



Date: June 12, 2018

From: Human Rights Campaign Legal Department

To: State Legislators and Other Policy Makers

**Memo: Educational Institutions' Obligations to Transgender Students under Title IX**

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Legislatures across the country have been considering passing legislation that would prohibit transgender students at federally funded educational institutions from accessing restrooms and other facilities consistent with their gender identity. This legislation creates a legal liability for any state in which it becomes law. It opens up school districts to costly litigation from students facing discrimination and, if properly investigated, administrative actions that may be brought by the United States Department of Education's Office of Civil Rights or the Department of Justice in the future. These bills offer costly supposed solutions to non-existent problems and would force schools to choose between complying with federal law – plus doing the right thing for their students – and complying with a state law that violates students' civil rights.

**Title IX of the Education Amendments of 1972 (Title IX) prohibits sex discrimination in any educational program or activity that receives federal funding** – including public primary and secondary schools, public colleges and universities, and private schools and universities that accept student loans or other federal funds. Although best known for its impact on girls' and women's athletic programs, Title IX protects students from discrimination in a broad array of areas of education including admissions, housing, recruitment, athletics, facilities, financial assistance, and counseling services.<sup>1</sup> It is also clear as a matter of law that Title IX protects students on the basis of gender identity as evidenced by case law prior to the Department of Education's guidance and school district settlements which support the use of Title IX by LGBTQ students seeking recourse from discrimination.

**Non-compliance with Title IX puts federal funding at risk; state education programs receive billions of dollars in federal funds.** Title IX conditions federal funding on agreement by the recipient institution that it will not discriminate on the basis of sex; therefore, non-compliance with Title IX can result in suspension or termination of a recipient's federal funding.<sup>2</sup> When an institution is non-compliant, the Department of Education can take administrative action at the conclusion of which, if the institution is still non-compliant, the Department of Education can terminate all federal funding flowing to that institution, including funding that flows from other federal agencies.<sup>3</sup> In addition to administrative remedies, individuals may bring a cause of action in federal court which, if discrimination has occurred, may result in an injunction or monetary damage or both.<sup>4</sup>

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<sup>1</sup> See generally 34 CFR Part 106, Subpart D.

<sup>2</sup> 20 U.S.C. § 1682

<sup>3</sup> See generally *id.* at § 1682 and 34 C.F.R. § 106.

<sup>4</sup> See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (holding that a claim for damages can be brought against a school district under Title IX), *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (holding that a claim for damages can be brought against a school district under Title IX for failing to stop teacher-on-student harassment where the school district had actual notice and acted with deliberate indifference to the misconduct), *Davis v. Monroe County Bd. of Educ.*,



**Title IX’s non-discrimination protections on the basis of sex include gender identity.** Title IX has been interpreted to prohibit gender identity discrimination based on the legal theory of sex stereotyping. Sex stereotyping was developed in the body of case law surrounding Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of sex, as well as other characteristics, in employment. Federal courts routinely rely on Title VII case law to interpret Title IX,<sup>5</sup> and the sex stereotyping argument has thus transitioned into interpretations of Title IX as well.

Several notable cases have developed and solidified the line of reasoning that, fundamentally, discrimination on the basis of gender identity, sexual orientation, or sex stereotyping (assuming that a person of a particular sex will behave in a certain way because of their sex), is discrimination “on the basis of sex”. In *Price Waterhouse v. Hopkins*, the Supreme Court unanimously held that Title VII did not permit an employer to evaluate female employees based upon their conformity with the employer’s stereotypical view of femininity.<sup>6</sup> While this case did not raise questions involving sexual orientation, the sex stereotyping reasoning utilized by the Court has proved pivotal for later claims involving sexual orientation and gender identity discrimination. In *Oncale v. Sundowner Offshore Services*, the Supreme Court determined that an employer could be held liable under Title VII for failing to stop sexual harassment involving employees of the same gender.<sup>7</sup> Subsequently, federal circuit and district courts have found that openly gay and lesbian employees can seek recourse under Title VII when they have been subjected to sexual harassment.<sup>8</sup>

This line of reasoning was further extended in administrative decisions issued by the U.S. Equal Employment Opportunity Commission (EEOC).<sup>9</sup> In 2012, the EEOC “recognized that a complaint of discrimination based on gender identity, change of sex, and/or transgender status was cognizable under Title VII.”<sup>10</sup> And in 2015, the EEOC concluded that “sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”<sup>11</sup> There is growing consensus on this in federal courts as well; to date, two federal circuit courts have ruled that Title VII applied to a claim brought by a transgender woman who alleged that she was fired based on her gender identity,<sup>12</sup> and two additional federal circuit courts have ruled that other federal laws prohibiting sex discrimination apply to discrimination on the

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526 U.S. 629 (1999) (holding that a claim for damages can be brought against a school under Title IX for student-to-student harassment where the funding recipient acted with deliberate indifference to known acts of harassment).

