U.S. at 244 and *Schwenk*, 204 F.3d at 1202).

discrimination under a stereotyping theory.⁹⁷ But some have concluded that transgender individuals can state a Title VII claim only if they specifically prove that the employer engaged in disparate treatment based upon the employee's failure to conform to certain sex stereotypes. The Tenth Circuit, for example, recognized that *Price Waterhouse* "may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex."⁹⁸ But it nevertheless concluded that "transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual."⁹⁹ To reach that conclusion, the court relied on the notion from *Holloway* (without acknowledging that the Ninth Circuit had already expressly recognized that it was overruled), *Sommers*, and *Ulane*, that "the plain meaning of 'sex'

⁹⁷ *Rosa*, 214 F.3d at 215-16 ("That is, the Bank ... treat[s] ... a woman who dresses like a man differently than a man who dresses like a woman."); *Smith*, 378 F.3d at 572 ("based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance"); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 659-661 (S.D. Tex. 2008) ("Title VII and *Price Waterhouse* ... do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and [a] 'macho' female who ... is perceived by others to be in non-conformity with traditional gender stereotypes."); *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (holding that a transgender plaintiff may state a claim for sex discrimination by "showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions"); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) ("Tronetti, however, is not claiming protection as a transsexual. Rather, Tronetti is claiming to have been discriminated against for failing to 'act like a man.'").

⁹⁸ *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1223-24 (10th Cir. 2007).

⁹⁹ *Id.* at 1222.

encompasses [no]thing more than male and female."¹⁰⁰

Similarly, a district judge in Pennsylvania concluded that a transgender student failed to state a Title IX claim in his challenge to the University's policy of requiring students to use sex-segregated bathroom and locker room facilities because, according to the court, Title IX does not proscribe gender identity discrimination and the plaintiff did not show that the University was motivated by stereotypes.¹⁰¹ (That case settled on appeal with the University agreeing to alter its policy to allow access to facilities based on gender identity.)¹⁰²

The *Gloucester, Schwenk, Glenn, Macy, Schroer*, and *Fabian* reading—that sex-stereotyping is not a separate claim with distinct proof standards and that transgender discrimination is necessarily gender discrimination—is the better reading of *Price Waterhouse*. As the

¹⁰⁰ *Id.* Other courts have concluded that transgender discrimination would be sex discrimination even without *Price Waterhouse*. "Even if the decisions that define the word 'sex' in Title VII as referring only to anatomical or chromosomal sex are still good law," discrimination based upon a medical transition, or in other words based on a person "undergoing sex reassignment surgery was literally discrimination 'because of ... sex.'" *Schroer v. Billington*, 577 F. Supp. 2d at 308 (concluding that transgender discrimination was sex discrimination under several theories); *id.* 306-07 ("Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.'"); see also *Fabian*, 2016 WL 1089178, at *13 ("[T]he word 'sex' refers to the property by which individuals are so classified" and not just two types of sex—male and female. "No court would make such a mistake [with religion] because no court would implicitly define religion as synonymous with a purportedly exhaustive list of religions, and thus could not conclude that discrimination 'because of religion' must be limited to discrimination against members of particular religions on the list because they are such members.").

¹⁰¹ *Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 680-82 (W.D. Pa. 2015).

¹⁰² Pursuant to the settlement, the University of Pittsburgh now recognizes that "[f]aculty, staff, and students are welcome to use ... any restroom that corresponds to their gender identity" and has convened a university task force to "make recommendations regarding the implementation of best practices for institutions of higher education vis-à-vis transgender individuals, particularly with respect to transgender individuals' access to gender-specific spaces in accordance with their gender identity." Joint Statement from the University of Pittsburgh and Seamus Johnston (March 29, 2016), available at <http://www.news.pitt.edu/news/joint-statement-university-pittsburgh-and-seamus-johnston>. Johnston's lawyers hailed the settlement as a "victory." See Dominic Holden, *Transgender Student Settles Locker Room Case With University Of Pittsburgh*, BuzzFeed.com (March 29, 2016), <http://www.buzzfeed.com/dominicholden/transgender-student-settles-locker-room-case-with-university#.tfnxJZl100>.

Price Waterhouse plurality made clear, “stereotyped remarks can certainly be evidence that gender played a part” in the disparate treatment, but the central question is always whether the decisionmaker “actually relied on [the person’s] gender in making its decision.”¹⁰³ Justice Kennedy likewise made clear that while “Title VII creates no independent cause of action for sex stereotyping,” evidence of stereotyping by employers is “quite relevant to the question of discriminatory intent.”¹⁰⁴

In sum, while courts have relied on slightly different reasoning for concluding that Title VII’s prohibitions on sex discrimination protect transgender individuals, nearly all have held that discrimination against transgender individuals is sex discrimination under Title VII and, therefore, transgender individuals are likely protected under Title IX as well, as the Fourth Circuit has held.

II. Other legal protections for transgender students

A. Equal Protection Clause

Transgender discrimination by public schools and public universities could also violate the Equal Protection Clause under at least two different theories.

First, such transgender discrimination would violate the Equal Protection clause for the same reasons that such discrimination violates Title VII and Title IX. As a general matter, “the disparate treatment standard of Title VII applies as well to [sex discrimination] claims arising under the equal protection clause and Title IX.”¹⁰⁵ If a public entity is violating Title IX, it would also likely be in violation of the Equal

Protection Clause.¹⁰⁶ And the Sixth and Eleventh Circuits, in the already discussed cases of *Glenn v. Brumby* and *Smith v. City of Salem*, have recognized that transgender discrimination violates the Equal Protection Clause for the same reasons it violates Title VII.¹⁰⁷

While the definition of sex discrimination is the same between Title IX and the Equal Protection Clause,¹⁰⁸ the substantive protections and covered entities can differ substantially. “Title IX reaches institutions and programs that receive federal funds, 20 U.S.C. § 1681(a), which may include nonpublic institutions, § 1681(c), but it has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals.”¹⁰⁹ “The Equal Protection Clause reaches only state actors, but § 1983 equal protection claims may be brought against individuals as well as municipalities and certain other state entities.”¹¹⁰ And Title IX exempts certain forms of discrimination that may be actionable under the Equal Protection Clause. “For example, Title IX exempts elementary and secondary schools from its prohibition against discrimination in admissions, § 1681(a)(1); it exempts military service schools and traditionally single-sex public colleges from all of its provisions, §§ 1681(a)(4)-(5),” but such discrimination may well violate the Constitution.¹¹¹

And in the context of transgender discrimination, there is another factor that bears mentioning. Under Title IX, the case generally ends once gender discrimination is established, but

¹⁰³ *Price Waterhouse*, 490 U.S. at 251; see also *Fabian*, 2016 WL 1089178, at *9 (“[T]here is no independent gender-stereotyping cause of action separate from sex discrimination *per se*; rather, *Price Waterhouse* shows that gender-stereotyping discrimination is sex discrimination *per se*.”).

