

MAKING THE LEAP FROM BULLYING TO EQUALITY: AN ANALYSIS OF TRANSGENDER STUDENT RIGHTS

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I. INTRODUCTION

The debate encompassing lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) rights and their interplay with marriage, employment, and education continues to define the civil rights issues of our time.¹ The debate in education regarding transgender rights has been further invigorated by the current administration. According to the Supreme Court, while students do not “shed their constitutional rights to freedom of speech at the schoolhouse gate,”² schools have a “comprehensive authority” to “prescribe and control conduct in the schools” that goes beyond the authority the state has outside of that context.³ Thus, the Court allows schools to restrict students’ rights when their speech would “materially and substantially interfer[e] with the

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¹ Noah Rothman, *Wasserman Schultz: Gay Marriage is ‘The Civil Rights Issue of Our Generation*, MEDIAITE (May 15, 2012), <http://www.mediaite.com/tv/wasserman-schultz-gay-marriage-is-the-civil-rights-issue-of-our-generation/> [<http://perma.cc/8L4B-B4RR>].

² *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

³ *Id.* at 507; *Chapter One: Pro-Gay and Anti-Gay Speech in Schools*, 127 HARV. L. REV. 1698, 1698 (2014).

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requirements of appropriate discipline in the operation of the school” or “collid[e] with the rights of other students.”⁴ The tricky question is where schools draw the line in determining what speech is significant enough of an interference that it must be restricted.

Transgender students’ fall within the hazy zone of conflict between the government’s continued interest in education on one hand, and its interest in protecting students’ Constitutional rights on the other hand. For example, a student’s interest in free speech can be displayed by their dress, which is an expression that has been protected by free speech.⁵ Accordingly, are a student’s interests in free speech outweighed when the student was born biologically female, has a gender identity of male, dresses consistent with his identity, and thus is constantly tormented and bullied throughout the hallways in the classrooms?⁶ In this scenario, does it matter that the student’s therapist deemed it “medically and clinically necessary” for him to wear clothing consistent with the male gender?⁷ Freedom of speech and the right to be free from discrimination are manifested in the right to dress, use facilities, and participate in athletics.⁸ How schools make determinations on these subjects has engendered vigorous debate.

Over the past decade, administrators and school boards have looked to President Obama’s “Dear Colleague” letters for guidance on how they can protect the rights and safety of their transgender students.⁹ These guidelines stood as a critical marker in the interpretation of Title IX and statutory intent regarding sex and gender.¹⁰ They explain how schools can ensure safe and equal environments by providing practical solutions.¹¹ On February 22, 2017 the Trump Administration withdrew the Obama era documents titled “Dear Colleague” Letter (“guidelines”) protecting transgender students under Title IX.¹² The Trump letter states that the withdrawn documents “do not contain extensive legal analysis or explain how the position is consistent with the express language of

⁴ *Tinker*, 393 U.S. at 513 (1969) (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)); see also *Chapter One: Pro-Gay and Anti-Gay Speech in Schools*, 127 HARV. L. REV. 1698, 1698 (2014).

⁵ *Doe v. Brockton Sch. Comm.*, 2000-J-638, 2000 WL 33342399, at *1 (Mass. App. 2000)

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education (Jan. 7, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx>.

¹⁰ *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 869 (S.D. Ohio 2016) (“For the Court to find that the statute was ambiguous, it need not find that the agencies’ interpretation is the *only* plausible reading of “sex” in the statute, but, rather, that it is *one* of the plausible readings.”).

¹¹ Letter to Emily Prince from James A. Ferg-Cadima, *supra* note 9.

¹² *Id.*

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Title IX, nor do they undergo any formal public process.”¹³ Thus President Trump’s administration determined that it was better to withdraw the documents, and leave the decision making determinations regarding transgender students to state legislatures.

However, courts, states, and individuals disagree with Trump’s determination.¹⁴ The Obama guidelines had tangible effects on law and politics. In fact, the removal of these guidelines has led to confusion in courts on questions of sex and discrimination.¹⁵ Additionally, despite the current executive branch opposition, states like New York have been unwavering in upholding their own legislative, executive, and judicial schemes regarding educational guarantees grounded both in state’s rights and Federal law.¹⁶ Specifically, New York’s state laws and state guidance letters provide clear protections of a student’s gender identity and solutions designed to assure safe and supportive environments for transgender students.¹⁷

Focusing on transgender students in education is both ripe and crucial to understanding student rights and how the legislative process contemplates the rights of diverse students. Education stands as the cornerstone of forming America’s youth. Former Secretary of State Colin Powell described education’s importance stating, “Children need to get a high-quality education, avoid violence and the criminal-justice system, and gain jobs. But they deserve more. We want them to learn not only reading and math, but fairness, caring, self-respect, family commitment, and civic duty.”¹⁸ Children need to be taught self-respect and respect for others. Ensuring an environment that teaches both must be a cornerstone of American foundation. By focusing on transgender students, we see how current policies apply to the individual rights of diverse individuals. This Note will analyze President Trump’s policies through both an academic and a legal lens, to explore the implications of his actions. Elected and future leaders thus will be able to understand the implications of where transgender students stand today, and how they can help shape a better future for the individual rights of students.

¹³ *Id.*

¹⁴ 1 Education Law §4:13 (West 2019).

¹⁵ *Grimm v. Gloucester Cty. Sch. Bd.*, 869 F.3d 286, 289 (4th Cir. 2017).

¹⁶ See Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 955 (2014); Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 321–25 (2011).

¹⁷ See STATE EDUC. DEP’T, GUIDANCE TO SCHOOL DISTRICTS FOR CREATING A SAFE AND SUPPORTIVE SCHOOL ENVIRONMENT FOR TRANSGENDER AND GENDER NONCONFORMING STUDENTS (2015), http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf; see also N.Y. EDUC. LAW §11(6) (defining “gender” as a “person’s actual or perceived sex and includes a person’s gender identity or expression”).

¹⁸ Claire Howorth, *Gen. Colin Powell On His New Effort to Help Kids Succeed*, TIME (April 13, 2017), <http://time.com/4737968/colin-powell-americas-promise-alliance/>.

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This Note reviews the United States Department of Education's recent declaration on transgender students and its decision to rescind the Obama era-guidelines that clarified and set forth practical school procedures to protect students, as important forms of informal lawmaking. The rescinding of the Obama era-guidelines has created a unique opportunity where transgender rights can either be strengthened or severely worsened. Although it is difficult to predict Supreme Court outcomes with changes in its composition, efforts by school districts, legislatures and advocates focusing on passing anti-bullying legislation and polices can help provide further protections to transgender students. Part I of this Note provides background on transgender students and explains the importance of individual rights in education. Part II traces state and federal statutes relevant to transgender students' rights in education. Part III reviews the Department of Education and Presidents' actions via executive guidelines and their significance. Part IV analyzes the guidelines through the lens of three examples of freedom of expression: facility use, clothing, and athletics. For each scenario, an analysis is provided on how courts have viewed the guidelines, and how current cases in those categories may have followed or are not following earlier case decisions. Part V reviews the comparisons made in Part VI and demonstrates how through diversification of efforts by local policymakers, legislatures, and state and federal courts, transgender rights have the strongest chance of being protected before a Supreme Court decision or Executive Order decides otherwise.

II. TRANSGENDER STUDENTS IN EDUCATION

To discuss the topic of students with transgender identities it is first necessary to clarify the differences between sex and gender, and how they interplay with identification and orientation. Although the terms "sex" and "gender" are often used interchangeably, they have different definitions and connotations.¹⁹ The term "sex" refers primarily to a person's classification as a male or female, according to their biological makeup.²⁰ Sex is assigned at birth, usually according to one's outward anatomy.²¹ Sexual orientation, on the other hand, describes an individual's physical, emotion, and romantic attraction to another

¹⁹ Carolyn E. Coffey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures*, 7 N.Y. CITY L. REV. 161, 169 (2004).

²⁰ *Id.*

²¹ 83 Causes of Action 2d 249, §†2 (West 2019).

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individual.²² Importantly, an individual's sexual orientation does not necessarily change if one's gender changes. For instance, a person who was assigned female at birth but identifies as a man may have a heterosexual orientation if they are primarily attracted to women

A person's "gender" is socially constructed and consists of socially ascribed characteristics within a spectrum of masculine and feminine.²³ Depending on how one sees oneself on that spectrum, he or she will identify with that gender. How someone expresses their gender varies with each person. Such expression can be manifested in a person's name, how they dress, how they speak, and how they wish to be perceived.²⁴ In most cases, an individual's gender identity will match their sex assigned at birth.²⁵

However, with transgender individuals, their assigned sex and gender do not match their actual sense of self. Social scientists define transgender as "the umbrella term for people whose gender identity or expression differs from what is typically associated with the sex they were assigned at birth."²⁶ Courts have recognized this definition as well.²⁷ Those who identify as transgender may introduce themselves as such or with pronouns such as "he," "she," or "they."²⁸ The American Psychiatric Association considers transgender identity "a marked incongruence between one's experienced/expressed gender and assigned gender" called "gender dysphoria."²⁹ Today, one of the most accepted and effective forms of treatment for treating gender identity disorder is hormone therapy and surgical reconstruction.³⁰ Additionally, many individuals will undergo these operations alongside counseling, psychotherapeutic treatments, and other types of therapy.³¹

There are two approaches theorists believe will help society understand transgender identities that will in turn help prevent transgender discrimination. The first approach, coined by Martine

²² *GLAAD Media Reference Guide - Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Nov. 17, 2019).