<sup>5</sup> See *Jennings v. Univ. of N. Carolina*, 482 F.3d 686 (4th Cir. 2007). (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”) and *Preston v. U.S.*, 376 U.S. 364 (1964)(holding that the Title IX discrimination claim should be interpreted by principles governing Title VII).

<sup>6</sup> 490 U.S. 228 (1989).

<sup>7</sup> 523 U.S. 75 (1998).

<sup>8</sup> See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (holding that an openly gay employee subjected to severe physical harassment of a sexual nature in the workplace may have a valid sex discrimination claim under Title VII.) See also *Nguyen v. Buchart-Horn, Inc.* 2003 U.S. Dist. LEXIS 12398 (E.D. La. July 15, 2003)(holding that the plaintiff was not barred from a sex discrimination claim under Title VII because of his sexual orientation.)

<sup>9</sup> As an administrative body, the EEOC is not part of the judiciary. EEOC decisions are not binding on the federal courts, but they are generally given deference.

<sup>10</sup> *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

<sup>11</sup> *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (July 15 2015).

<sup>12</sup> *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) and *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)



basis of gender identity.<sup>13</sup> As a panel of Sixth Circuit judges ruled, “[t]here is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.”<sup>14</sup>

The Departments of Education and Justice adopted this legal reasoning between 2010 and 2016 in their respective interpretations of Title IX. The Department of Education, through a series of “Dear Colleague” letters and guidance documents, instructed that Title IX prohibits gender-based harassment of students, including harassment by a person of the same sex,<sup>15</sup> harassment for “failing to conform to stereotypical notions of masculinity or femininity,”<sup>16</sup> discrimination against transgender and gender non-conforming students,<sup>17</sup> failure to respect transgender students’ gender identity when operating single-sex classes,<sup>18</sup> and failure to respect transgender students’ gender identity for purposes of restroom access, gender pronouns, and athletics.<sup>19</sup> Similarly, the Department of Justice relied on *Oncale* and *Price Waterhouse* in its explanation that “[t]reating a student adversely because the sex assigned to him at birth does not match his gender identity is literally discrimination ‘on the basis of sex.’”<sup>20</sup> The agency participated in an array of lawsuits to ensure that LGBTQ students’ Title IX rights are enforced. The guidance documents explained the scope of Title IX, but did not create the legal obligation to protect transgender students – that obligation arises from Title IX itself.

White it is true that the Departments of Education and Justice rescinded the 2016 “Dear Colleague” letter, and the Department of Education has declined to investigate claims of sex discrimination from transgender students who cannot use the bathroom aligning with their gender identity, **these enforcement decisions neither overturn the mounting case law nor do they eliminate the rights of transgender students under Title IX, and they cannot be interpreted to authorize discrimination against transgender students.**

**Forbidding transgender students appropriate access to bathrooms, specifically, is discrimination on the basis of gender identity and, therefore, sex as prohibited by Title IX.** In addition to the materials released by the Department of Education under the prior administration, several enforcement actions have

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<sup>13</sup> *Rosa v. Parks W. Bank & Trust Co.*, 214 F.3d 213 (1<sup>st</sup> Cir. 2000) and *Schwenck v. Hartford*, 204 F.3d 1187 (9<sup>th</sup> Cir. 2000).

<sup>14</sup> *EEOC v. R.G. & G.R. Funeral Homes, Inc.* 884 F.3d 560, 576-77 (6<sup>th</sup> Cir. 2018).

<sup>15</sup> *Dear Colleague Letter: Harassment and Bullying*, U.S. Department Of Education, 8 (October 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Questions and Answers on Title IX and Sexual Violence*, U.S. Department Of Education, 5 (April 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (noting that the Office for Civil Rights “accepts such claims for investigation”).