¹⁰⁴ *Id.* at 294 (Kennedy, J., dissenting).

¹⁰⁵ See, e.g., *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988).

¹⁰⁶ State-sanctioned “gender discrimination” is unconstitutional unless the discrimination is substantially related to an important government purpose and state action that perpetuates gender stereotypes likewise constitutes sex discrimination, see *Craig v. Boren*, 429 U.S. 190, 197, 198–99 (1976).

¹⁰⁷ See *Glenn*, 663 F.3d at 1317; *Smith*, 378 F.3d at 576–77.

¹⁰⁸ While they are very similar, they are not wholly congruent. For example, the requirements for school district liability for sexual harassment differ for Title IX and the Equal Protection Clause. See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257–58 (2009) (holding that both Title IX and the Equal Protection Clause are available to plaintiffs alleging unconstitutional gender discrimination in schools).

¹⁰⁹ *Id.* at 257.

¹¹⁰ *Id.*

¹¹¹ *Id.*

under the Equal Protection Clause, gender discrimination is constitutional if the discriminatory conduct is "substantially related to a sufficiently important governmental interest."¹¹²

Governmental entities are likely to assert that refusing to allow transgender individuals to use restrooms consistent with their gender identity, to name one example, serves the important governmental interest of protecting the privacy and safety of non-transgender individuals. The Eleventh Circuit in *Glenn* specifically rejected that argument because in that case there was no evidence that the decisionmaker was actually motivated by those concerns.¹¹³

Second, transgender discrimination may violate the Equal Protection Clause because transgender individuals are a protected class. For example, in *Adkins v. City of New York*,¹¹⁴ the Southern District of New York read the Second Circuit's decision striking down the Defense of Marriage Act to also mean that transgender people are a "quasi-suspect" class and therefore that transgender disparate treatment is subject to "intermediate scrutiny." According to the *Adkins* court, the Second Circuit "held that gay people were a quasi-suspect class on the basis of four factors: gay people have suffered a history of persecution; sexual orientation has no relation to ability to contribute to society; gay people are a discernible group; and gay people remain politically weakened."¹¹⁵ And "[w]hile transgender people and gay people are not identical, they are similarly situated with respect to each of [those] four factors."¹¹⁶

B. Right to privacy about transgender issues

The Family Educational Rights and Privacy Act (FERPA) applies to all educational agencies

¹¹² See, e.g., *Glenn*, 663 F.3d at 1321 (quoting *City of Cleburne v. Cleburne Living Cntr.*, 473 U.S. 432, 441 (1985)).

¹¹³ See *id.*

¹¹⁴ No. 14-cv-7519, ___ F. Supp. 3d ___, 2015 WL 7076956, at *3 (S.D.N.Y. Nov. 15, 2015).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

and institutions that receive funds under any program administered by the Secretary of Education and protects the privacy interests of parents and students in a student's "education records." "Education records" are broadly defined, including records that are: (1) directly related to a student and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. 34 C.F.R. § 99.3. Medical records (including counseling records) are generally considered to be education records.¹¹⁷

Under FERPA, a parent or eligible student, that is, any student who has reached 18 years of age or attends a post-secondary institution, must provide a signed and dated written consent before the agency or institution discloses personally identifiable information from the student's education records.¹¹⁸ FERPA permits the disclosure of eligible students' education records without consent only under limited circumstances,¹¹⁹ and sharing a student's transgender identity would rarely, if ever, meet those limited exceptions.¹²⁰

¹¹⁷ U.S. Dep't of Health & Human Servs. & U.S. Dep't of Educ., (*Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records*), at 2 (Nov. 2008), available at <http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf> ("At the elementary or secondary level, a student's health records, including immunization records, maintained by an educational agency or institution subject to FERPA, as well as records maintained by a school nurse, are 'education records' subject to FERPA.").

¹¹⁸ 34 C.F.R. § 99.30.

¹¹⁹ For those limited exceptions, see 20 U.S.C. §§ 1232g (b), (h)-(j) and 34 C.F.R. § 99.31. For a high-level overview of the FERPA exceptions, see Privacy Technical Assistance Center, U.S. Dep't of Educ., (*FERPA Exceptions—Summary*) (April 2014), available at http://ptac.ed.gov/sites/default/files/FERPA%20Exceptions_HANDOUT_horizontal_0.pdf.

¹²⁰ It bears mentioning that "[t]he Department currently interprets FERPA as not conflicting with the Title IX ... but if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions." Office for Civil Rights, U.S. Dep't of Educ., *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* vii (Jan. 19, 2001) [hereinafter *Sexual Harassment Guidance*], available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

Disclosure of a student's transgender status or requiring students to produce records of the student's transgender status may violate the constitutional right to privacy. In *Whalen v. Roe*, the Supreme Court acknowledged a substantive due process right to informational privacy in "avoiding disclosure of personal matters," and in "making certain kinds of important decisions."¹²¹ Since then, "[e]very circuit except for the D.C. Circuit has now recognized a constitutional right to informational privacy, but the scope of protection varies."¹²²

In *Sterling v. Borough of Minersville*,¹²³ for example, the Third Circuit held that a police officer's disclosure of a citizen's sexual orientation gave rise to constitutional claim for the violation of privacy.¹²⁴ In that case, a police officer discovered two male teenagers in a parked car at night and threatened to disclose to one of the teenager's relatives that the teenager was gay, and the threat led one of the teenagers to commit suicide.¹²⁵ Despite recognizing the right, the court affirmed the lower court's summary judgment based on qualified immunity because there was no clearly established right in the Third Circuit yet.¹²⁶ And at least one court has recognized the compelling interest in privacy that individuals who have transitioned possess: transgender individuals "understandably might desire to conduct their affairs as if such a transition was never necessary."¹²⁷

In the education context in particular, the Third Circuit has held that a high school swim coach violated a student's constitutional right to privacy when he compelled the student to submit to a pregnancy test that was adminis-

tered by other students.¹²⁸ A federal district court in California has similarly held that a student had a reasonable expectation of privacy about her sexual orientation, and that even though she was out at school, she had a protected interest in not being outed to her parents by school officials.¹²⁹

Since the scope of these protections vary, each Circuit's precedent should be consulted when evaluating any specific case.