²³ Coffey, *supra* note 19, at 169.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 83 Causes of Action 2d 249 at §†2.

²⁷ *Lewis v. High Point Regional Health System*, 79 F. Supp. 3d 588, 589 (E.D. N.C. 2015).

²⁸ *GLAAD Media Reference Guide*, *supra* note 22.

²⁹ *New Health Guidelines Propel Transgender Rights*, HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2019/05/27/new-health-guidelines-propel-transgender-rights#> (last visited Nov. 11, 2019).

³⁰ WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 33, 54 (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf.

³¹ *Id.* at 21.

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Rothblatt, is viewing sex and gender as a “sexual continuum.”³² Commentator Terry S. Kogan described Rosenblatt’s theory in terms that, “although society arbitrarily divides people exclusively into male and female, sex should be viewed on a continuum with no exclusive male and female categories and without regard to genitalia.”³³ With this approach, an individual can select how they want to be viewed on the continuum, without having to conform with rigid gender conformities or biases. However, this theory may present challenges. The acceptance of different identifications can create confusion in terms of ensuring equal opportunities and rights along the continuum. Statutes and precedent applying to “males” and “females” would no longer apply to transgender individuals because they are a new category. Thus, when courts determine discrimination in reference to transgender individuals, the court will ask whether that individual was treated equally to other individuals of his or her sex.³⁴ Yet, whom can you compare this unknown category in order to ensure their equality? Without categorical classification, lawmakers will have trouble drafting statutes, and courts will find applying the law difficult.

Another approach that Kogan suggests is placing “members of sex/gender minorities into a third sex/gender category.”³⁵ In this instance, an individual would identify as “other.” This approach defies gender stereotypes as well and allows institutions to create rules pertaining to “others” such as an “other” choice restroom.³⁶ Scholar Carolyn E. Coffey criticizes the “other” approach’s applicability, due to the already present hesitation judicial and legislative bodies experience in recognizing transgender individuals.³⁷ Since she views transgender identities as deserving a category more substantial and defining than “others”, this categorization will create an “amorphous, dehumanized” understanding of individuals identifying as transgender.³⁸ Additionally, Coffey points out, many transgender individuals simply wish to live with the identity of their post-operation gender.³⁹ Thus, transgender and gender non-conforming (“TGNC”) identities remain misunderstood socially and misunderstood by courts as well.

³² Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other,”* 48 HASTINGS L.J. 1223, 1235 (1996).

³³ Coffey, *supra* note 19, at 170 (citing Kogan, *supra* note 32, at 1238).

³⁴ *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

³⁵ Coffey, *supra* note 19, at 170.

³⁶ *Id.*

³⁷ *Id.* at 171.

³⁸ *Id.*

³⁹ *Id.*

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III. LEGAL BACKGROUND

The fight for gay and lesbian rights was and continues to be instrumental in paving the path for the recognition of transgender individuals and their rights. Landmark cases such as *Lawrence v. Texas*, *U.S. v. Windsor*, and *Obergefell v. Hodges* all led to the recognition of equal rights for gay and lesbian people under the Fourteenth Amendment, Title VII, and Title IX.⁴⁰ Even though *Obergefell* found a right to marry rather than the rights of individuals to have any particular sexual orientation, the “tone and language of the *Obergefell* decision potentially indicate much broader implications for the rights of the LGBTQ community than the Court’s holdings regarding marriage.⁴¹ *Obergefell* decided an important constitutional issue, but it also stood as a pivotal marker of shifting opinion in the judicial area of statutory interpretation, as well in applying Title IX to apply to male-on-male sexual harassment.⁴²

Title VII and Title IX are two of the most important Federal laws protecting against sex discrimination. Title IX of the Education Amendments of 1972 provides, in part, that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁴³ In simplified terms, Title IX protects against sex discrimination in educational environments, and Title VII protects against it in the workplace.⁴⁴

Title IX has been interpreted in traditional terms of protecting women against discrimination from the men.⁴⁵ In order to properly allege a violation of Title IX in the context of education, a plaintiff must allege that they were excluded from an education program because of their sex, the educational institution received financial assistance from Federal funding at the time of that exclusion, and the discrimination caused harm to the individual.⁴⁶ Title IX’s protection of transgender individuals has been established through a series of cases.⁴⁷ Importantly,

⁴⁰ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 (1998) (“[S]ame sex marriage was covered by Title VII’s prohibition against discrimination on the basis of sex.”); *Lawrence v. Texas*, 123 U.S. 2472, 2484 (2003); *U.S. v. Windsor*, 133 U.S. 2675, 2693 (2013); *Obergefell v. Hodges*, 135 U.S. 2584, 2597 (2015).

⁴¹ 1 Education Law §4:13.

⁴² See *infra*, notes 46–69, and discussion.

⁴³ 20 U.S.C.A. §1681(a).

⁴⁴ Civil Rights Act of 1964, §701 (codified as 42 U.S.C.A. §2000e); Education Amendments of 1972, §901, (codified as 20 U.S.C.A. §1681).

⁴⁵ *Finch v. Xavier Univ.*, 689 F. Supp. 2d 955, 966 (S.D. Ohio 2010)

⁴⁶ *Preston v. Com. of Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 205 (4th Cir. 1994).

⁴⁷ 1 Education Law §4:13 (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75,

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protections deriving from Title IX were established through cases finding violations of Title VII discrimination.⁴⁸

Oncale v. Sundowner Offshore Services, Inc. focused on the specific text of Title VII in protecting individuals on “the basis of sex.”⁴⁹ In *Oncale*, a male employee was sexually harassed by other male employees in his workplace. Joseph Oncale argued that under Title VII, his claim of same-sex sexual harassment was actionable, and he had a right of protection from discrimination.⁵⁰ Title VII of the Civil Rights Act of 1964, provides “that [i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁵¹

The Court in *Oncale* recognized that although male-on-male sexual harassment may not have been an evil the framers intended to prevent, “discriminat[ion] . . . because of . . . sex” is prohibited in male-on-male circumstances under Title VII.⁵² In other cases, such as *Jennings v. Univ. of North Carolina*, courts have interpreted “Title VII for guidance in evaluating a claim brought under Title IX.”⁵³ Here, the judiciary recognized rights in male-on-male workplace contact as well as found that the statute protected against discrimination on the basis of sex generally.⁵⁴

The decision in *Oncale* and subsequent decisions have established today’s interpretation of Title IX. In cases following the precedent of *Oncale*, courts have held that “there was no logical rationale for distinguishing between Title IV and Title IX with regard to the circumstances under which abusive or offensive conduct amounts to harassment ‘based on sex.’”⁵⁵ Further, courts have held that the same language found in Title IX regarding the “basis of sex” can also create a cognizable claim under Title IX for sexual harassment as an individual who identifies as LGBTQ.⁵⁶

Only five years after *Oncale*, in *Miles v. N.Y.U.*, a court in New

117 (1998)).

⁴⁸ *Id.*

⁴⁹ *Oncale*, 523 U.S. at 118. *Oncale* was cited with approval in *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 631, U.S. (1999) and *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 118 U.S. (1998), both Title IX cases. See 1 Education Law §4:13.

⁵⁰ *Oncale*, 523 U.S. at 80.

⁵¹ *Id.* at 100 (citing 78 Stat. 255 (codified as amended at 42 U.S.C. §2000e–2(a)(1)).

⁵² *Id.* at 102.

⁵³ *Jennings v. Univ. of North Carolina*, 482 F.3d 686, 695 (4th Cir. 2007) (holding that a school violated Title IX by denying a transgender student access to an appropriate restroom).

⁵⁴ *Id.*

⁵⁵ 1 Education Law §4:13

⁵⁶ *Id.*

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York's Southern District held that a transgender student "could proceed with her case under Title IX for discrimination on the basis of sex."⁵⁷ The decision in *Miles* presented a bold statement to the public—transgender individuals and students have equal rights.⁵⁸ Thereafter, many claims for sexual discrimination of transgender students occurring in public schools have successfully been brought under Title IX.⁵⁹

Courts have primarily taken two approaches in analyzing whether a claim for discrimination against a transgender individual can be brought under Title IX.⁶⁰ The first approach asks whether the individual is being discriminated against because of identification related to their sex such as sexual orientation or if they identify as transgender. Discrimination relating to a transgender student's identification is more often found to be sexual discrimination.⁶¹ However, transgender students have also been discriminated against because of their sexual orientation.⁶² If the student was discriminated against in this context, they have a claim that they were treated differently "on the basis of sex" in violation of Title IX.⁶³ For example, the court in *Philpott v. New York*, held that "discrimination on the basis of sexual orientation is a form of sex discrimination."⁶⁴ This is an example where a court found discrimination according to the first approach because the student was denied equal opportunity offered to other male students.

The second judicial approach instead asks if the discrimination arises from a person's non-conformance with gender stereotypes, which also violates Title IX.⁶⁵ Similar to the first approach, discrimination on the basis of sexual orientation and gender identity can be found. For example, the court in *Doe v. Brimfield Grade School* held that "same-sex student harassment based on the victim's failure to meet gender norms constitutes sex discrimination under Title IX."⁶⁶ *Brimfield* is an example where the court found discrimination according to the second approach because the student was discriminated against on the basis of sexual orientation.

