

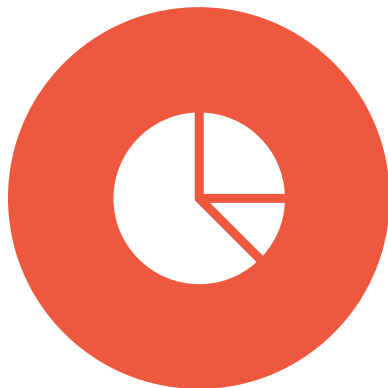


Gender issues in our schools.

WHERE WE HAVE BEEN,
WHERE WE ARE GOING.

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The legal aspects of transgender students in our schools.



**LEGAL PROTECTION FOR
TRANSGENDER INDIVIDUALS
HAS LONG BEEN BREWING .**



**CURRENT STATUS OF THE
LAW AS IT AFFECTS OUR
SCHOOLS**



**WHAT DO WE DO GOING
FORWARD?**

Laws Implicated By Transgender Students In Our Schools

- Title VII of the Civil Rights Act of 1964: prohibits "discrimination on the basis of sex" in employment.
- Title IX of the Education Amendments of 1972. Title IX protects people from discrimination based on sex in education programs or activities that receive federal financial assistance. Title IX states:
 - No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Laws Implicated By One's Transgender Status

- The United States Constitution: The Fourteenth Amendment promises "the equal protection of the laws."
- Because sex or gender "generally provide[] no sensible ground for differential treatment," *id.*, the Equal Protection Clause tolerates only "exceedingly persuasive" classifications based on sex or gender, *United States v. Virginia* ("VMI"), 518 U.S. 515, 534, 555, 116 S. Ct. 2264, 2276, 2286, 135 L. Ed. 2d 735 (1996).
- "A gender classification fails unless it is substantially related to a sufficiently important governmental interest." *Cleburne*, 473 U.S. at 441, 105 S. Ct. at 3255. "

The shaping of the law as it relates to transgender students.

Although not overly apparent to the average citizen, there has been a long, slow shaping of federal law towards finding protection in our laws for transgender employees and students.

"The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."

Ulane v. E. Airlines, Inc., 742 F. 2d 1081, 1085 (7th Cir. 1984).

Price Waterhouse v. Hopkins (1989).

The Supreme Court established that gender stereotyping is actionable as sex discrimination.

Schwenck v. Hartford, 204 F.3d 1187 (9th Cir. 2000).

Although not a Title VII case, the court stated that the approach taken in earlier Title VII cases rejecting claims by transgender plaintiffs was overruled by the reasoning in Price Waterhouse.

Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

Title VII prohibits discrimination against transgender individuals based on gender stereotyping.

Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

The government's discharge of a transgender person for his or her gender nonconformity is unconstitutional sex discrimination.

Macy v. Dep't of Justice, EEOC Appeal No. 0120120821 (April 12, 2012).

The EEOC determined that discrimination based on transgender status is sex discrimination in violation of Title VII.

Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395 (March 27, 2015).

The EEOC determined that denying an employee equal access to a common bathroom corresponding to the employee's gender identity constitutes discrimination on the basis of sex.

Office of civil rights -- Guidance re LGBT Students

Bullying and harassment based on actual or perceived sexual orientation or gender identity must be taken seriously. Schools must promptly investigate and take action if warranted.

- "Bullying and Harassment 2010"

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>

OCR requires training for staff regarding LGBT students: "Thus, a school should ensure that its counselors and other staff who are responsible for receiving and responding to complaints of sexual violence, including investigators and hearing board members, receive appropriate training about working with LGBT and gender-nonconforming students and same-sex sexual violence."

- "Questions and Answers on Title IX and Sexual Violence 2014"

<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

OCR – Guidance re LGBT students

Under the Equal Access Act, schools must allow a Gay Straight Alliance and other similar clubs if the school allows any student-initiated clubs.