C. Right to change school records

In addition to protecting the private records of students, FERPA provides students—current and former—with the right to seek to amend their school records when the records are "inaccurate, misleading, or in violation of the student's rights of privacy."¹³⁰ A person who has transitioned genders has a privacy interest in records that would reveal the transition to future educational institutions, employers, or others.¹³¹

Given that, transgender students wishing to change their name and gender marker on their educational records should be able to seek such an amendment under FERPA. Parents (for students under 18) and students (for those over 18 or who attend a postsecondary educational institution)¹³² are entitled to a hearing, at which they can challenge the content of school records to ensure that the records are not inaccurate, misleading or otherwise in violation of their privacy rights.¹³³

Changes can also be made after graduation. Transgender students may wish to amend their secondary educational records after graduation to ensure that anyone who

¹²¹ 429 U.S. 589, 599–600 (1977).

¹²² See Emily Gold Waldman, *Show and Tell?: Students' Personal Lives, Schools, and Parents*, 47 Conn. L. Rev. 699, 707 (2015) (collecting cases).

¹²³ 232 F.3d 190 (3d Cir. 2000).

¹²⁴ *Id.* at 196–97.

¹²⁵ *Id.* at 192–93.

¹²⁶ *Id.* at 197–98.

¹²⁷ See *Powell v. Schriver*, 175 F.3d 107, 111–12 (2d Cir. 1999).

¹²⁸ *Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000).

¹²⁹ *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1192–95 (C.D. Cal. 2007).

¹³⁰ 34 C.F.R. § 99.7(a)(2)(ii).

¹³¹ See *Powell*, 175 F.3d at 111–12 ("Individuals who have chosen to abandon one gender in favor of another understandably might desire to conduct their affairs as if such a transition was never necessary. That interest in privacy ... is particularly compelling.")

¹³² 34 C.F.R. §§ 99.4–99.5.

¹³³ 34 C.F.R. §§ 99.7(a)(2)(ii), 99.21.

requests those records (for example, college admissions offices or potential employers) see only the correct name and gender marker on their transcript.¹³⁴

It should be noted that in 1991, the Department of Education's Family Policy Compliance Office issued a letter saying FERPA does not apply to requests for record changes regarding transgender status, because, according to the letter, records reflecting a student's gender or name as of a certain date contain are not erroneous.¹³⁵ The letter does not address the problem of changing the records to prevent disclosure of a gender transition, which would violate a student's privacy rights. Given the Department of Education's changing views on transgender discrimination, it remains to be seen how the Department would view this issue now.

D. First Amendment liberty interest in gender expression

Transgender students also may have a First Amendment right to express their gender identity, which would include the right to dress in conformity with that identity, regardless of any contrary school restrictions. As a general matter, Circuit courts throughout the country have recognized a liberty interest in appearance.¹³⁶ And

the Supreme Court has assumed without deciding that such a liberty interest exists.¹³⁷

In the education context in particular, a liberty interest under the First Amendment has been recognized to protect male students' right to wear their hair as they wish.¹³⁸ And a Massachusetts trial court has specifically concluded that a transgender student has a First Amendment liberty interest in wearing clothing consistent with her female gender identity.¹³⁹ In *Doe v. Yunits*, that court found that the student plaintiff was likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she was expressing her identification with that gender and that such expression was important to her health and well-being.¹⁴⁰ The court applied the rule of *Tinker v. Des Moines Community School District*,¹⁴¹ requiring the school to establish that the suppression of speech was necessary because otherwise the expression would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Other students' reaction to the dress would not establish such interference; only the plaintiff's conduct matters. Otherwise, those who oppose her gender expression would have a

¹³⁴ See generally Lambda Legal, *(A Transgender Advocate's Guide to Updating and Amending School Records)* (2014), available at http://www.lambdalegal.org/sites/default/files/publications/downloads/factsheet_ferpa.pdf.

¹³⁵ Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Karol Johnson, Assistant Superintendent, Great Falls Public Schools (Nov. 13, 1991).

¹³⁶ See *Zalewska v. Cty. of Sullivan*, New York, 316 F.3d 314, 321 (2d Cir. 2003) (assuming existence of a liberty interest in appearance and agreeing with the District Court's comment that courts have recognized the interest in a "veritable fashion show of different factual scenarios," but upholding constitutionality of transit employee uniforms); *Rathert v. Village of Peotone*, 903 F.2d 510, 514 (7th Cir. 1990) (assuming liberty interest in appearance but upholding prohibition on police officers wearing ear studs); *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1367 (11th Cir. 1987) (prohibition on shirtless male jogging irrational and arbitrary); *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 101 (5th Cir. 1982) (recognizing liberty interest but upholding dress code prohibition on beards applied to teachers in public school).

¹³⁷ See *Kelley v. Johnson*, 425 U.S. 238, 244 (1976) (assuming liberty interest in appearance for police officers but upholding police department's regulation of hair length and facial hair because of the state's interest and latitude in regulating its police force).

¹³⁸ See *Richards v. Thurston*, 424 F.2d 1281, 1285 (1st Cir. 1970).

¹³⁹ See *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *6 (Mass. Super. Oct. 11, 2000), aff'd sub nom. *Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

¹⁴⁰ *Id.* at *3.

¹⁴¹ *Id.*; 393 U.S. 503, 509 (1969). In *Tinker v. Des Moines Independent Community School District*, school officials suspended students for wearing black armbands in protest of the Vietnam War, and the Supreme Court held that suppression of the students' political expression could not be validated when the students' behavior did not contribute to a disturbance in the educational environment. See *id.* 508. Under *Tinker*, when school officials attempt to restrict students from expressing particular views, they must demonstrate that the expression would "substantially interfere with the work of the school or impinge upon the rights of other students." *Id.* at 509.

“heckler’s veto.”¹⁴² Tinker’s disruption rule applies only when the plaintiff’s own disruptive activities interfere with the ability to maintain order and discipline.¹⁴³

E. First Amendment right to LGBT student groups

A number of Equal Access Act cases in lower courts have established the right of students to form LGBT clubs on public school campuses; and the First Amendment similarly protects students’ right to advocate for equality, tolerance, and pride where such advocacy is not disruptive.¹⁴⁴

F. Americans with Disabilities Act

As applied to education, Title II of the Americans with Disabilities Act (ADA), prohibits a qualified individual with a disability from being excluded from participation in or being denied the benefits of the services, programs, or activities of a public entity, or being subjected to discrimination by any such entity because of the individual’s disability.¹⁴⁵

But the ADA and ADA Amendments Act of 2008 specifically exempt “gender identity disorders not resulting from physical impairments.”¹⁴⁶ Some in the medical community, however, have begun to treat gender dysphoria as a condition resulting from a physical impairment arising from genetic or hormonal

issues *in utero*.¹⁴⁷ If that were correct, gender dysphoria could be covered under the ADA.