⁵⁷ Emily Q. Shults, *Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender*, 12 *CARDOZO J.L. & GENDER* 337 (2005) (citing *Miles v. N.Y.U.*, 979 F.Supp. 248 (S.D.N.Y. 1997) (although the court did support the transgender student, the teacher did not know that the student was transgender)).

⁵⁸ *Miles*, 979 F.Supp. at 248.

⁵⁹ 1 Education Law §4:13.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 662 (W.D. Pa. 2015).

⁶³ *Id.*

⁶⁴ *Philpott v. New York*, 252 F. Supp. 3d 313, 316, (S.D. N.Y. 2017) (citing *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 342 (7th Cir. 2017)).

⁶⁵ 1 Education Law §4:13

⁶⁶ *Doe v. Brimfield Grade School*, 552 F. Supp. 2d 816, 823 (2008).

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Drawing the distinction between these two approaches may be difficult because of the fine line between discrimination based on sexual orientation, gender, or sex.⁶⁷ Importantly, in an effort to clarify the law, courts have relied on the Department of Education, Office of Civil Rights (“OCR”) guidelines and statements that provide that discrimination on the basis of one’s gender, sex, or sexual orientation is prohibited under Title IX regardless of approach.⁶⁸ However, the rescinding of the Obama era guidelines has reopened this question and returned the decision back to the courts.

Two Constitutional protections transgender students have successfully pleaded include the First Amendment right to free speech, and the Fourteenth Amendment’s protection under the Equal Protection and Due Process Clauses.⁶⁹ Many students have brought suits claiming violation of their rights under the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment provides that no State may “deny to any person within its jurisdiction the equal protection of the laws.”⁷⁰ However, in order to invoke the Fourteenth amendment, there must be a resulting disadvantage to various groups or persons.⁷¹ Thus, imbedded in every claimed Equal Protection Clause violation is a requirement for the plaintiff to show that the alleged separate treatment can negatively impact other transgender people.⁷²

When the claim of disadvantage is based on sex, courts hold the action subject to intermediate scrutiny.⁷³ Under intermediate scrutiny, the State must demonstrate that the law serves “‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”⁷⁴ In contrast to strict scrutiny, here, the government does not need to show that this is the least intrusive means in achieving that goal.⁷⁵ Rather, the

⁶⁷ *Videckis v. Pepperdine University*, 150 F. Supp. 3d 1151, 1159 (2015) (noting that “[o]ther courts have acknowledged the difficulty of distinguishing sexual orientation discrimination from discrimination based on sex or gender stereotypes” and “[i]t is impossible to categorically separate ‘sexual orientation discrimination’ from discrimination on the basis of sex or from gender stereotypes; to do so would result in a false choice”).

⁶⁸ U.S. Department of Education, Office for Civil Rights, Title IX Resource Guide (Apr. 2015). For a more in-depth analysis of the OCR’s effect on judicial decision making, see, *infra*, Part III,

⁶⁹ The first amendment right to free speech will be seen later in the “Right to Dress”

⁷⁰ *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 640 (M.D.N.C. 2016) (citing U.S. CONST. amend. XIV, §1).

⁷¹ *Id.*; *Romer v. Evans*, 517 U.S. 620, 631 (1996).

⁷² See e.g., *Carcaño*, 203 F. Supp. 3d at 640; *Romer*, 517 U.S. at 631.

⁷³ *Carcaño*, 203 F. Supp. 3d at 640 (citing *United States v. Virginia*, 518 U.S. 515, 532–33 (1996)).

⁷⁴ *Id.* (citing *Virginia*, 518 U.S. at 533; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

⁷⁵ *Id.*

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test is one of reasonableness.⁷⁶ Thus, under intermediate scrutiny, if the means used to achieve important government interests is found reasonable, it is not discriminatory. In the case of bathrooms for example, the State's interest would be one of protecting intimate bodily functions.⁷⁷ Many have argued that by allowing transgender students the use of a neutral bathroom as opposed to a bathroom separated by sex, students will be forced to expose their private parts to students of the "opposite" sex. This interest is even stronger when applied to minors and students.⁷⁸ However, the debate here again returns to interpreting and defining "sex" when it comes to the State's interests in bodily privacy.⁷⁹ Thus, without a decision by the Supreme Court to directly explain the difference between sexually defining men and women, state and lower Federal courts will determine that difference for themselves.⁸⁰

An argument of Due Process must follow similar Constitutional hurdles. Plaintiffs have contended that in barring individuals from equal treatment of their rights, the State violates their Fourteenth Amendment rights of due process. As seen earlier in Due Process determinations, the state must show that the law "bears a rational relation to some legitimate end."⁸¹ Legitimate ends such as continuing education and protection of privacy of intimate body parts are substantially related to a governmental interest.⁸² However, here, unlike with Equal Protection, a Plaintiff must make "a clear showing" that the act "burdens a fundamental right and therefore triggers strict scrutiny."⁸³ This high bar makes it even tougher for a plaintiff to meet the standards required to successfully plead a Fourteenth Amendment Due Process claim.

Transgender students have also sought protection under 42 U.S.C.A. §1983.⁸⁴ As opposed to a Due Process claim, which can only reach state actors, or schools funded by states, bringing a claim under Section 1983 allows an student to challenge both individual actions as well as schools and other private actors.⁸⁵ Here, a student may sue where Title IX may exempt actors in certain situations.⁸⁶ However, to

⁷⁶ *Id.* at 617.

⁷⁷ *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir.1993).

⁷⁸ *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir.2005).

⁷⁹ *Carcaño*, 203 F. Supp. 3d at 641 ("Not surprisingly, then, the parties disagree about which definition of "sex" promotes the State's interest in bodily privacy.").

⁸⁰ *Id.* at 642.

⁸¹ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

⁸² *Id.*

⁸³ *Carcaño*, 203 F. Supp. 3d at 646 (citing *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 907 (9th Cir. 2007)).

⁸⁴ 42 U.S.C.A. §1983; 83 Causes of Action 2d 249 at §13 (West 2019).

⁸⁵ *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257–58 (2009).

⁸⁶ *Id.* at 257 ("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)–

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successfully bring this claim, a plaintiff must show compulsion by a government actor, and thus these claims usually fail unless a student is actually being forced to use a specific bathroom.⁸⁷

Violation of the Due Process Clause also provides transgender students with a cause of action in harassment cases. For example, on February 28, 2018, in connection with the New York State Education Department, Attorney General Eric Schneiderman released a memo clarifying and emphasizing the States' continuing obligation to protect transgender students, regardless of DOE determination.⁸⁸ He stated, "the USDOE's announcement has no bearing upon school districts' independent duties, under New York State law, to protect their transgender students and ensure those students' equal access to all school resources and programming."⁸⁹ Specifically, New York State's Dignity for All Students Act ("DASA") protects students from discrimination and harassment based on their gender identity or expression.⁹⁰ Additionally, New York state has released its own guidelines instructing schools on how to properly address issues of bathroom, safe environments, and athletics.⁹¹

IV. ANALYZING THE GUIDELINES AND THEIR EFFECTS

The first relevant release by the OCR and DOE was the December 2014 document titled, "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities."⁹² The Departments have determined that this document, and later additional documents, have the status of a "significant guidance document" under the Office of Management and Budget's Final

(5)").

⁸⁷ *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 379 (E.D. Pa. 2017), *aff'd*, 890 F.3d 1124 (3d Cir. 2018), and *aff'd*, 897 F.3d 518 (3d Cir. 2018).

⁸⁸ Memorandum from Eric T Schneiderman and Mary Ellen Elia to New York School Districts (February 18, 2018) (on file with the New York School Education Database).

⁸⁹ *Id.*

⁹⁰ *Id.*; Dignity for All Students Act, 2010 Sess. Laws of N.Y. ch. 482 (McKinney's) (codified at N.Y. EDUC. LAW §10 et seq.); *see also* N.Y. EDUC. LAW §11(6) (defining "gender" as a "person's actual or perceived sex and includes a person's gender identity or expression").

⁹¹ STATE OF NEW YORK DEP'T OF EDU., GUIDANCE TO SCHOOL DISTRICTS FOR CREATING A SAFE AND SUPPORTIVE SCHOOL ENVIRONMENT FOR TRANSGENDER AND GENDER NONCONFORMING STUDENTS (July 2015), http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf.

⁹² DEP'T OF EDU. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES (Dec. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

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Bulletin for Agency Good Guidance Practices.⁹³ Importantly, this document, like the subsequent others, does not add any requirements to applicable law, but instead provides examples and information that schools or institutions can readily follow to comply with their legal obligations under Title IX.⁹⁴

These guidelines provide answers to questions that schools should consider in order to provide equal treatment and avoid discriminatory practices.⁹⁵ The document addresses topics such as: which schools fall under the requirement of Title IX; which types of classes and activities must be compliant; steps to be taken to ensure such compliance; and how to perform evaluations of those steps and programs.⁹⁶ Case law has used these guidelines along with the other DOE releases as evidence of interpretation of Title IX supporting transgender student rights.⁹⁷

The next relevant set of documents released by the DOE was the January 2007 “Dear Colleague” letter.⁹⁸ This letter informed the public that the DOE amended regulations of Title IX regarding local education agencies and other educational institutions.⁹⁹ The amendments provided the recipients with more “flexibility” to offer single-sex classes and activities in compliance with Title IX.¹⁰⁰ When educational institutions do provide single sex activities, they still must ensure that the students of that sex are treated equally.¹⁰¹ For example, a single-sex school must still treat transgender boys equal to other boys, or a single-sex sports team must treat a transgender boy in the same fashion as the other boys in reference to acceptance to the team, participation on the team, and access to team facilities.