<sup>18</sup> *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, U.S. Department Of Education, (December 25, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

<sup>19</sup> *Dear Colleague Letter on Transgender Students*, US Department of Education (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

<sup>20</sup> Brief for the United States as Amici Curiae Supporting Appellant, *G.G. v. Gloucester County School Board*, No. 15-2056, 13-14 (4<sup>th</sup> Cir. Oct. 28, 2015) (internal citations omitted).



been taken against schools that discriminate against transgender students by denying them access to the bathroom consistent with the students' gender identity.

- *Student v. Arcadia Unified School District* (2013): A complaint was filed with the U.S. Department of Education's Office for Civil Rights and the U.S. Department of Justice's Civil Rights Division after a school district refused to allow a transgender student access to bathroom and locker room facilities that accord with his gender identity, requiring him instead to use the nurse's office for restroom access and changing for gym class.<sup>21</sup> He was also prevented from staying in overnight accommodations with other male students as part of a school-sponsored trip. The school district agreed to a settlement that required the school district to implement school- and district-wide measures, including updated policies and procedures, to ensure that transgender and gender nonconforming students have equal access to all school programs, facilities, and activities.<sup>22</sup> **This case makes it clear that Title IX prohibits educational institutions from forbidding students bathroom access in accordance with their gender identity.**<sup>23</sup>
- *Student v. Township High School District 211* (2015): A complaint was filed with the Department of Education's Office for Civil Rights after a student was denied equal access to a school locker room when she was forced to use a separate bathroom for changing. The school agreed to a settlement in which it committed to grant the student equal access to all district programs and activities without discrimination based on gender identity, including equal access to locker rooms. **This case makes it clear that Title IX prohibits educational institutions from forbidding students locker room access in accordance with their gender identity.**<sup>24</sup>
- *Board of Ed. Of the Highland Local Sch. Dist. v. United States Dept. of Educ* (2016): A transgender girl, who had socially transitioned and was using a female name when she entered first grade, was forced to use unisex bathroom in the teacher's lounge. Despite repeated requests to allow her to use the girls' restroom, she was denied the ability to do so; this led her to refrain from drinking fluids and to avoid using the restroom at all, and it caused her anxiety and depression so severe that she attempted suicide before starting the fourth grade. The Office of Civil Rights of the Department of Education brought an action against the school district for discriminating against her on the basis of her sex in violation of Title IX. A federal district court denied the District's request to enjoin enforcement of the administrative action, and granted the student's motion to enjoin the school district from further discriminatory action: "the Court orders School District officials to treat Jane Doe as the girl she is, including referring to her by female

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<sup>21</sup> Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division, No. 09-12-1020 (August 24, 2013), available at <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>. See also Resolution Agreement of the Downey Unified School District, No. 09-12- 1095, (Oct. 8, 2014), available at <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>.

<sup>22</sup> See, e.g., Department of Justice Case Summaries, available at <http://www.justice.gov/crt/case-summaries> (last visited Nov. 18, 2015) for other agreements.

<sup>23</sup> Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division. <https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>

<sup>24</sup> Agreement to Resolve Between Township High School District 211 and the U.S. Department of Education, Office Office for Civil Rights OCR Case # 05-14-1055. <http://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf>



pronouns and her female name and allowing her to use the girls' restroom at Highland Elementary School."<sup>25</sup> On appeal, a panel of the Sixth Circuit Court of Appeals upheld the injunction issued by the District Court.<sup>26</sup>