It bears noting that the notion that being transgender is in any way a disability is a deeply controversial one inside the transgender community.¹⁴⁸

G. State and local laws

As with federal law, transgender students are protected by various state and local laws, which vary around the country. Many jurisdictions explicitly prohibit discrimination in schools based on gender identity or expression as well as sexual orientation. California,¹⁴⁹ Colorado,¹⁵⁰ Connecticut,¹⁵¹ the District of Columbia,¹⁵² Illinois,¹⁵³ Iowa,¹⁵⁴ Maine,¹⁵⁵ Massachusetts,¹⁵⁶ Minnesota,¹⁵⁷ New Jersey,¹⁵⁸ New York,¹⁵⁹ Oregon,¹⁶⁰ Vermont,¹⁶¹ and Washington State¹⁶²

¹⁴⁷ See Second Statement of Interest of the United States of America, *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-cv-4822-JFL (E.D. Pa. Nov. 16, 2015) (arguing that the ADA is not unconstitutional because its discriminatory transgender provision can be read to cover transgender people under a physiological theory), available at <http://www.glad.org/uploads/docs/cases/blatt-v-cabelas/blatt-v-cabelas-doj-soi-11-16-15.pdf>.

¹⁴⁸ See Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 *Yale Hum. Rts. & Dev. L.J.* 1, 4 (2013) (“But some in the transgender community—echoing the call of gay, lesbian, and bisexual people over thirty years ago—believe that GID is not a mental impairment and therefore has no business being in the DSM.”).

¹⁴⁹ Cal. Educ. Code § 221.5(f) (“A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”); see also Cal. St. Assem., Bill Analysis of AB 1266, at 2 (Apr. 25, 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1251-1300/ab_1266_cfa_20130501_170107_asm_floor.html.

¹⁵⁰ Colo. Rev. Stat. Ann. §22-32-109 (2011).

¹⁵¹ Conn. Gen. Stat. Ann. §§ 1-1n, 10-15c (2011).

¹⁵² D.C. Code §§ 2-1535.01-2-1535.09.

¹⁵³ 105 Ill. Comp. Stat. Ann. 5/27-23.7.

¹⁵⁴ Iowa Code Ann. §§ 216.1, 216.2, 216.9 (2016).

¹⁵⁵ Me. Rev. Stat. Ann. tit. 5, § 4552, tit. 20-A, § 6554.

¹⁵⁶ Mass. Gen. Laws ch. 76, §5 (2012); see also Mass. Dep’t of Elementary and Secondary Educ., Massachusetts on Gender Identity 2 (2013), available at www.doc.mass.edu/ssce/genderidentity.pdf (concluding by emphasizing the importance of addressing problems faced by transgender and gender nonconforming students on a case-by-case basis).

¹⁵⁷ Minn. Stat. Ann. §§ 363A.03, 363A.13 (2016).

¹⁵⁸ N.J. Stat. Ann. §§ 10:5-4, 10:5-5, 18A:37-14 (2012).

¹⁵⁹ N.Y. Educ. Law §§ 11(7), 12, 3201-a (2013).

¹⁶⁰ Or. Rev. Stat. Ann. §§ 659.850 (2014), 174.100(7) (2016).

¹⁶¹ Vt. Stat. Ann. tit. 16, §§ 11(26), 570, 570a, 570c (2011).

¹⁶² Wash. Rev. Code Ann. § 28A.642.010 (2010).

¹⁴² *Yunits*, 2000 WL 33162199, at *5; see also *Fricke v. Lynch*, 491 F. Supp. 381, 383–84, 387 (D.R.I. 1980) (principal’s claim could not prevent two boys from attending prom together because their peers’ reaction could “lead to disruption ... and possibly to physical harm” even if the principal’s concern for the students’ safety because it would give those who might attack or harass the students a “heckler’s veto”).

¹⁴³ *Boyd Cty. High Sch. Gay Straight Alliance v. Bd. of Ed.*, 258 F. Supp. 2d 667, 689–90 (E.D. Ky. 2003).

¹⁴⁴ See *id.* at 691 (finding plaintiffs likely to prevail on Equal Access Act claim where LGBT student group was denied access and communication avenues available to other student groups); *Straights and Gays for Equal. v. Osseo Area Sch. Dist. No. 279*, 471 F.3d 908, 909–10 (8th Cir. 2006) (same); *Gillman v. Sch. Bd. for Holmes Cnty., Fla.*, 567 F. Supp. 2d 1359, 1375 (N.D. Fla. 2008) (finding a First Amendment violation where a school sought to prohibit shirts, buttons, and other items supporting LGBT rights); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1149 (C.D. Cal. 2000) (finding plaintiffs likely to prevail on Equal Access Act claim where the district had denied students’ application to form a Gay-Straight Alliance student group).

¹⁴⁵ 34 C.F.R. §104.4; 28 C.F.R. §35.130.

¹⁴⁶ 42 U.S.C. § 12211(b)(1).

have such laws, which are generally enforced by state civil or human rights agencies.¹⁶³ North Carolina state law prohibits school-based harassment based on gender identity,¹⁶⁴ but as will be discussed below, North Carolina has passed a law *requiring* discrimination against transgender students when it comes to accessing sex-segregated facilities.¹⁶⁵

Each state's law should be consulted closely to determine its applicability.

Most states also prohibit discrimination because of sex and just as Title VII and Title IX law has developed to recognize that "sex" discrimination includes transgender discrimination, some state courts have recognized that their state's prohibition of discrimination on the basis of sex includes transgender discrimination.¹⁶⁶ For a comprehensive list of state court and administrative decisions applying sex discrimination to transgender plaintiffs, see National Center for Lesbian Rights, Cases

Recognizing Protection for Transgender People Under State Sex and Disability Discrimination Laws.¹⁶⁷

In addition, at least two states, New York and New Jersey, recognize gender dysphoria as a disability under those states' disability law.¹⁶⁸ Transgender individuals may be entitled to certain accommodations under state disability laws. For a comprehensive list of state court and administrative decisions applying disability discrimination to transgender plaintiffs, see National Center for Lesbian Rights, Cases Recognizing Protection for Transgender People Under State Sex and Disability Discrimination Laws.¹⁶⁹

¹⁶³ See Gay, Lesbian & Straight Educ. Network (GLSEN), Nondiscrimination Laws Protecting Students By State, http://www.glsen.org/sites/default/files/NonDiscrim_Laws_byState.pdf; Human Rights Campaign, Maps of State Laws & Policies, http://www.hrc.org/state_maps; see also Nat'l Ctr. for Transgend. Equal., Map: State Nondiscrimination Laws, <http://www.transequality.org/issues/resources/map-state-transgender-non-discrimination-laws> (last visited Apr. 27, 2016); Refinery 29, Trans America, How Does Your State Rank On "The Civil Rights Issue of Our Time?", <http://www.refinery29.com/2015/03/83531/transgender-rights-by-state> (last visited Apr. 27, 2016).