The most relevant DOE letters related to the recent transgender litigation are The Dear Colleague Letter of May 13, 2016 and the Letter to Emily Prince from James A. Ferg-Cadima of January 7, 2015.¹⁰² The 2015 letter was in response to Ms. Prince’s inquiry requesting further guidance about access to restrooms and policies or practices regarding transgender students’ access to bathrooms. This letter includes the idea that Title IX prohibits discrimination “including gender identity and failure to conform to stereotypical notions of masculinity or

⁹³ *Id.* at 2.

⁹⁴ *Id.*

⁹⁵ *Id.* at 6.

⁹⁶ *Id.* at 7.

⁹⁷ *Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir.), *cert. granted in part*, 137 S. Ct. 369 (2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

⁹⁸ OCR Dear Colleague Letter on Single-Sex Title IX Regulations (Jan. 31, 2007), <http://www.ed.gov/ocr/letters/single-sex-20070131.pdf>

⁹⁹ *Id.* at 2.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 3.

¹⁰² Letter to Emily Prince from James A. Ferg-Cadima, *supra* note 9.

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femininity.”¹⁰³ It further explains, 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.¹⁰⁴ The letter specifically supports actions, in response to two of OCR’s recent investigations at the time, in which schools had created policies ensuring that transgender students were treated “consistent with their gender identity for purposes of restroom access.”¹⁰⁵ Importantly, for the first time, the DOE “found a school district in violation of civil rights laws over transgender issues.”¹⁰⁶ By including these facts, the OCR implicitly conveyed that schools should follow likewise or be faced with Title IX violations.

The May 2016 “Dear Colleague Letter” further addresses a variety of issues involving transgender students.¹⁰⁷ While reiterating the points made by the previous documents and letters, this letter explains, “[a] school’s Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns.”¹⁰⁸ Some of the protections it addressed in detail were athletic locker rooms, housing accommodations, and other sex-specific rules like school dances and graduation ceremonies.¹⁰⁹

The deviations between the earlier letters and the final letter is significant for three reasons. First, the final letter directly refers to the balancing test relied upon in case law as a factor to be considered in determining the rights and opportunities of students with transgender

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1.

¹⁰⁵ *Id.* at 2.

¹⁰⁶ Letter from Adele Rapport, Regional Director, U.S. Department of Education, Office for Civil Rights, to Daniel E. Cates, Superintendent, Township High School District 211, OCR Case No. 05-14-1055 (Nov. 2, 2015), <http://www.chicagotribune.com/ct-doe-report-on-district-211-20151102-htmlstory.html>.

¹⁰⁷ U.S. Department of Justice Civil Rights Division & U.S. Department of Education Office for Civil Rights, Dear Colleague Letter on Transgender Students (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [hereinafter May 13 Letter].

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 8 (“A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity. . . . A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students. . . . But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students. . . . [A] school may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule.”).

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identities.¹¹⁰ Second, the OCR not only recognizes the balancing test, but it holds and recommends with “significant guidance” that in order to not violate Title IX, schools must prioritize bathroom use, programs, and activities for transgender students even when there may result a significant disruption.¹¹¹ Most importantly, the letter spells out the fact that gender identity equals sex for the purposes of Title IX.¹¹² Third, without specifically endorsing any policies, the DOE attached a supplement including policies from other districts in support of the guidelines.¹¹³

On February 22, 2017, the Trump administration withdrew the previous “Dear Colleague Letter from May 2016 and the Letter to Emily Prince from January of 2015.”¹¹⁴ On one hand, proponents of the letters argue that its withdrawal removes critical interpretation of Title IX and removes necessary rules and policy guidance helping to protect transgender students.¹¹⁵ Many have argued that removing the letters leaves young and scared students vulnerable to abuse.¹¹⁶ Without clear interpretation of Title IX, courts and school municipalities may deny transgender students’ equal rights. On the other hand, for example, in the press briefing following the rescinding of the guidelines, press secretary Sean Spicer stated that the Title IX from 1972 framers did not contemplate transgender students.¹¹⁷ Approving the removal of the Obama guidelines, Spicer commented that the Obama era letters was an instance of the Federal government making a decision “forcing schools to make a huge accommodation” without a proper “comment period.”¹¹⁸ Spicer implied that instead of a guidelines release, state legislatures should amend Title IX, but as a Federal statute.¹¹⁹

Right to Dress

¹¹⁰ *Id.* at 2.

¹¹¹ *Id.* at 1.

¹¹² *Id.* at 2 (stating that the “Departments treat a student’s gender identity as the student’s sex for purposes of Title IX”).

¹¹³ *Id.*

¹¹⁴ See Office for Civil Rights of the Department of Education, Dear Colleague Letter Withdrawing the Dear Colleague Letter of May 13, 2016 and the Letter to Emily Prince from James A. Ferg-Cadima of Jan. 7, 2015 (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹¹⁵ 1 Education Law §4:13.

¹¹⁶ See, e.g., Logan Casey, *After Trump Rescinds Title IX Guidance, What’s Next for Transgender Students’ Rights?*, Brookings Institute: Brown Center Chalkboard (Mar. 1, 2017), <https://www.brookings.edu/blog/brown-center-chalkboard/2017/03/01/after-trump-rescinds-title-ix-guidance-whats-next-for-transgender-students-rights/>; see also Press Briefing by Press Secretary Sean Spicer, THE WHITE HOUSE (Feb. 23, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sean-spicer-022317/>.

¹¹⁷ Press Briefing by Press Secretary Sean Spicer, *supra* note 116.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

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The right of a transgender student to dress consistent with their gender identity was recognized by courts as vital to compliance with Title IX and the constitutional rights prior to the release of the Obama-era letters. *Doe v. Yunitz*, a leading case, was decided in favor of allowing a transgender student to dress consistent with their gender identity.¹²⁰ This case involved a fifteen-year old student who was assigned male at birth, but identified as a female.¹²¹ This student sought to attend school wearing clothes and fashion accessories consistent with her gender identity, but she was barred by the school from doing so.¹²² The school's policy prohibited clothing or dress that could be distracting or disruptive to the education process, or that affected the safety of students, and thus staff would send her home to change or would require that she change.¹²³ Relying on state law, the court held that the case should be guided by a "federal free speech analysis."¹²⁴

The first step in this analysis was determining whether the plaintiff's dress constituted speech protected by State law.¹²⁵ In order for a court to recognize an act as speech, it must be clear that the symbolic act by the student "constitutes expression" of the particular act the student was trying to portray.¹²⁶ Importantly, that same message needs to be understood by other students and the administration. In this example, the speech is clear: she is trying to express through her clothing, makeup and accessories that she should be identified as a girl.¹²⁷

Next, if that speech is expressive, the court will ask if the defendant school's conduct suppressed that speech. On one hand, if the school's direct conduct did not suppress speech, but rather was acting within its constitutional scope to further a governmental interest, then its actions would not be considered a restriction on speech.¹²⁸ In this case, the specific government interest would be education and furthering the work of the school.¹²⁹ On the other hand, if the school did suppress speech, it violated both the student's state rights and First Amendment rights.

However, this rule is not absolute. This court, and others have

¹²⁰ *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, *1 (Mass. Super. Ct. 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).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*; The Massachusetts Declaration of Rights, art. XVI (as amended by art. 77).

¹²⁵ *Yunits*, 2000 WL 33162199, at *1.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *United States v. O'Brien* 391 U.S. 367, 377 (1968).

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relied upon *Tinker v. Des Moines Community School District* and its balancing of interests test.¹³⁰ The court in *Tinker*, found that denying the student's ability to wear controversial armbands did suppress speech.¹³¹ It accordingly held that although there is a violation of students' rights when they are denied the ability to wear the armbands, "suppression of speech that 'materially and substantially interferes with the work of the school' is permissible."¹³² Hence clarifying above, a school can interfere with speech if such speech substantially interferes with the work of school.

In another leading case, *Yunitz*, despite the school's contentions, the plaintiff's speech was well understood by not only the staff but the student body.¹³³ The court found by requiring her to change, the school suppressed her speech.¹³⁴ Additionally, any argument that the school's policy was neutral was defeated by the fact that, since the plaintiff was a girl, she should in the very least have been able to dress like one.¹³⁵ Yet, the school still argued that her dress and actions around school not only disrupted classrooms, but her safety was also at risk when she dressed more femininely. The court responded with two rebuttals. First, it found that threats the student received fall under normal school bullying protocol.¹³⁶ If a student is bullied because of how they dress in school, the school will discipline the bully for their actions. Second, the court emphasized that in considering the individual student's rights, the disapproval of masses will have no bearing on the student's ability to dress according to her identity.¹³⁷ Thus, the court held that a school should not be allowed to bar students from dressing when their wish is to dress consistent with their gender identity when that activity does not substantially interfere with the running of the school.¹³⁸

Many courts had followed in the direction of *Yunitz*, *Tinker*, and *O'Brien* before the release of the Obama era documents.¹³⁹ For example, the court *Yunitz* expanded its holding to the topic of gender rather than to the issue of "sexual orientation, transsexualism, and transvestitism."¹⁴⁰ However, the Court of Appeals for the Second

¹³⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. 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).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *United States v. O' Brien* 391 U.S. 367,377 (1989); *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 739 (1969); *Yunits*, 2000 WL 33162199, at *1.