- <http://www2.ed.gov/policy/elsec/guid/secletter/110607.html>
- Department of Education asks questions about bullying based on LGBT status in the Office of Civil Rights Data Collection.
 - <http://ocrdata.ed.gov/>

OCR: TITLE IX COVERS GENDER Identity

- "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. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations."
 - "Questions and Answers on Title IX and Sexual Violence 2014"
- OCR Training Tool: "Title IX: Addressing Harassment and Different Treatment on the Basis of Gender Identity and Gender Nonconformance."
 - <http://www.ode.state.or.us/policy/federal/civilrights/3.2015-gender-identity-gender-nonconformance-presentation.pdf>

OCR – enforcement and remedies

An OCR complaint filed against a school district may result in remedies and enforcement.

OCR Resolution Agreements can include:

- specific access and plan for the individual student,
 - policy/procedure revisions,
 - engaging consultants with expertise in gender identity,
 - providing access to specific facilities at all schools and district-sponsored activities (including off-campus),
 - establishing support teams for students,
 - education and training for all staff,
 - curriculum and instruction, and
 - school-climate assessments.
- Example: Resolution Agreement, Downey Unified School District, OCR Case No. 09-12-1095, Oct. 8, 2014;
<http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>

Courts began to shape Title IX

"Although the parties have submitted lengthy briefs and have advanced numerous arguments, this case presents one central question: whether a university, receiving federal funds, engages in unlawful discrimination, in violation of the United States Constitution and federal and state statutes, when it prohibits a transgender male student from using sex-segregated restrooms and locker rooms designated for men on a university campus. **The simple answer is no.**"

[Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657, 661 \(W.D. Pa. 2015\)](#)

Courts began to shape Title IX

"While Plaintiff alleges that he is a "male," the complaint also alleges that Plaintiff was assigned the sex of "female" at birth. Importantly, Plaintiff has not alleged that he has undergone a sex change. Thus, while Plaintiff might identify his *gender* as male, his *birth sex* is female. **It is this fact—that Plaintiff was born a biological female, as alleged in the complaint—that is fatal to Plaintiff's sex discrimination claim.** Regardless of how gender and gender identity are defined, the law recognizes certain distinctions between male and female on the basis of birth sex. Thus, even though Plaintiff is a transgender male, his sex is female, a fact alleged in Plaintiff's complaint and a fact that has legal significance in light of Plaintiff's discrimination claim."

[Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657, 671 \(W.D. Pa. 2015\)](#)

Courts began to shape Title IX

"34 C.F.R. § 106.33. A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

This regulation (hereinafter, "Section 106.33") expressly allows schools to provide separate bathroom facilities based upon sex, so long as the bathrooms are comparable.

In light of Section 106.33, G.G. fails to state a valid claim under Title IX. G.G. alleges that the School Board violated Title IX by preventing him from using the boys' restrooms despite the fact that his gender identity is male. Compl. ¶¶ 64, 65. According to G.G., the School Board's determination was based on the belief that **Plaintiff is biologically female, not biologically male.** *Id.* ¶ 65. However, Section 106.33 specifically allows schools to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable. **Therefore, the School Board did not run afoul of Title IX by limiting G.G. to the bathrooms assigned to his birth sex."**

[G.G. v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 744-45 \(E.D. Va. 2015\)](#)

Courts began to shape Title IX

"We conclude that the Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to Auer deference and is to be accorded controlling weight in this case. We reverse the district court's contrary conclusion and its resultant dismissal of G.G.'s Title IX claim."

[G. G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 723 \(4th Cir. 2016\).](#)

G.G. was the domino.

Courts began to shape Title IX

"Until very recently, little to no explicit authority existed regarding the application of Title IX and its related regulations to transgender students and employees. **Around 2013, however, DOE began taking the position that covered institutions must treat transgender individuals consistent with their gender identity.** (See Doc. 23-29 at 3 (citing Letter from Anurima Bhargava, Chief, U.S. Dep't of Justice, and Arthur Zeidman, Director, U.S. Dep't of Educ. Office of Civil Rights, to Dr. Joel Shawn, Superintendent, Arcadia Unified Sch. Dist. (July 24, 2013))."