¹⁶⁴ N.C. Gen. Stat. §§ 115C-407.15.

¹⁶⁵ H.B. 2, 2015-2016 Gen. Assemb., 2nd Extra Sess. (N.C. 2016), <http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v0.pdf>.

¹⁶⁶ See, e.g., *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173 (W.D. Pa. 2006) (holding that transgender employee stated valid sex discrimination claim under Pennsylvania Human Relations Act); *Lie v. Sky Publ'g Corp.*, 15 Mass. L. Rptr. 412, 2002 WL 31492397 (Mass. Super. Ct. 2002) (holding that transsexual plaintiff had established a prima facie case of discrimination based on sex and disability under state law prohibiting employment discrimination); *Enriquez v. W. Jersey Health Sys.*, 342 N.J. Super. 501, 515-16, 777 A.2d 365, 373 (App. Div. 2001); *Maffei v. Kolaeton Indus., Inc.*, 164 Misc.2d 547, 626 N.Y.S.2d 391 (Sup. Ct. 1995); *Shepley v. Lazy Days RV Center, Inc.*, Order No. 06-016 (Fla. Comm'n on Human Relations 2006) (holding that employer who fired transgender employee violated state law against sex discrimination) available at <http://fchr.state.fl.us/fchr/layout/set/print/content/view/full/2019>; *Fishbaugh v. Brevard County Sheriff's Dep't*, Order No. 04-103 (Fla. Comm'n on Human Relations 2004) (holding that transgender employee could bring claim of sex discrimination under state law) available at <http://fchr.state.fl.us/fchr/layout/set/print/content/view/full/2263>. New Jersey later expressly added "gender identification or expression, affection or sexual orientation," to its law. See *Schiavo v. Marina Dist. Dev. Co., LLC*, 442 N.J. Super. 346, 370-71, 123 A.3d 272, 286 (App. Div. 2015).

¹⁶⁷ Nat'l Ctr. for Lesbian Rights, Cases Recognizing Protection for Transgender People under State Sex and Disability Discrimination Laws (Aug. 2008), available at http://www.nclrights.org/wp-content/uploads/2013/04/Resources_State_Cases.pdf.

¹⁶⁸ See *Wilson v. Phoenix House*, 978 N.Y.S.2d 748, 763 (N.Y. Sup. Ct. 2013) ("Gender Identity Disorder is a disability under both the New York State Human Rights Law and the New York City Human Rights Law.") (citing *Maffei v. Kolaeton Indus.*, 164 Misc.2d at 555-56 (finding comments towards transgender employee creating a hostile work environment to be discrimination on the basis of sex)); *Doe v. Bell*, 754 N.Y.S.2d 846, 851 (N.Y. Sup. Ct. 2003) (considering plaintiff's "Gender Identity Disorder" a protected disability under State Human Rights law); *Lie v. Sky Pub. Corp.*, 2002 WL 31492397 at *5 (holding that a transsexual employee had stated a viable disability discrimination claim under state law).

¹⁶⁹ Nat'l Ctr. for Lesbian Rights, *supra* note 167.

Specific Issues

I. Access to sex-segregated facilities

As discussed, the Fourth Circuit and the Departments of Education and Justice have concluded that denying equal access to gender-appropriate facilities (such as locker rooms and restrooms) for students who are transgender violates Title IX. It is essential to the health and well-being of transgender people for them to be able to live in accordance with their internal gender identity in all aspects of life and restroom usage is a necessary part of that experience.¹⁷⁰ When transgender students seek to use private separate facilities, schools should grant access to such private facilities but transgender students should not be required to use these separate facilities.¹⁷¹

In addition, to protect the privacy of all students, locker rooms and restrooms should have some private enclosed changing areas, shower areas, and toilets. And if non-transgender students complain about needing to share a restroom with a transgender student, school officials could offer the complaining student an alternative restroom.¹⁷²

¹⁷⁰ Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 Wis. J.L. Gen. & Soc’y 301, 306–07 (2013).

¹⁷¹ As a general matter, discomfort by others cannot justify unlawful discrimination, and thus transgender discrimination cannot be justified on the ground that others are uncomfortable with transgender individuals. See, e.g., *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 912 (7th Cir. 2010) (concluding that “assignment sheet that unambiguously, and daily, reminded [the plaintiff, a black nurse,] and her co-workers that certain residents preferred no black” nurses was racially discriminatory and could not be justified by the discriminatory preferences of residents); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981) (cannot fire a woman because her employer’s clients would only work with men); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (cannot discriminate against male flight attendants even if travelers prefer female attendants).

¹⁷² Cf. *Cruzan v. Special School District #1*, 294 F.3d 981, 984 (8th Cir. 2002) (denying a claim of gender and religious discrimination based upon a non-transgender employee’s objection to a transgender co-worker’s use of the women’s restroom given that there was no allegation of “any inappropriate conduct other than merely being present in the women’s faculty restroom”).

It should be noted that the concerns that are often expressed in opposition to providing transgender people access to facilities consistent with their gender identity are ungrounded. The two primary objections are that such access “might lead to sexual assaults in bathrooms,” and “that a non-transgender boy could come to the school in a dress and demand to use the girls’ restroom.”¹⁷³

Sexual assaults are unlawful on their own terms, and there is no evidence that sexual predators use transgender rights to engage in sexual assaults or that transgender discrimination would prevent such predators from engaging in sexual assaults. In fact, in the numerous states and localities that require that such facilities be open to transgender people, those states and localities have had no experience with those laws leading to any sexual assaults as a result.¹⁷⁴

As for the notion that boys will misuse transgender rights, there is likewise no evidence of that occurring, and, in any event, educational institutions remain free to prevent and punish such abuse. Denying restroom access to such a boy would not constitute discrimination on the basis of sex.