¹⁴⁰ *Yunits*, 2000 WL 33162199, at *6.

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Circuit in *Zalewska*, has declined to extend *Yunitz* and held that although an employee's act of wearing a skirt was expressive, her interest in her personal appearance did not violate a fundamental right.¹⁴¹ Thus, the controversy has hardly been settled by these cases.

The Obama-era documents have provided some guidance on this topic. In determining ambiguities in rules and regulations, the Supreme Court has ordered that judges are required to “defer to an agency’s interpretations of its own legislative rules and regulations where they are ambiguous.”¹⁴² Hence, in ambiguous Title XI cases, judges have followed this instruction in support of the Obama-era guidance letters. Specifically, the interpretation of Title IX’s “on the basis of sex” language and whether sex includes gender identity is where courts look to the guidelines.¹⁴³

Although the guideline letters do not create a separate category for “the right to dress,” in setting forth “Safe and Nondiscriminatory Environments” courts have recognized the DOE’s efforts in protecting such First Amendment rights.¹⁴⁴ The 2016 letter proscribes specific guidance on preventing bullying and harassment directly targeting a student on the basis of their status, identity, or transition.¹⁴⁵ Courts have recognized this as a firm stance in protection of transgender students.

For example, *Fricke v. Lynch* was the first court to recognize the “heckler’s veto” in the context of sexual orientation.¹⁴⁶ The heckler’s veto occurs when an institution or individual submits to conforming in a situation because they are disparaged by hecklers to the point of submission. For transgender students, the heckler’s veto usually comes from other students, student boards, and the surrounding community that oppose transgender students’ clothing or use of bathrooms. Also recognized and relied on in *Yunitz* was the idea that the heckler’s veto will not outweigh the rights of transgender students. The guidelines have been especially usefully here where the heckler’s veto becomes loud and powerful. The guidelines specifically set out that regardless of negative backlash by individuals, school boards, or communities, a transgender student must be treated equally with their gender identity and those of the same gender identity as themselves.¹⁴⁷ Decisions such as, *Baldwin v. Foxx* and *Auer v. Robbins* have relied upon the guidelines and required schools provide equal protection for transgender students.¹⁴⁸ In direct reflection of the guidelines, schools have come to

¹⁴¹ *Zalewska v. Cty. of Sullivan*, New York, 316 F.3d 314, 319 (2d Cir. 2003).

¹⁴² *Aver v. Robbins*, 519 U.S. 452, 117, 137 (1997).

¹⁴³ *Smith v. Salem, Ohio*, 369 F.3d 912, 922 (6th Cir. 2004).

¹⁴⁴ May 13 Letter, *supra* note 107.

¹⁴⁵ *Id.*

¹⁴⁶ *Fricke v. Lynch*, 491 F. Supp. 381 (1980).

¹⁴⁷ May 13 Letter, *supra* note 107.

¹⁴⁸ *Appleberry v. Blue Springs R-IV Sch. Dist.*, (2017) (“EEOC determinations like that

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private agreements with individual students to recognize their gender identity and allow them to dress consistently with that identity.¹⁴⁹

Facility Use

The debate over sex and gender discrimination in relation to facility use is a strikingly new topic. Although it is not the first time facilities have been used in discriminatory ways, it is the first time in history that the debate has centered around a distinction of gender and sex. In 2016, North Carolina was the first state to address transgender bathroom rights.¹⁵⁰ By creating a new law stating that public bathrooms are accessible only to people of the same biological sex, they directly prohibited transgender individuals from using the restroom that corresponded to their gender.¹⁵¹ This law later became known as the “bathroom bill.”¹⁵²

In pre-guideline cases, courts have continually held that when it comes to constitutional questions of gender and sexuality, sex will be determined on the basis of physiology.¹⁵³ Although many of these cases come from pre-guideline era, even in 2016, the Fourth Circuit cited *Virginia* in support of treating men and women differently because of physiological differences.¹⁵⁴ Additionally, in *Carcaño*, applying the intermediate scrutiny test, the court held that segregation of bathrooms based on physiological difference did not violate plaintiffs’ constitutional rights. It held, “[w]ithout reducing the “reasonable fit” requirement to a numerical comparison, it seems unlikely that a law that classifies individuals with 99.7% accuracy is insufficient to survive

in Baldwin were influenced by an unpublished guidance document issued by the Department of Education in 2014, and by a related opinion letter issued by the Department of Education in January 2015, which announced that Title IX’s prohibition of sex discrimination includes gender identity. The Fourth Circuit afforded the Department’s guidance document and opinion letter controlling deference under the doctrine of *Auer v. Robbins*, 519 U.S. 452 117, 137 (1997).”

¹⁴⁹ May 13 Letter, *supra* note 107 (citing Resolution Agreement, In re Downey Unified Sch. Dist., CA, OCR Case No. 09-12-1095, (Oct. 8, 2014), www.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (“[A]greement to address harassment of transgender student, including allegations that peers continued to call her by her former name, shared pictures of her prior to her transition, and frequently asked questions about her anatomy and sexuality.”); *Doe v. Anoka-Hennepin Sch. Dist. No. 11*, MN (2012), www.ed.gov/ocr/docs/investigations/05115901-d.pdf (“[C]onsent decree to address sex-based harassment, including based on nonconformity with gender stereotypes.”)).

¹⁵⁰ Public Facilities Privacy and Security Act, 2016 N.C. Laws 2nd Ex. Sess. (repealed by Act to Reset S.L. 2016-3, 2017 N.C. Laws 1st Sess.).

¹⁵¹ Brian S. Barnett, et al. *The Transgender Bathroom Debate at the Intersection of Politics, Law, Ethics, and Science*, THE JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW (2018).

¹⁵² *Id.*

¹⁵³ *United States v. Virginia*, 518 U.S. 515, 522 (1996); *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 121 (2001).

¹⁵⁴ *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 643 (M.D.N.C. 2016) (citing *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016)).

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intermediate scrutiny.”¹⁵⁵

Until very recently no “authority existed regarding the application of Title IX and its related regulations to transgender students and employees.”¹⁵⁶ Although denying the plaintiff’s Fourteenth amendment claims, the court in *Carcaño* held that the new state law barring transgender individuals from using public restrooms of their gender did violate Title IX.¹⁵⁷ In relation to schools, courts have been reluctant to bar transgender students from bathrooms matching their gender. The court in *Carcaño* also relied upon the court’s guidance in *Highland*, which also relied on the guidelines.¹⁵⁸

In *Whitaker*, the court took a strong stance on protecting transgender rights. First, by providing a preliminary injunction, an “extraordinary remedy,” the court recognized the necessity and importance of the harm that could be caused to the student from the discriminatory practices.¹⁵⁹ Second, the Supreme Court relied on *Oncale* in embracing an expansive view of Title VII, admitting that although the framers didn’t have transgender student’s in mind, it is the duty of the court to protect against “comparable evils.”¹⁶⁰

It is important to note that when a school only makes a single-occupancy bathroom available or makes the transgender student use the bathroom of their sex assigned at birth, there is a violation of Title IX.¹⁶¹ Although separate, single-occupancy, facilities may seem to create a solution, the problem is that the school is treating the transgender students differently from students of the same gender.¹⁶² Noting this, the court in *Evancho* rejected the school’s argument that the failure of law makers’ to include the word “transgender” in Title VII or IX despite the opportunity to do so as determinative.¹⁶³ Thus, the court held that the balance of harms favored the student, and the school violated his Title IX claims.¹⁶⁴

In 2016, in a groundbreaking case in the category, the Fourth Circuit directly required that courts defer to the DOE’s

¹⁵⁵ *Id.* at 644.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 623.

¹⁵⁸ *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 299 (W.D. Pa. 2017) (“On top of all of that is the reality that the 2015 and 2016 Guidance letters were central to the Title IX holdings by the Highland and Carcaño courts†.†.†”); Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ., 208 F. Supp. 3d 850, 869 (S.D. Ohio 2016).

¹⁵⁹ *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017), *cert. dismissed sub nom.* *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker*, 138 S. Ct. 1260 (2018).

¹⁶⁰ *Id.* (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 (1998)).

¹⁶¹ *Evancho*, 237 F. Supp. 3d at 285.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

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recommendations on bathrooms.¹⁶⁵ Gavin Grimm was a high school sophomore who transitioned from female to male and used the male bathrooms in school. School officials allowed him to use the boys' bathroom until community members began contacting the school.¹⁶⁶ Once complaints were made, the school limited Grimm's access to sex-segregated bathrooms, restricting him to separate facilities. After Grimm brought suit, the district court relied on 34 C.F.R. §†106.33, holding that the statute unambiguously refers to a student's birth or biological sex, denying his claims.¹⁶⁷ On appeal, the reviewing court remanded with an injunction and with instructions for the court to regard the DOE letter with "controlling weight."¹⁶⁸

However, even in light of the guidelines, two days after the hearing in 2016, the Supreme Court stayed the Fourth Circuit's mandate until it could rule on the case. Then, once the new administration withdrew the previous documents, the Court vacated the 2016 decision and remanded the case down to the Fourth Circuit Court of Appeals "for further consideration in light of the [new] guidance document issued by the Department of Education and Department of Justice."¹⁶⁹ In response, the Fourth Circuit vacated the district court's 2016 preliminary injunction.¹⁷⁰ Additionally, the Fourth Circuit remanded to the district court to determine whether this case has become moot because of G.G.'s graduation.¹⁷¹ This is a clear example of courts centering their decisions around and being directly affected by the DOE guidelines letters.