- *Whitaker v. Kenosha Unified School District* (2017): This decision by a panel of the 7<sup>th</sup> Circuit Court of Appeals upheld an injunction forbidding the school from continuing to exclude a transgender boy from using the restroom consistent with his gender identity. **The court found that the student had not only a claim under Title IX, but also under the Equal Protection Clause of the United States Constitution.** Further, the court wrote specifically that “providing a gender-neutral alternative is not sufficient” as an alternative to allowing the student to access the boys’ restroom.<sup>27</sup> The district settled in January 2018.
- *Evancho v. Pine-Richland School District* (2017): This case settled on August 1, 2017 with the school district agreeing to abandon its discriminatory policy – which forced students to use “either the facilities that correspond to their biological sex or unisex facilities” – and to allow transgender students to use facilities consistent with their gender identity.<sup>28</sup> Earlier this year the court issued an order granting the plaintiff students an injunction on the basis that their Constitutional rights under the Equal Protection Clause had been violated, but due to the flux in the *Grimm* case at the time (the Supreme Court had just issued a stay in the case) the Title IX claim was dismissed.<sup>29</sup> The parties nonetheless agreed to a settlement that stopped the discriminatory practices from continuing.
- *Doe ex rel. Doe v. Boyertown Area School District* (2018): A group of cisgender students and their parents challenged their school district’s transgender-inclusive restroom policy in district court. The district court ruled against the cisgender students,<sup>30</sup> and the Third Circuit affirmed.<sup>31</sup> The district court did not agree with the plaintiff’s overtly discriminatory argument that “the mere presence of transgender students in a high school locker room or bathroom ... constitutes severe, pervasive and objectively offensive conduct.”<sup>32</sup>
- *Grimm v. Gloucester County School Board* (2018): A transgender student challenged a school district policy that prevented him from using bathroom and locker room facilities that accord with his gender identity as a violation of both the Equal Protection Clause of the Fourteenth Amendment and Title IX. The U.S. Court of Appeals for the Fourth Circuit found that the determination by the Department of Education and the Department of Justice that the school board’s actions violated Title IX was a reasonable interpretation of the law. **This case makes it clear that it is reasonable to interpret Title IX to prohibit denying a student bathroom access according to the student’s gender identity.**<sup>33</sup> After being appealed to the Supreme Court

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<sup>25</sup> *Bd. of Educ. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, (S.D. Ohio, 2016).

<sup>26</sup> *Dodds v. United States Dep’t of Educ.*, 845 F.3d 217, (6th Cir. 2016).

<sup>27</sup> *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017)

<sup>28</sup> Available at [www.lambdalegal.org/in-court/legal-docs/pa\\_evancho\\_20170801\\_joint-motion-for-entry-of-consent-judgment](http://www.lambdalegal.org/in-court/legal-docs/pa_evancho_20170801_joint-motion-for-entry-of-consent-judgment)

<sup>29</sup> *Evancho v. Pine-Richland Sch. Dist.*, No. 2:16-01537, 2017 U.S. Dist. LEXIS 26767 (W.D. Pa. Feb. 27, 2017).

<sup>30</sup> *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 276 F.Supp.3d 324 (E.D. Pa. 2017).

<sup>31</sup> *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 2018 WL 2355999 (3d Cir. 2018).

<sup>32</sup> *Doe*, 276 F.Supp.3d at \*2.

<sup>33</sup> *G.G. v. Gloucester County Sch. Bd.*, 2015 U.S. Dist. LEXIS 124905 (E.D. Va. Sept. 17, 2015).



of the United States, the case was remanded to the Fourth Circuit.<sup>34</sup> The circuit court further remanded the case to the district court.<sup>35</sup> In May 2018, the District Court found the school district policy “classified Mr. Grimm differently on the basis on his transgender status, and, accordingly, **subjected him to sex stereotyping**” and violated the Equal Protection Clause.<sup>36</sup>

The body of law around Title IX has solidified around the principle that discrimination against a transgender student, including in the provision of access to sex-segregated facilities such as bathrooms and locker rooms, is discrimination on the basis of sex as prohibited by Title IX. For this reason, should a bill prohibiting schools from allowing transgender students to access restrooms consistent with their gender identity become law, the enacting state would have a serious, costly legal challenge on its hands. Defending an administrative action is pricey in and of itself – the Township High school district cited above paid approximately \$62,500 in legal fees.<sup>37</sup> Further, this memo focuses on the potential liability incurred around Title IX non-compliance, specifically; it did not examine in depth the possible equal protection claims that could be brought by a student against a government entity that treated transgender students differently from their peers on the basis of their gender identity or sex. However, following the latest disposition of the court in the *Grimm* case, as well as the holding in the *Whitaker* case, the momentum for such challenges is building.

*The Human Rights Campaign is America’s largest civil rights organization working to achieve lesbian, gay, bisexual, transgender, and queer (LGBTQ) equality with more than 1.5 million members and supporters nationwide.*

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<sup>34</sup> Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017)

<sup>35</sup> Gavin Grimm v. Gloucester Cty. Sch. Bd., Order No. 15-2056. (4th Cir. 2017). Available at <http://www.ca4.uscourts.gov/Opinions/Published/152056R2.P.pdf>

<sup>36</sup> Grimm v. Gloucester Cty. Sch. Bd., 2018 WL 2328233, at \*11 (E.D. Va. 2018) (emphasis added).

<sup>37</sup> According to a FOIA request conducted by the American Civil Liberties Union (ACLU) on file with the ACLU.