¹⁷³ See, e.g. G.G., 2015 WL 5560190, at *3.

¹⁷⁴ See Marcie Bianco, *Statistics Show Exactly How Many Times Trans People Have Attacked You in Bathrooms*, Mic (Apr. 2, 2015), <http://mic.com/articles/114066/statistics-show-exactly-how-many-times-trans-people-have-attacked-you-in-bathrooms#.VWGDSYcay> (noting agreement among experts in multiple states that fears about sexual assault by transgender people in public restrooms are not supported by empirical or anecdotal evidence); Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Myth*, MediaMatters (March 20, 2014), <http://mediamatters.org/research/2014/03/20/15-experts-debunk-right-wing-transgender-bathroom/198533> (collecting interviews with law enforcement officials, government employees, and advocates for victims of sexual assault who all dismiss the notion that sexual predators will exploit transgender non-discrimination laws to sneak into women’s restrooms, calling the myth baseless and “beyond specious”); Carlos Maza & Rachel Percelay, *Texas Experts Debunk The Transgender “Bathroom Predator” Myth Ahead Of HERO Referendum*, MediaMatters (Oct. 15, 2015), <http://mediamatters.org/research/2015/10/15/texas-experts-debunk-the-transgender-bathroom-p/206178> (same).

Some states, including California, Washington, Massachusetts, and Connecticut, have drafted guidelines stating that transgender students should have access to facilities based on their gender identities, and that this should not be denied due to others' discomfort.¹⁷⁵

In addition, this issue has been specifically litigated in Maine and Colorado in the school context and both jurisdictions concluded that the transgender student had the right to use the facilities consistent with the student's gender identity.¹⁷⁶ As the Colorado agency put it, forcing a first grade transgender girl to "disregard her identity while performing one of the most essential human functions constitutes severe and pervasive treatment, and creates an environment that is objectively and subjectively hostile, intimidating or offensive."¹⁷⁷

II. Harassment and Bullying

Harassment and bullying of transgender students by school officials can violate Title IX. As OCR has made clear, "Title IX ... prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity

of the harasser or target."¹⁷⁸ And educational institutions may violate Title IX "when peer harassment based on ... sex ... is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees."¹⁷⁹ Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school.¹⁸⁰ Harassment 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.¹⁸¹

Courts have largely agreed. In several cases, courts have concluded that Title IX imposes a duty on schools to protect transgender students from harassment on an equal basis with other students.¹⁸² For a fuller discussion of the obligation institutions have to prevent and remedy gender-based harassment under Title IX, see Dear Colleague Letter, OCR, U.S. Dep't of Education, Harassment and Bullying (Oct. 26, 2010).

In addition to Title IX's regulation of gender-based harassment, several courts have concluded that the Equal Protection Clause likewise imposes a duty on schools to protect transgender students from harassment on an equal basis with other students.¹⁸³

¹⁷⁵ Susanne Beauchaine et al., *Equity and Civil Rights Office, Office of Superintendent of Public Instruction, Prohibiting Discrimination in Washington Public Schools: Guidelines for School Districts to Implement Chapters 28A.640 and 28A.642 RCS and Chapter 329-190 WAC*, 28-31 (2012), available at <http://www.k12.wa.us/Equity/pubdocs/ProhibitingDiscriminationInPublicSchools.pdf>; Connecticut Safe School Coalition (2012), *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws*, available at http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf; Mass. Dep't of Elem. & Secondary Ed., *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity*, *supra* note 6, available at <http://www.doe.mass.edu/ssce/GenderIdentity.pdf>.

¹⁷⁶ See *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 606-07 (Me. 2014) (holding that, under Maine's Human Rights Act, fifth grader was entitled to use the restroom appropriate to her gender identity instead of her biological sex); *Mathis v. Fountain-Fort Carson School District 8*, No. P20130034X (June 17, 2013), available at http://www.transgenderlegal.org/media/uploads/doc_529.pdf (holding that first grade transgender girl had right to use the girl's restroom, reasoning that forcing her to "disregard her identity while performing one of the most essential human functions constitutes severe and pervasive treatment, and creates an environment that is objectively and subjectively hostile, intimidating or offensive").

¹⁷⁷ *Mathis*, Slip Op., at 12.

¹⁷⁸ Dear Colleague Letter, Office for Civil Rights, U.S. Dep't of Education, Harassment and Bullying 8 (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

¹⁷⁹ *Id.* at 1.

¹⁸⁰ *Id.* at 2.

¹⁸¹ *Id.*

¹⁸² *Doe v. Brimfield Grade Sch.*, 552 F. Supp.2d 816, 822-23 (C.D. Ill. 2008); *Ricco v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 224-26 (D. Conn. 2006); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 965 (D. Kan. 2005); *Montgomery v. Local Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1091-93 (D. Minn. 2000); *Doe v. South-eastern Greene Sch. Dist.*, No. 03-717, 2006 U.S. Dist. LEXIS 12790 (W.D. Pa. 2006); *Snelling v. Fall Mountain Regional Sch. Dist.*, No. CIV. 99-448-JD, 2001 WL 276975, **5-6 (D.N.H. 2001).

¹⁸³ See *Flores v. Morgan High Sch.*, 324 F.3d 1130, 1134-35 (9th Cir. 2003); *Nabozny v. Podlesny*, 92 F.3d 446, 457-58 (7th Cir. 1996); *Montgomery*, 109 F. Supp. 2d at 1091.

III. Athletic programs

Denying transgender students the right to participate in school athletics consistent with their gender identity may also violate Title IX and the Equal Protection Clause.

While the original Title IX statute itself did not specifically mention sports,¹⁸⁴ soon after enacting Title IX, Congress charged the then-Department of Health, Education, and Welfare (HEW) with responsibility for developing regulations regarding the applicability of Title IX to athletic programs.¹⁸⁵ Title IX's implementing regulations specifically prohibit gender discrimination in athletics, providing that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis."¹⁸⁶ Further, the regulations recognize that schools may institute gender-segregated teams in certain circumstances, but also state that individuals cannot be denied the opportunity for equal participation in sports on the basis of their sex.¹⁸⁷

Currently there is a dearth of caselaw or guidance addressing Title IX's application to transgender students who wish to participate in gender-segregated teams based upon their gender identity.¹⁸⁸ But, as noted, OCR has taken the position Title IX requires that "a recipi-

¹⁸⁴ See *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 287 (2nd Cir. 2004).

¹⁸⁵ See Pub. L. No. 93-380, § 844, 88 Stat. 484 (1974).

¹⁸⁶ 34 C.F.R. § 106.41(a).