When the Obama-era guidelines letters were withdrawn, the issue became substantially more complicated.¹⁷² In *Evancho*, the court battled with the withdrawal stating, "[i]n light of that retraction, the Court cannot avoid considering which—if any—of the DOJ and DOE's Departmental Guidance documents and other communications related to Title IX and its application to transgender individuals would now be entitled to any sort of *Auer* deference."¹⁷³ The court visibly battled between interpreting the withdrawal as meaning one of two things.¹⁷⁴ It could either mean that the withdrawn documents were no longer relevant to interpretation of Title IV and IX, or it could mean that they should interpret the withdrawal as a message to rule against what the

¹⁶⁵ Grimm v. Gloucester Cty. Sch. Bd., 869 F.3d 286, 289 (4th Cir. 2017).

¹⁶⁶ *Id.* at 287.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 290.

¹⁷¹ *Id.*

¹⁷² *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 298 (W.D. Pa. 2017).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

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guidelines stated.¹⁷⁵ Importantly, the court did not treat the withdrawal as overruling cases that have drawn on the guidelines; rather, it followed in the precedent of those that have not acknowledged the guidelines as judicial instructions.¹⁷⁶

In response to the order to stay in *G.G.*, the court in *Evancho* was hesitant to conclude that petitioner had a likelihood of success on the merits in order to present a preliminary injunction.¹⁷⁷ However, in dicta, the court narrowed this decision to the facts of the case in determining relief and emphasized the plaintiff's mission "to do what young people try to do every day—go to school, obtain an education, and interact as equals with their peers."¹⁷⁸ Notably, a small win in the battle, the court ruled that the plaintiffs will wear graduation garb and shall be identified with pronouns matching their gender identities.¹⁷⁹

Athletics

Title IX has been recognized in large part in relation to expanding opportunities for female athletes.¹⁸⁰ Although Title IX doesn't specifically address athletics, athletics are considered integral to the education process and thus are subject to Fourteenth Amendment constitutional protection.¹⁸¹ As female participation in athletics increases every year, Title IX has provided remedy to women seeking equal treatment in all levels of education, including collegiate.¹⁸² Case law has recognized that sex discrimination in athletics is protected by Title IX.¹⁸³

To date, there have been few—if any—cases brought by a transgender student athlete. However, there are cases that suggest that sexual orientation in the field of athletics may stretch over to transgender rights. In 2006, a Federal district court held that "language, with sexual orientation overtones, amounts to gender discrimination."¹⁸⁴ This court adopted an expansive view of Title IX, protecting against actions which speak to more than just a male-female physiological distinction.¹⁸⁵ Additionally, Title IX protections which have been recognized in preventing against hostile environments, can also protect

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 301.

¹⁷⁸ *Id.* at 302.

¹⁷⁹ *Id.* at 267.

¹⁸⁰ Elaine Chamberlain et al., *Athletics & Title IX of the 1972 Education Amendments*, 19 *GEO. J. GENDER & L.* 231, 232 (2018)

¹⁸¹ *Id.* (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971)).

¹⁸² NAT'L. COAL. FOR WOMEN & GIRLS IN EDUC., *TITLE IX AT 40*, at 8 (2012), <https://ncwge.org/archive/TitleIX40/TitleIX-print.pdf>.

¹⁸³ See generally *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005).

¹⁸⁴ Chamberlain et al., *supra* note 180, at 236 (citing *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (2006)).

¹⁸⁵ *Id.*

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transgender students. Transgender students can argue for the same protections against hostile environments, *quid pro quo* situations (in which benefits are exchanged for sexual advances), and peer-to-peer harassment, all of which have been recognized as clear violations of Title IX.¹⁸⁶

Opponents of expanding transgender rights in this situation argue that allowing individuals of the “opposite sex” to play on certain sports’ teams creates unfair competition.¹⁸⁷ However, sports organizations like the NCAA, argues that these assumptions are “not well founded” when it comes to transgender athletes.¹⁸⁸ Additionally, courts have held that the Equal Protection clause allow girls to participate on boys’ teams and have ruled that “generalized stereotypes about girls’ strength, physical ability, or susceptibility to injury are not sufficient governmental interests to overcome intermediate scrutiny.”¹⁸⁹ This argument would seem to apply equally to transgender players as well.¹⁹⁰

V. IMPLICATIONS

In review of the discussion above, it is clear that the both the creation and removal of the Obama-era guidelines have had very clear effects on judicial lawmaking. In many instances, the guidelines were used as legislative interpretation in which courts were able to refer to in expanding the definition of sex when it came to Title VII, Title IX and other constitutional protections. Still there are courts and states that still stand by strict interpretations of laws and define sex physiologically.¹⁹¹ Whereas previous courts were ready to interpret statutory law defining sex to include gender identification, the removal of the guidelines has created murkiness and confusion in this distinction.¹⁹² So what, if anything, have the guidelines accomplished, and what has their removal left in their place?

The right to dress consistent with a transgender student’s gender

¹⁸⁶ *Mary M. v. N. Lawrence Cnty. Sch. Corp.*, 131 F.3d 1220, 1226 (7th Cir. 1997); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 246 (2009).

¹⁸⁷ WOMEN’S SPORTS FOUNDATION, PARTICIPATION OF TRANSGENDER ATHLETES IN WOMEN’S SPORTS 3 (2011); NATIONAL EDUCATION ASSOCIATION, LEGAL GUIDANCE ON TRANSGENDER STUDENT RIGHTS (2006), https://www.nea.org/assets/docs/20184_Transgender%20Guide_v4.pdf.

¹⁸⁸ NATIONAL EDUCATION ASSOCIATION, *supra* note 187.

¹⁸⁹ *Id.* (citing *Clark v. Arizona Interscholastic Ass’n*, 695 F.2d 1126, 1130 (9th Cir. 1982) (holding that “denial of an opportunity in a specific sport, even when overall opportunities are equal can violate equal protection”).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

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identity has become a vital and undeniable liberty for students. Although, pre-guideline cases protected transgender students, the debate was clearly unsettled. However, unlike facility use and athletics, the right to dress has much stronger grounds rooted in the First Amendment. Perhaps it is because the right to dress is something broad enough to encompass other individual's rights and not just a fight specific to transgender students.

The guidelines and their removal have clearly upset the waters when it comes to transgender students' right to use facilities. In an already unsettled arena, the guidelines gave a brief directive to the courts on how to determine "sex" in settling on student bathroom rights. Although, it is still unclear which direction the courts will ultimately land, a majority of courts, while denying Fourteenth Amendment grounds, seem to hear and give merit to Title IX claims where transgender discrimination is clear.¹⁹³ Perhaps the difference between the two causes of action may revolve around that idea that while the Constitutional grounds allow leeway for some types of qualified discrimination, Title VII and IX hold steadfast grounds dependent on whether discrimination was present in the case or not. Of course, "in order for a transgender student to show discrimination in violation of Title IX," they must show that they were discriminated against based on sex.¹⁹⁴

The Obama-era guidelines clearly identified that transgender students must be treated equally upon the grounds of sex seen through their gender identity.¹⁹⁵ During the time the guidelines were in place, courts, whether technically bound or not, had somewhere to look for guidance. However, since Trump's removal of the guidelines, how states choose to define sex is back up for debate. Although some states have given deference to Trump's withdrawal, without further clarification, transgender rights will "vary across jurisdictions."¹⁹⁶

Such variation may especially be seen, as evidenced from Part III-Athletics, *supra*, in relation to transgender student rights to equal participation and acceptance in athletics. The topic of transgender athletics is relatively untouched by litigation and direct legislation, and therefore it is difficult to predict the results. Since transgender athletes are in the world of athletics, depending on the merits of a case, they may have strong Title VII claims.¹⁹⁷ However, unlike the previous

¹⁹³ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 (1998); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 643 (M.D.N.C. 2016); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 869 (S.D. Ohio 2016).

¹⁹⁴ Chamberlain et al., *supra* note 180, at 236.

¹⁹⁵ U.S. Dep't of Education Office for Civil Rights, Dear Colleague Letter (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx>.

¹⁹⁶ Chamberlain et al., *supra* note 180, at 257.

¹⁹⁷ *Id.* at 249.

