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Commentary

TRANSGENDER STUDENTS AND ACCESS TO FACILITIES [FN1]

Suzanne E. Eckes and Colleen E. Chesnut [FNaa1]

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Vice President Joe Biden stated in 2012 that transgender discrimination is the “Civil Rights Issue of Our Time.” [FN1] Within the public school context, the media has reported transgender students experiencing harassment and other access issues. [FN2] To illustrate, an elementary school student in Colorado who was born biologically male but who began to identify as female at an early age was not permitted to use the female restroom at school. [FN3] This incident is not unusual. Masen Davis, the Executive Director of the Transgender Law Center notes, “[w]e hear from hundreds of students each year who simply want to be themselves and learn at school. Sadly, many schools continue to exclude transgender students from being able to fully participate.” [FN4] School officials are oftentimes caught in a difficult dilemma. While protecting the rights of transgender students, school officials may worry about the privacy rights of the rest of the student body. It is not surprising that the Associated Press wrote that this is a topic that “school administrators are grappling with nationwide.” [FN5] With only a few legal opinions on the topic, school officials might be unclear about which approach to take when confronted with this issue.

In recent years, society’s views on gender identity and sex have dramatically evolved, and the legal landscape will likely transform as well. Currently, at least 17 states and the District of Columbia prohibit discrimination of transgender people. [FN6] Even if a state has not passed a law, transgender students who have been discriminated against may have enforceable legal rights under Title IX of the Education Amendments of 1972 [fn7] OR UNDER THE fourteenth aMendment’s eQual protectIon clAuse. [fn8] The Equal Protection Clause requires school officials to present valid reasons for treating a student differently based on gender. Specifically, because transgender individuals are not considered members of a protected class under Fourteenth Amendment analysis, claims of discrimination based on a student's transgender status are subject to rational basis review. Rational basis review is a low threshold to meet; school officials need to only have a rational reason for treating transgender students differently than cisgender students.

The U.S. Department of Education released a “Dear Colleague Letter” in 2010 noting that Title IX prohibits both gender-based and sexual harassment of all students, regardless of the actual or perceived gender identity of the harasser or target. [FN9] With increased recent attention on this issue, in April 2014, the U.S. Department of Education issued “Questions and Answers on Title IX and Sexual Violence.” The document makes clear that Title IX sex discrimination prohibition extends to claims of discrimination related to gender identity or failure to conform to stereotypical ideas of femininity and masculinity. [FN10]

In this article we focus on some of the legal controversies involving access issues and transgender students

in K–12 public schools. Specifically, since most traditional school buildings have sex–specific restrooms and locker rooms, questions may arise about which are appropriate for students who are transgender or questioning their gender identities. We review the relevant research related to accommodating transgender students and then examine the relevant K–12 legal challenges in this area. We conclude with suggestions for school leaders.

Experiences of Transgender Students in Public Schools

Research on the school experiences of transgender students has revealed that there is a profound need for attention to school climates and policies affecting these students. Data from a recent national school climate survey for LGBT students indicated that harassment or negative remarks toward transgender students occurred frequently, and over half of transgender students reported that they were required to use the restroom or locker room of their legal (biological) sex. [FN11] According to this study, gender non–conforming students faced more hostile school climates even than their lesbian, gay, or bisexual peers. [FN12] These hostile school environments for transgender students may be characterized by harassment both from other students and from school staff. In one survey of transgender middle and high school students, participants were as likely to report teachers intervening to stop bullying from other students as they were to report negative comments from the teachers themselves. [FN13] Actual harassment, physical assault, and fear that these will occur, combined with limited protection from school staff, can render school environments quite unwelcome for students who are transgender.

Students who are transgender and face unpleasant school experiences related to their gender identities may suffer a variety of adverse effects. Research has indicated that students who are victimized in school due to gender expression are absent more often and may have lower GPAs, [FN14] as well as lower expectations for completing high school and attending four–year colleges. [FN15] Students who have experienced violence in school related to their perceived or actual gender identities have described feeling vulnerable and powerless, and many choose to distance themselves from school altogether in order to cope. [FN16] Even students who may not have suffered physical harm but who have endured harassment or bullying in school as a result of their transgender status have expressed fear for their safety at school. These students may mitigate this fear by transferring to other schools, dropping out, avoiding school, or even becoming aggressive towards their harassers. [FN17] Additionally, other studies have shown that transgender youth often choose schools perceived as welcoming for queer youth, which may limit their abilities to access schools based on other important factors, such as academic rigor or extracurricular options. [FN18] Transgender students also report avoiding sex–segregated areas at school, such as locker rooms or restrooms, due to feeling unsafe or uncomfortable among their peers in these spaces. [FN19]