¹⁸⁷ 34 C.F.R. § 106.41(b).

¹⁸⁸ *Richards v. United States Tennis Association* may be the only case to hold that a sex discrimination statute—in that case, the New York Human Rights Law—protects a transgender athlete's right to participation in sex-segregated sports consistent with the athlete's gender identity. See *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977) (holding that requirement that athletes possess a pair of X chromosomes in order to qualify for the women's competition was "grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of [New York] state").

ent must generally treat transgender students consistent with their gender identity in all aspects[.]"¹⁸⁹

And existing case law seems to clearly demand that transgender boys (boys who were assigned as girls at birth) be allowed to participate on boys' teams. Most courts have held that the Equal Protection Clause requires that girls be allowed to participate in boys teams and that generalized stereotypes about girls' strength, physical ability, or susceptibility to injury are not sufficient governmental interests to overcome intermediate scrutiny.¹⁹⁰ Those cases would seem to apply with equal force to transgender boys who were assigned the female sex at birth.

Different justifications have been given to preclude transgender girls and women from participating in girls' and womens' sports but those justifications would also seem unlikely to satisfy intermediate scrutiny. Historically, transgender girls have been prevented from joining girls teams out of a concern of competitive imbalance. That is, there is a notion that allowing girls who were assigned as boys

¹⁸⁹ Title IX and Single-Sex, *supra* note 85 at 25.

¹⁹⁰ See, e.g., *Clark, By and Through Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1130–1131 (9th Cir. 1982) (holding that "denial of an opportunity in a specific sport, even when overall opportunities are equal can violate equal protection"); *Fortin v. Darlington Little League*, 514 F.2d 344, 350–51 (1st Cir. 1975) (holding that a Little League, a state actor, could not categorically exclude girls); *Beattie v. Line Mountain Sch. Dist.*, 992 F. Supp. 2d 384, 392–94 (M.D. Pa. 2014) (granting preliminary injunction to parents of female students who were barred from junior high and high school wrestling teams); *Mansourian v. Board of Regents of University of California at Davis*, 816 F. Supp. 2d 869, 938–39 (E.D. Cal. 2011) ("denial of an opportunity in a specific sport, even when overall opportunities are equal, can be a violation of the equal protection clause.") (quoting *Clark*, 695 F.2d at 1030–31); *Israel by Israel v. W. Va. Secondary Schs. Activities Com'n*, 388 S.E.2d 480, 485–90 (W. Va. 1989) (striking down rule prohibiting female student from trying out for school baseball team where school also had a girls' softball team); *Lantz by Lantz v. Ambach*, 620 F. Supp. 663, 665–66 (S.D.N.Y. 1985) (holding high school regulation prohibiting girl from trying out for boys football team violated equal protection); *Force by Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1024–25 (W.D. Mo. 1983) (equal protection violated by prohibiting eighth grade female from competing for place on school's football team); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 166 (D. Colo. 1977) (striking down rule that prohibited all females from playing interscholastic soccer because of physical safety concerns for females noting that "the range of difference among individuals in both sexes is greater than the average difference between the sexes"); *Clinton v. Nagy*, 411 F. Supp. 1396, 1400 (N.D. Ohio 1974) (holding that the Equal Protection Clause required a municipal football league to let a qualified girl play).

at birth to play on girls teams would create an unfair competition in favor of the transgender girl. But, as the NCAA has noted, concerns about competitive imbalance are based on three assumptions that are “not well founded” when it comes to transgender athletes. The three assumptions are:

[O]ne, that transgender women are not “real” women and therefore not deserving of an equal competitive opportunity; two, that being born with a male body automatically gives a transgender woman an unfair advantage when competing against non-transgender women; and three, that men might be tempted to pretend to be transgender in order to compete in competition with women. These assumptions are not well founded.¹⁹¹

Transgender girls’ (and womens’) gender identity as women is as real as anyone else’s gender identity.¹⁹² Transgender girls who transition before puberty, often do not undergo the male transformations that result in larger muscle mass, and even transgender women who transition after puberty are not necessarily larger or stronger than nontransgender women, and taking female hormones will negate any strength advantage that testosterone may have provided the male to female transgender athlete.¹⁹³ Likewise, the Women’s Sports Foundation has endorsed equitable transgender participation in girls’ sports, echoing all these sentiments.¹⁹⁴

In addition, several state governments and scholastic athletic governing bodies have issued guidelines for athletic participation for transgender students, requiring that students be allowed to participate in activities accord-

ing to their gender identities.¹⁹⁵ For a survey of state policies on transgender access to athletic programs, see *Trans*Athlete*, K-12 resources, <http://www.transathlete.com/#!k-12/c4w2>.¹⁹⁶

The guidelines in California are bolstered by recent state legislation clarifying that the state’s nondiscrimination law applies to transgender students and specifically permits them to participate in sex-segregated extracurricular activities and to access facilities in accordance with their gender identities.¹⁹⁷

IV. Documentation of gender

Some school districts and universities require proof of medical treatments or document of a medical gender transition before agreeing to respect a student’s gender identity or expression. For example, in the *Johnston* case, university officials told Johnston that he could not use male facilities unless “his student records were updated from male to female” and to accomplish that he would have to “provide either a court order or a new birth certificate reflecting [his] current gender.”¹⁹⁸

Such requirements are highly problematic for several reasons. First, Title IX’s requirement that public schools and universities cannot take the student’s gender into account does not turn on such formalism. Under Title IX, a transgender student is entitled to use the sex-segregated facilities consistent with the student’s

¹⁹¹ Pat Griffin & Helen Carol, *NCAA Inclusion of Transgender Athletes 7* (Aug. 2011), http://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

¹⁹² *Id.*

¹⁹³ *Id.* at 7-8.

¹⁹⁴ Women’s Sports Foundation, *Participation of Transgender Athletes in Women’s Sports 3* (2011), http://www.womenssportsfoundation.org/home/advocate/title-ix-and-issues/title-ix-positions/participation_of_transgender_athletes (“Prior to puberty, there is no gender-based physiological reason to separate females and males in sports competition.”).

¹⁹⁵ See, e.g., Scott Skinner–Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 *Wis. J.L. Gender & Soc’y* 271 (2013); Washington Interscholastic Activities Ass’n, 2015–2016 Washington Interscholastic Activities Ass’n Handbook 31–32 (2015), <http://www.wiaa.com/ConDocs/Con1544/Handbook%20201516.pdf> (“All students should have the opportunity to participate in WIAA activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student’s records.”); Mass. Dep’t of Elem. and Sec. Educ., *supra* note 6 at 10 (“Where there are sex-segregated classes or athletic activities, including intramural and interscholastic athletics, all students must be allowed to participate in a manner consistent with their gender identity”); California Interscholastic Federation, *Constitution and Bylaws: Guidelines for Gender Identity Participation 90*, http://cifstate.org/governance/constitution/Guidelines_for_Gender_Identity_Participation.pdf (“All students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student’s records.”).