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liberties, various sports organizations have taken strong stances in protecting transgender students. For example, the NCAA has specific policies allowing for transgender students to play on the teams corresponding to their gender identity.¹⁹⁸ Many contend that this can create unfair advantages in sports and that students can claim to be transgender in order to gain unfair advantages.¹⁹⁹ However, the NCAA also requires that the transgender student-athlete also have strong medical evidence such as that a transwoman's testosterone levels are within the range of an "average" woman.²⁰⁰ If a student does not undergo hormone treatment, they may play on the team of their assigned birth gender according to their state.²⁰¹ Some argue that this is discriminatory because if an individual can travel to a state and play on a male team, and travel to another state and cannot play on the male team, they are not treated similarly to individuals of their same sex, and are being discriminated against on the basis of sex.²⁰² Thus, they may have valid Title VII or Title IX claims. In order to combat this discrimination, many state governments and "scholastic athletic governing bodies" have issued guidelines requiring schools to allow transgender students to play on teams corresponding with their gender identities.²⁰³

It is also worth noting that President Trump's actions taken in office have gone against the goals of LGBTQ advocates. In his first year, he has nominated officials with anti-LGBTQ records and has directed federal attorneys to take anti-LGBTQ stances in court. Additionally, he has attempted to reinstate a ban on transgender people in the military. These are just a few of the many actions Trump has taken in an effort to minimize and quash the LGBTQ fight for equal rights. However, for some reason, the Trump administration did not withdraw the supplemental documents to the Obama guidelines that included policy recommendations which "directly supported students in using locker rooms associated with their gender identities."²⁰⁴ So

¹⁹⁸ *NCAA Policy on Transgender Student-Athlete Participation*, GENERAL ATHLETICS, https://www.generalssports.com/information/Inside_Athletics/sahandbook/Transgender (last visited January 17, 2019).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* ("A trans male (FTM) student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men's team, but is no longer eligible to compete on a women's team without changing that team status to a mixed team.").

²⁰¹ Chamberlain et al., *supra* note 180, at 249.

²⁰² *Id.*

²⁰³ *NCAA Policy on Transgender Student-Athlete Participation*, *supra* note 198.

²⁰⁴ Meghan M. Pirics, *Undressing the Locker Room Issue: Applying Title IX to the Legal Battle Over Locker Room Equality for Transgender Student Athletes*, 27 MARQ. SPORTS L. REV. 449, 460 (2017).

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perhaps LGBTQ student may still have a claim of right of action under Title IX that can be supported by the guideline's interpretation.²⁰⁵

VI. PROPOSAL

Many opponents of transgender rights contend that allowing equal access to transgender students might lead to more violence, or could “lead to sexual assaults in bathrooms,” and “that a [cis]gender boy could come to the school in a dress and demand to use the girls’ restroom.”²⁰⁶

Identifying as transgender is not something a student does on a whim or fancy. Contentions trivializing transgender identities both victimizes and misinterprets the validity of transgender individuals. When transgender children request access to certain facilities or sports teams, they are not, on a whim, deciding to “act like” another gender. Transgender students have potentially undergone surgeries, therapies, and serious practical and legal changes in their lives in order to be identified consistently with their gender. Additionally, there is no evidence that cisgender men pose as transwomen in order to commit sexual assault in women’s bathrooms.²⁰⁷ The only evidence of abuse and harm noted today is to transgender students, and the continual bullying and non-acceptance they receive from their peers and adults.²⁰⁸

Bullying was and remains one of the biggest challenges facing transgender students. Non-acceptance and isolation of transgender students as “others” aggravate their acceptance into society. In Part I, *supra*, two interpretations that could help society understand transgender individuals were discussed.²⁰⁹ However, these approaches are problematic for three reasons. First, they both make TGNC identities intangible and vague by blurring trans individuals into a third and niche category of people of a “gender” that is completely distinct from “normal” mainstream society. Although aiming to aid TGNC students, this approach ultimately isolates them even further. Second, these approaches narrow trans identities, and make them an exclusive and remote topic. By focusing on transgender students’ exclusively, courts inherently remove all other students from the discussion. Instead, if courts have an approach that discusses gender, sex, and identity, in

²⁰⁵ *Id.*

²⁰⁶ NATIONAL EDUCATION ASSOCIATION, *supra* note 187 (citing *Grimm v. Gloucester Cty. Sch. Bd.*, 869 F.3d 286, 289 (4th Cir. 2017)).

²⁰⁷ Julie Moreau, *No Link Between Trans-Inclusive Policies and Bathroom Safety, Study Finds*, CBS News (Sept. 19, 2018).

²⁰⁸ *Id.*

²⁰⁹ *See supra* notes 32–39 and discussion.

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terms that apply to all students, transgender issues can be discussed in a broader sense. Third, there is no reason to believe transgender students want to be identified as “other.” For example, nonbinary or genderqueer students do not fit into well into this model.²¹⁰ In fact, many students want to specifically be named by a gender, just not the one they were assigned at birth.

The most successful approach to advocate for transgender rights would not focus on trans identities at the policy level. Instead, districts, municipalities, and schools, must focus on creating anti-bullying laws. Schools in conservative states will not implement policies directly supporting transgender students, nor gender identity nor gender roles, but they may support policies that seek to treat each and every student equally. By providing this frame, the issue of TGNC rights is not an inquiry to help a remote set of individuals, but instead strong positive stance to make improvements that affect *every* student’s rights.

By focusing on bullying policy, states would not be required to take a stance on the interpretation of sex and gender. As of February 2016, 44 anti-transgender bills have been filed in 16 states, “more than double the amount of 2015.”²¹¹ Importantly, around half of those bills were targeted at transgender students.²¹² As evidenced, many states are vehemently against supporting pro-transgender legislation. However, there is no evidence that they are against supporting anti-bullying laws. Although the bills may not specifically mention gender identity, if policymakers can fight for liberal dress codes in schools, transgender students will have the first step in protection. As we have seen in Part III, *supra*, the right to dress has been strongly supported in the courts and schools preventing bullying on this subject will only be creating a safer and less contentious environment.

Importantly, such policies must not be construed to dilute bullying based on gender and gender identification. Authors Payne and Smith suggest that anti-bullying policies may actually be more harmful than helpful for the rights of LGBTQ students.²¹³ They warn that bullying policies must be exacting to target the “cultural roots of ‘the problem’”

²¹⁰ NYC COMM’N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION (Feb. 2019), <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/2019.2.15%20Gender%20Guidance-February%202019%20FINAL.pdf>

²¹¹ HUMAN RIGHTS CAMPAIGN, ANTI-TRANSGENDER LEGISLATION SPREADS NATIONWIDE, BILLS TARGETING TRANSGENDER CHILDREN SURGE (2016), <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/HRC-Anti-Trans-Issue-Brief-FINAL-REV2.pdf>.

²¹² *Id.*

²¹³ ELIZABETH PAYNE & MELISSA J. SMITH, THE WILEY HANDBOOK ON VIOLENCE IN EDUCATION ch. 19 (2018), <https://onlinelibrary.wiley.com/doi/pdf/10.1002/9781118966709.ch19>.

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and focus on more subtle forms of peer-to-peer aggression.²¹⁴ Otherwise, they diminish and demean student's identifications as LGBTQ students to mere instance of bullying.²¹⁵ Alternatively, they suggest policymakers to reframe their view on bullying.²¹⁶ Instead of viewing the bullying collection of big, mean, and scary individuals, anti-bullying policy must seek to impact the broader "hierarchies of power and privilege" imbedded in the culture and environment of schools.²¹⁷ Policies supporting liberal dress codes may help achieve that type of environment.

Once transgender students are one degree less alienated, they are one degree closer to equality. If schools can prevent bullying of transgender students, the student can be seen as their classmates' equals and not as outsiders or "others." When there is a lack of animosity between classmates, students will gain respect for each other, and eventually for each other's needs.

This mutual environment of respect must also be reflected in policies directing administrators. Principals must affirmatively ensure that the school environment is safe for all students, and that each student is treated with respect and understanding of individual cultures and contexts.²¹⁸ Teachers and counselors must also educate themselves and their students on the importance of respect and acceptance of students even if the students choose to dress or speak differently from them. Teachers must preach empathy, understanding and respect of others. Pedagogically, this is an ancient idea, rooted in the veins of the diversity of American culture.

Although the step from broad bullying policy to recognizing gender identity in the interpretation of sex seems like a huge leap, recognizing the bullying of transgender students is the first and *necessary* step towards equality. Once schools and administrators are able to lay out clear expectations that bullying in any form is unacceptable, an environment where mutual respect can foster, is much more likely. Soon after, cisgender students who understand that a transgender student should not be bullied because of their hair, their shirt, or how they speak, perhaps can understand that a transgender student should not be bullied based on what bathroom they want to use.

²¹⁴ *Id.* at 409.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 410

²¹⁸ AMERICAN PSYCHOLOGICAL ASSOCIATION, KEY TERMS AND CONCEPTS IN UNDERSTANDING GENDER DIVERSITY AND SEXUAL ORIENTATION AMONG STUDENTS (2015), <http://www.apa.org/pi/lgbt/programs/safe-supportive/lgbt/key-terms.pdf> (setting out "best practices for educators, school counselors, administrators and personnel, based on the latest research on the needs of lesbian, gay, bisexual, transgender, queer, gender diverse, questioning and intersex students").

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Importantly, change can and should be made at the local level. Before *G.G.* was decided, the OCR entered into Resolution Agreements with local districts that were required to accept Title IX guidelines that would guarantee equal access to facilities, athletics, and dress.²¹⁹ Additionally, the school districts agreed to work with consultants to help create safe environments for transgender students or students who did not conform with gender stereotypes.²²⁰ There is a movement to help transgender students at local levels afoot.

By refocusing TGNC rights to protection against student bullying, state legislatures will have a stronger platform to oppose anti-transgender lawmaking. If opposition against the introduction of legislation aimed at restricting transgender students (the use of restrooms or participation in sports) is couched in terms of bullying, the bill will become harder to pass. Of course, advocates have argued that bullying will result as an effect of these bills.²²¹ However, the argument now is that these bills *themselves* are a form of bullying.²²² When you make it a law to allowing bullying to stem from restricting a boy's use of a bathroom, regardless of how they identify, the law alienates the student from his classmates.