Carcaño v. McCrory, 203 F. Supp. 3d 615, 633 (M.D.N.C. 2016)

Courts began to shape Title IX

"The court first concluded that the phrase "on the basis of sex" in § 106.33 is ambiguous because the regulation "is silent as to how a school should determine whether a transgender individual is a male or female." *Id.* at 720. **The court then determined that DOE's interpretation, while "novel" and "perhaps not the intuitive one," is not clearly erroneous because a dictionary from 1971 defined the word "sex" as encompassing "morphological, physiological, and behavioral" characteristics.** *Id.* at 721-22.**21** Finally, the court concluded that the DOE opinion letter reflects the agency's fair and considered judgment on policy formulation, rather than a convenient litigating position. *Id.* at 722-23. As a result, the court remanded with instructions for the district court to give the DOE opinion letter "controlling weight" with regard to the meaning of § 106.33. *Id.* at 723, 727."

[Carcaño v. McCrory, 203 F. Supp. 3d 615, 634-35 \(M.D.N.C. 2016\)](#)

Courts began to shape Title IX

"Therefore, at this early stage on a motion for preliminary relief pending trial, it is enough to say that **G.G. requires Title IX institutions in this circuit to generally treat transgender students consistent with their gender identity, including in showers and changing rooms.** (Doc. 23-29 at 3.) ... Thus, G.G. indicates that the individual transgender Plaintiffs are likely to succeed on the merits of their Title IX claim."

[Carcaño v. McCrory, 203 F. Supp. 3d 615, 637 \(M.D.N.C. 2016\)](#)

Courts began to shape Title IX

The court **ORDERS** that defendants Kenosha Unified School District and Sue Savaglio-Jarvis (in her capacity as superintendent of that district) are **ENJOINED** from:

- (1) denying Ash Whitaker access to the boys' restrooms;
- (2) enforcing any policy, written or unwritten, against the plaintiff that would prevent him from using the boys restroom during any time he is on the school premises or attending school-sponsored events;
- (3) disciplining the plaintiff for using the boys restroom during any time that he is on the school premises or attending school-sponsored events; and
- (4) monitoring or surveilling in any way Ash Whitaker's restroom use.

[Whitaker v. Kenosha Unified Sch. Dist. No. 1, No. 16-CV-943-PP, 2016 U.S. Dist. LEXIS 129678, at *23 \(E.D. Wis. Sep. 22, 2016\)](#)

Courts began to shape Title IX

"Several district courts have adopted this reasoning, finding that **a transgender plaintiff can state a claim under Title VII for sex discrimination on the basis of a sex-stereotyping theory**. See *Valentine Ge v. Dun & Bradstreet, Inc.*, No. 6:15-CV-1029-ORL-41GJK, 2017 U.S. Dist. LEXIS 9497, 2017 WL 347582, at *4 (M.D. Fla. Jan. 24, 2017); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016), reconsideration denied, No. 2:15-CV-00388-JAD-PAL, 2016 U.S. Dist. LEXIS 163800, 2016 WL 6986346 (D. Nev. Nov. 28, 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008)."

Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049 (7th Cir. 2017)

Courts began to shape Title IX

"Ash can demonstrate a likelihood of success on the merits of his claim because he has alleged that the School District has denied him access to the boys' restroom because he is transgender. **A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.** The School District's policy also subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX. **Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act.** Further, based on the record here, these gender-neutral alternatives were not true alternatives because of their distant location to Ash's classrooms and the increased stigmatization they caused Ash. Rather, the School District only continued to treat Ash differently when it provided him with access to these gender-neutral bathrooms because he was the only student given access."

[Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.](#), 858 F.3d 1034, 1049-50 (7th Cir. 2017)

Courts began to shape Title IX

"After the Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020), we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him "on the basis of sex." Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), it guides our evaluation of claims under Title IX. See *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); cf. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258, 129 S. Ct. 788, 172 L. Ed. 2d 582 (2009) ("Congress modeled Title IX after Title VI . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was." (citation omitted)). In *Bostock*, the Supreme Court held that **discrimination against a person for being transgender is discrimination "on the basis of sex.""**

[Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 616 \(4th Cir. 2020\)](#)

Courts began to shape Title IX

"Courts across the country have consistently held that Title IX requires schools to treat transgender students consistent with their gender identity. See A.H. v. Minersville Area Sch. Dist., 408 F. Supp. 3d 536, 552 (M.D. Pa. 2019) (collecting and discussing cases). Every Court of Appeals to consider the issue has so held. See Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir. 2020), cert. denied, No. 20-62, 2020 WL 7132263 (U.S. Dec. 7, 2020); Doe by & through Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018); Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017); Dodds v. United States Dep't of Educ., 845 F.3d 217 (6th Cir. 2016); G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), vacated and remanded, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017)."

[Soule v. Conn. Ass'n of Sch.](#), No. 3:20-cv-00201 (RNC), 2021 U.S. Dist. LEXIS 78919, at *29-30 (D. Conn. Apr. 25, 2021)

So where does this leave us???

- Title IX's prohibition against sex-based discrimination applies to students on their transgender status and sexual orientation.
 - Non-discrimination obligations.
 - Harassment and bullying.
- In looking at "discrimination" one must recognize that Title IX requires schools to treat transgender students consistent with their gender identity.
- The court decisions have now universally analyzed the issue as: if a girl is treated one way, then a trans girl must be treated the same way or it is sex-based discrimination.

So where does this leave us???

The courts decisions have now universally analyzed the issue as: if a girl is treated one way, then a trans girl must be treated the same way or it is sex-based discrimination.

➤ Bathrooms:

"Notably, Grimm's Title IX claim did not challenge the Board's maintenance of separate bathrooms for boys and girls. Instead, the unlawful discrimination at issue here is the **"separation of transgender students from their cisgender counterparts** through a policy that ensures that transgender students may use *neither* male nor female bathrooms due to the incongruence between their gender identity and their sex-assigned-at-birth." 2020 U.S. App. LEXIS 30339, [WL] at *29 (Wynn, J., concurring) (emphasis in original). This type of segregation creates harmful stigma, just as the racial segregation [**17] of restrooms and schools imposed a badge of inferiority on Black children. *Id.*; see also *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494, 74 S. Ct. 686, 98 L. Ed. 873 (1954)."

[*Grimm v. Gloucester Cty. Sch. Bd.*, 976 F.3d 399, 403 \(4th Cir. 2020\)](#)

So where does this leave us???

The court decisions have now universally analyzed the issue as: if a girl is treated one way, then a trans girl must be treated the same way or it is sex-based discrimination.

➤ Bathrooms:

"Grimm consistently and persistently identified as male. He had been clinically diagnosed with gender dysphoria, and his treatment provider identified using the boys restrooms as part of the appropriate treatment. Rather than contend with Grimm's serious medical need, the Board relied on its own invented classification, "biological gender," for which it turned to the sex on his birth certificate. And even when Grimm provided the school with his amended birth certificate, the Board *still* denied him access to the boys restrooms.

For these reasons, we hold that the Board's application of its restroom policy against Grimm violated Title IX."

[Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 619 \(4th Cir. 2020\)](#)

Title IX and Bathrooms



Title IX and Bathrooms



Republicans want to put me in the restroom with her, because I was assigned female at birth - do I look like I belong in women's facilities?
#occupotty #wejustneedtopee #letmypeoplepee #translivesmatter
michaelhughes.co @_michaelhughes1

So where does this leave us???

- Prior to these court decisions, how schools addressed transgender issues was a political issue.
 - Often viewed as a conservative versus liberal issue.
- The rights of transgender students are no longer a political issue:
 - Its now a legal issue, controlled by Title IX and the Equal Protection Clause.
 - Not by politics;
 - Not by ideology;
 - The court decisions have largely removed a board's discretion.

So where does this leave us???

These court decisions have now universally analyzed the issue as: if a girl is treated one way, then a trans girl must be treated the same way or it is sex-based discrimination.

- Bathrooms
- Locker rooms
- Accommodations
- Playing on sports teams that best fit their gender identity.

All of these are required under Title IX to be open to transgender student based on their gender identity, not birth gender.