¹⁹⁶ Cal. Educ. Code § 221.5.

¹⁹⁷ 2013 Cal. Legis. Serv. Ch. 85 (A.B. 1266).

¹⁹⁸ See, e.g., *Johnston*, 97 F. Supp. 3d at 663.

gender identity. And the responsibility for determining a student's gender identity rests with the student or, in the case of young students not yet able to advocate for themselves, with parents and guardians. Second, such requirements themselves discriminate against transgender students, imposing a requirement on transgender students that is not imposed on other students. And third, compelling students to produce such records may itself violate the student's constitutional right to privacy.

Educational institutions should accept requests to refer to a student by their chosen name for day-to-day activities without altering the official record.

V. Dress codes

Students should be allowed to wear clothing consistent with their gender identity, and education institutions should not seek to enforce gender norms through the school dress codes. Courts have concluded that enforcing such codes can violate Title IX and the Equal Protection Clause,¹⁹⁹ as well as the First Amendment.²⁰⁰

¹⁹⁹ See *Hayden v. Greensburg Community Sch. Corp.*, 743 F.3d 569, 582–83 (7th Cir. 2014) (rule prohibiting long hair for boys basketball team violates Title IX and Equal Protection Clause).

²⁰⁰ See, e.g., *Yuntis*, 2000 WL 33162199, at *6.

State Laws Limiting Transgender Rights

Although the federal government and many states now recognize transgender discrimination as a harm that should be eradicated, some states have specifically defended transgender discrimination in employment and public accommodations as a positive good, one that should be insulated from government regulation. Some states have passed laws requiring public entities to engage in purposeful transgender discrimination.

I. "Bathroom" bills

Several states have proposed so-called bathroom bills that would require transgender people (and everyone else) to use public restrooms according to the biological sex on their birth certificate. These bills vary somewhat: some have provided a fine for using a proscribed restroom, others have created a cause of action for non-transgender people to sue transgender people for damages when they use restrooms consistent with their gender identity, and others, such as North Carolina's, are somewhat unclear about the enforcement mechanism.²⁰¹

At present, North Carolina is the only state to pass such a law. The South Dakota legislature had passed one of these bills,²⁰² but that state's Governor vetoed it.²⁰³ North Carolina's

²⁰¹ For a clearinghouse tracking all the various bills, see National Center for Transgender Equality, Action Center, <http://www.transequality.org/action-center>.

²⁰² South Dakota's H.B. 1008 would have required students to use single-sex facilities (like restrooms and changing rooms) according to their sex assigned at birth, required schools to segregate all multi-user facilities by sex, and created restrictions on when transgender students can use single-user restrooms. H.B. 1008, 91st Sess. (S.D. 2016), available at http://legis.sd.gov/legislative_session/bills/Bill.aspx?File=HB1008H.htm&Session=2016.

²⁰³ The Governor stated that "[l]ocal school districts can, and have, made necessary restroom and locker room accommodations that serve the best interests of all students, regardless of biological sex or gender identity," and state law should not prevent such accommodations. Gov. Daugaard Vetoes HB 1008 (March 1, 2016), <http://news.sd.gov/news-item.aspx?id=19926>.

HB 2, which was approved, states expressly that "Local boards of education shall require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex."²⁰⁴

These bills are particularly dangerous to educational institutions because, for the reasons already discussed, they would likely violate Title IX. North Carolina's law would seem to be contravened by the Fourth Circuit's decision in *Gloucester*. Should a state law and Title IX conflict, Title IX would not necessarily "preempt" the state law. Instead, educational institutions and other institutions throughout the state that receive federal funds could face the loss of significant federal monies.²⁰⁵

These laws are likely to be declared unconstitutional because, among other reasons, they constitute sex discrimination,²⁰⁶ transgender discrimination,²⁰⁷ and intentionally target LGBT citizens for disparate treatment.²⁰⁸ A federal lawsuit has already been filed challenging the North Carolina law, asserting that HB 2 violates the Equal Protection Clause, the

²⁰⁴ H.B. 2, 2015–2016 Gen. Assemb., 2nd Extra Sess. (N.C. 2016).

²⁰⁵ See Matt Apuzzo & Alan Blinder, *North Carolina Law May Risk Federal Aid*, N.Y. Times (April 1, 2016), <http://www.nytimes.com/2016/04/02/us/politics/north-carolina-anti-discrimination-law-obama-federal-funds.html>.

²⁰⁶ *Glenn*, 663 F.3d at 1317.

²⁰⁷ *Adkins v. City of New York*, ___ F.Supp.3d ___, 2015 WL 7076956, at *3 (S.D.N.Y. Nov. 15, 2015).

²⁰⁸ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) ("The imposition of this disability on gays and lesbians serves to disrespect and subordinate them."); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."); *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("conclud[ing] that [the challenged law] classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else" and thus does not serve a legitimate governmental interest).

Due Process Clause, and Title IX.²⁰⁹ And the Department of Justice has notified the State of North Carolina, Governor Pat McCrory, the North Carolina Department of Public Safety, and the University of North Carolina that compliance with and implementation of H.B. 2 violates Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.²¹⁰

Conclusion

The legal regime of transgender student rights is an emerging and complex area of law. But educational institutions can ensure that they are complying with their legal obligations by developing effective policies that treat transgender students with dignity and respect. Institutions should create a safe, nondiscriminatory learning environment for students who are transgender or gender non-conforming; amend policies and procedures to reflect that gender-based discrimination, including discrimination based on a student's gender identity, transgender status, and nonconformity with gender stereotypes, is a form of discrimination based on sex; and train administrators and faculty on preventing gender-based discrimination.

²⁰⁹ See *Complaint, Carcano v. McCrory*, No. 1:16-cv-00236 (M.D.N.C. March 28, 2016), available at <https://assets.documentcloud.org/documents/2777460/Carcano-v-McCrory-Complaint.pdf>.

²¹⁰ Letter from Vanita Gupta, Principal Deputy Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Gov. Pat McCrory, State of North Carolina (May 4, 2016), available at <https://assets.documentcloud.org/documents/2823410/Civil-Rights-Division-letter-on-HB2.pdf>.

Resources

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