When state legislatures create anti-transgender laws, they operationalize bullying. Thus, state legislatures can help strengthen transgender policy by strengthening anti-bullying rights. If laws focus on an expansion of unacceptable bullying, not only do transgender citizens benefit, but others under the LGBQ umbrella, as well as straight, and cisgender women, will have a leg up on battling against oppressive gender stereotypes. This focus is one that protects an individual's rights of freedom and expression. It no longer becomes a question of sex, gender, morality, or controversial politicization. Importantly, case law has touched upon this distinction.²²³

It goes without saying that ideally, liberal state legislatures will pass clear and concise laws protecting gender identity and expression. These laws should be drafted in bullying policy as well. The difference here is that legislatures should specifically include bullying based on gender identification and sexual orientation. Importantly, teachers, counselors, and staff must be educated on transgender students, and they should foster open environments encouraging discussion. Such discussion can be implemented in sex education classes, classroom

²¹⁹ 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, at 1 (July 24, 2013), <https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>.

²²⁰ *Id.*

²²¹ *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 285 (W.D. Pa. 2017).

²²² *Id.*

²²³ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 (1998).

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discussions, after school meetings, and peer-to-peer dialogues.

However, there is a battle between the Federal government's scope of powers in withdrawing the guidelines, and a state's scope of powers in controlling their education systems. Ultimately, nothing in the Constitution directly delineates powers to the Federal government to control education, and any power not delineated to the Federal government is reserved for the states.²²⁴ States may then disagree on how Federal statutes should be interpreted when it comes to defining "sex." It then lies upon the judicial system to help create some form of uniform law to weave through the Federal interpretation.

Without a decision by the Supreme Court to directly explain what makes the difference between defining sex when it comes to gender identity, states courts will determine that difference for themselves.²²⁵ For example, states like New York have realized the divide between Federal scope and state powers. In the previously mentioned memo released by Attorney General and Commissioner of New York Education, they distinguished USDOE's "own interpretation and enforcement of Title IX," in relation to federal law and federal assistance with a states' clear and continuing duties to interpret and enforce Federal and State law to protect their transgender students.²²⁶

Federal courts can strengthen the case for transgender students by focusing on anti-bullying efforts. Cases deciding transgender rights have continually recognized gender stereotyping as a form of bullying as a relevant factor in determining whether sex discrimination has occurred. The plurality in *Price Waterhouse* made it clear that "stereotyped remarks" will be included in the question of whether discrimination occurred.²²⁷ Importantly, asking whether there was a stereotype begs the bigger question of whether a decision was made based upon someone's gender. If there was, that decision was one made on the basis of sex, and thus was wrong according to Title IX and Title VII. Importantly, *Price Waterhouse* held that "discrimination based on a failure to conform to stereotypical gender norms" can be a valid claim to seek relief.²²⁸ In *Price Waterhouse*, where a woman was discriminated against for dressing in a way that was perceived too masculine, the court noted that discrimination would be found if a man was discriminated for dressing in a way that is perceived to be too feminine.²²⁹

²²⁴ U.S. CONST. amend.X.

²²⁵ Carcaño v. McCrory, 203 F. Supp. 3d 615, 642 (M.D. N.C. 2016).

²²⁶ Memorandum from Eric T Schneiderman and Mary Ellen Elia to New York School Districts (February 18, 2018) (on file with the New York School Education Database).

²²⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 570, 571 (1989).

²²⁸ *Id.* at 573.

²²⁹ *Id.* at 574.

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While the future of transgender students in the courtroom is still to be decided, it is vital that states take advantage of the rights and powers of sovereign states to maintain their education process and the rights of their students. In the press briefing following the rescinding of the guidelines press secretary Sean Spicer stated that the president believes that transgender students ability to use the bathrooms of their choice is “a states’ rights” issue and he’s not going to go into determining such issues.²³⁰ Spicer continued stating that the Title IX from 1972 framers did not contemplate transgender students and that the Obama era letters was the Federal government making a decision “forcing schools to make a huge accommodation” without a proper “comment period.”²³¹ If this is a state’s issue how far can the state’s go in protecting their students, even if they contradict executive orders?

States like New Jersey have released their own guidelines letters for school districts in conjunction with state law. New Jersey’s guidelines are a clear indication that liberal states are making efforts to protect transgender students. New Jersey has protections for transgender students framed both in specific rights and in terms of bullying. The first part of New Jersey’s legislation directs the Commissioner of the New Jersey DOE to establish guidelines to protect transgender students and to establish policies that ensure a supportive environment for transgender students.²³² The second part implicates two separate laws that prohibit “harassment, intimidation, and bullying, for all students, including transgender students.”²³³ As part of compliance with these laws, New Jersey held that schools must provide staff training on respect and understanding of transgender students, and integrate educational programs and activities concerning nondiscrimination into “school culture.”²³⁴ Importantly, New Jersey law also protects transgender students with its general discrimination law, “NJLAD,” which makes it unlawful for schools to subject to differential treatment including discrimination based on gender identity or expression, sex, and sexual orientation.²³⁵

New York has also taken initiatives to train administrators to prevent such discrimination and to teach students about gender

²³⁰ Press Briefing by Press Secretary Sean Spicer, THE WHITE HOUSE (Feb. 23, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sean-spicer-022317/>.

²³¹ *Id.*

²³² NEW JERSEY DEPARTMENT OF EDUCATION, *TRANSGENER STUDENT GUIDANCE FOR SCHOOL DISTRICTS* (Sept. 2018), <https://nj.gov/education/students/safety/sandp/transgender/Guidance.pdf>.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

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stereotypes.²³⁶ Recently, the New York Legislature passed the Gender Expression Non-Discrimination Act (“GENDA”) and a ban on conversion therapy.²³⁷ GENDA solidifies “[e]xisting law by explicitly adding gender identity and expression to the New York Human Rights Law.”²³⁸ On January 15, 2019 the bill was passed by both chambers of the New York Assembly. The passage of the bill is a clear indication of a state taking an interpretation of “sex” in opposition with gender biases and preconceived gender norms. Additionally, by banning conversion therapy the state is sending “powerful message to LGBTQ young people across New York that they are seen, loved, and will soon be protected—we thank transgender advocates from across the state for their years of work.†.†.†.”²³⁹ This constant advocacy and education on the importance of acceptance of different genders, sexes, and identities has spurred the reaction in the legislature today.

Many other states have acted in support of these actions. States like California, Massachusetts, and Connecticut have presented guidelines similar to the Obama-era guidelines detailing fair facilities use recommendations for transgender students.²⁴⁰ Such informal law-making is a great first step states can take towards progressive change.²⁴¹

VII. CONCLUSION

In the next few years, the picture for transgender students remains a mystery. With the new Supreme Court appointment, there is the potential that controlling precedent may rule against transgender

²³⁶ *LGBTQ Sex Ed & Safety: A Survey of New York City High School Students*, NYCLU (March 20, 2017), <https://www.nyclu.org/en/publications/lgbtq-sex-ed-safety-survey-new-york-city-high-school-students>.

²³⁷ S. 1047, 2019–2020 Legis. Sess. (N.Y. 2019); S. 1046, 2019–2020 Legis. Sess. (N.Y. 2019); see also Nick Morrow, *New York Passes Gender Expression Non-Discrimination Act & Protections Against Conversion Therapy*, HUMAN RIGHTS CAMPAIGN (Jan. 15, 2019), <https://www.hrc.org/blog/historic-ny-legislature-passes-gender-expression-non-discrimination-act-ban>.

²³⁸ Morrow, *supra* note 237.

²³⁹ *Id.*

²⁴⁰ NATIONAL EDUCATION ASSOCIATION, *supra* note 187 (citing 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, at 28–31 (2012), <http://www.k12.wa.us/Equity/pubdocs/ProhibitingDiscriminationInPublicSchools.pdf>; Connecticut Safe School Coalition, Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws (2012), http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf).

²⁴¹ NATIONAL EDUCATION ASSOCIATION, *supra* note 187.

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students. Furthermore, President Trump may choose to release his own set of guidelines specifying that sex should be determined by biology. At this current moment, before either of these possibilities come to fruition, it is more important than ever to diversify the rights of transgender students. Policymakers must focus on creating rights for these students from the bottom up starting at districts to state legislatures, and from local courts to state and federal courts.

However, the picture is not complete; obtaining rights for transgender students does not end in advocating for pro-transgender legislation. The topic of students with transgender identities must first become an open topic of discussion. In fact, it seems to be the broad misunderstanding and apprehension of transgender students which continues to foster fear, hate, and disrespect for individuals.

Once individuals are educated about gender stereotypes, a new environment will be set to help question such misunderstanding through local action. Constituents of towns, districts, and cities should be encouraged to share dialogue and respectful conversation. Advocates must work from the bottom up. Transgender students have been affected by the recent political environment and their fate is in the air for the next few years to come. However, if the public comes to see TGNC rights not as topic that is narrow and insignificant, but one that allows open bullying to gender stereotypes, our country's protection of individual rights can improve drastically. Advocates, students, teachers, and legislatures must fight against discrimination and mistreatment of transgender students by voting for and supporting anti-bullying laws and policies. No student deserves to be bullied. With this platform, the leap from bullying to equality will only take a few steps.