Re-affirmed by Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,
January 20, 2021

So where does this leave us???

Pronouns and chosen names:

- In this case, continuing to provide [the teacher] an accommodation [not to use transgender students' chosen names and pronouns] that resulted in complaints that transgender students felt targeted and dehumanized could potentially have subjected BCSC to a Title IX discrimination lawsuit brought by a transgender student.

Kluge v. Brownsburg Cmty. Sch. Corp., No. 1:19-cv-2462-JMS-DLP, 2021 U.S. Dist. LEXIS 129122, at *71 (S.D. Ind. July 12, 2021)

Is this just a harassment issue?

So where does this leave us???

Pronouns and chosen names:

How is a school to respond to a student's request to change their pronouns or name?

- Madison Metro School District is in litigation over this issue.
- Kettle Moraine School District is in litigation over this issue.

- Still a gray area in regard to a **student's** rights.
- Still a gray area in regard to **parents'** rights.

So where does this leave us???

Moving forward:

➤ Policy or no policy?

➤ Some districts have them, and some do not.

➤ Pros: Consistency and uniform responses.

➤ Cons: Hard to address every possible scenario;
Tendency to become a political issue.

So where does this leave us???

➤ Policy.

➤ 2. Discrimination, Harassment and Bullying:

➤ The District prohibits all forms of discrimination against any transgender student or any student who does not conform to gender role stereotypes. Further, existing District policies that prohibit the harassment and bullying of students apply to any such actions that are based on a student's actual or perceived transgender status or gender nonconformity. This includes ensuring that any incident or complaint of discrimination, harassment, or bullying is given prompt attention, including taking appropriate corrective and/or disciplinary action. Complaints alleging discrimination, harassment or bullying based on a person's actual or perceived transgender status or gender nonconformity are to be handled in the same manner as other discrimination, harassment, or bullying complaints. See Policy 5110.1 and Policy 5111.

So where does this leave us???

Policy.

3. Restroom and Locker Room Accessibility

In most cases, a student who is transgender will be permitted to access the men's/women's segregated restrooms that correspond to the gender identity that the student consistently asserts at school and in other social environments. Any student who has a need or desire for increased privacy, regardless of the underlying reason, may be provided with access to a single-access restroom where such a facility is reasonably available, but no student shall be required to use such a restroom because of the student's transgender or gender nonconforming status.

So where does this leave us???

Policy.

3. Restroom and Locker Room Accessibility

If a transgender student makes any request regarding the use of locker rooms or any similar type of changing area, the request shall be assessed on a case-by-case basis with the goals of: (a) facilitating the transgender student's access to the District's physical education curriculum and other relevant programs; (b) ensuring adequate student privacy and safety; and (c) minimizing stigmatization of the transgender student. The physical layout of the facility and the degree of undress required when changing for the applicable activity are examples of factors that will be considered in making the arrangements. There is no absolute rule that, in all cases, will require a transgender student to access and use only the locker rooms and other changing areas that correspond to the biological sex that the student was assigned at birth. Requests regarding the use of locker rooms or any similar type of changing area should be addressed to the building principal.

The building principal shall inform the Title IX coordinator of the request and the principal and Title IX coordinator shall consult with the Superintendent to develop a response that addresses how the use of locker rooms or any similar type of changing area will be established for that student in that building. The response shall be provided within fifteen (15) school days. This deadline may be extended for good cause with notice to the requestor.

So where does this leave us???

Policy.

4. Participation in Physical Education Classes and Sports Activities

A student who is transgender shall be permitted to participate in physical education classes and intramural sports in a manner consistent with the gender identity that the student regularly asserts at school and in other social environments. Students who are transgender shall be permitted to participate in interscholastic athletics in a manner consistent with the requirements and policies of the Wisconsin Interscholastic Athletics Association (WIAA).

So where does this leave us???

Policy.

5. Dress Codes.

Within the constraints of the District's dress code policy and dress codes adopted by the school, students may dress in accordance with their gender identity. School personnel shall not enforce a dress code more strictly against transgender and gender nonconforming students than other students.

So where does this leave us???

QUESTIONS?