In addition to negatively impacting educational outcomes for transgender students, hostile school environments also may affect transgender students' mental and emotional health. It should be noted that the American Psychiatric Association no longer classifies transgender individuals as having mental disorders; rather experts contend that transgender children experience feelings of dissatisfaction or discomfort between their sex and gender. [FN20] These negative feelings related to gender identity for transgender children may be magnified in school environments where access and acceptance are problematic for them. Studies have indicated that effects of victimization based on gender expression for transgender youth may include higher levels of depression and lower self–esteem. [FN21] Furthermore, research on young adults who are transgender has found links between gender–identity–related school victimization and prevalence of suicidal thoughts [FN22] as well as general mental well–being and life satisfaction. [FN23] This research only reinforces the urgency for school staff and education policy makers to attend to the issue of hostile school environments for students who are transgender. The

educational, physical, and emotional toll of victimization for these students based on their non-conforming gender identities is a great one, affecting both educational outcomes and psychological health well into adulthood.

While many scholars have researched the troubling experiences of transgender students in schools and the harmful effects of these, some have also examined mitigating factors that can alleviate some of the issues transgender students face. For example, transgender students often report that personal connections with school personnel who either serve as advocates on their behalf or intervene to stop harassment helped them to feel safer at school. [FN24] With regard to school environments, one study indicated that high school students perceived their schools as safer for their gender nonconforming male peers when LGBTQ issues were included in the curriculum and the school had a gay-straight alliance (GSA). [FN25] Additional research supports that transgender students report greater feelings of safety and more connection to school personnel if their school has a GSA or similar support group. [FN26] The establishment of a GSA in a school may be one important step in ensuring better school experiences for transgender students, but as recent cases illustrate, more clarity is needed on policies regarding transgender students' rights within public schools.

The Legal Landscape for Transgender Students

School officials might wonder whether transgender students need to provide documentation of their gender identities before using the restroom that they prefer. LAMBDA Legal suggests that based on court decisions and other guidance, transgender students should be able to use the restroom of their choice without providing any documentation related to their transgender status. [FN27] For example, it would be inappropriate for administrators to ask students about whether they have undergone sex reassignment surgery because this would raise several privacy concerns. Also, research shows us that most transgender people do not elect to have surgery. Further, the U.S. State Department's policy does not require such documentation when passport applicants want to change the gender listed. [FN28] If students complain about needing to share a restroom with a transgender student, school officials could offer the complaining student an alternative restroom. At least one court has taken this approach within the employment context. [FN29]

While we focus here on the legal issues and protections pertaining to transgender K-12 students, it must be noted that similar issues exist for students in higher education and school employees who are transgender. Although a full analysis of higher education and employment issues is beyond the scope of this article, it is interesting to note that within higher education many universities have been pushing for more policies to allow greater access for transgender students. [FN30] For example, Mills College in California and Mount Holyoke in Massachusetts, which are women's colleges, will accept undergraduate applicants from self-identified women, regardless of biological sex. [FN31] While there are few courts that have addressed this issue of facility access in higher education, one recent case provides some guidance. This controversy involved a university student who was born biologically female but who began to identify as male at age nine. The U.S. District Court in Western Pennsylvania dismissed a lawsuit that a transgender male student filed against the University of Pittsburgh. [FN32] The transgender student alleged that under the Equal Protection Clause, that while non-transgender male students could use the men's restrooms and locker rooms, he was denied access. Under the Title IX claim he argued that he was discriminated against based on his transgender status and his perceived gender nonconformity. In 2015, the judge ruled that the university did not discriminate against the university student when it prohibited him from using male facilities because he was biologically female. The student appealed this decision to the Third Circuit Court of Appeals and this litigation is ongoing.

With regard to employment, the Equal Employment Opportunities Commission (EEOC) has provided protections under existing prohibitions on sex discrimination for transgender employees. [FN33] Furthermore, President Obama announced that discrimination based on gender identity is prohibited for purposes of federal employment and government contracting. [FN34] Also, Attorney General Eric Holder examined the text of the statute, the relevant Supreme Court decisions interpreting the statute, and the developing jurisprudence in this area and determined that Title VII's prohibition of sex discrimination encompasses discrimination based on gender identity, which includes transgender status. [FN35] He contended that the most straightforward analysis of Title VII is that discrimination "because of...sex" includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex. Citing *Price Waterhouse v. Hopkins*, he wrote that in using "the simple words 'because of,'...Congress meant to obligate" a Title VII plaintiff to prove only "that the employer relied upon sex-based considerations in coming to its decision." [FN36] Moreover, he argued that the plain meaning of Title VII's prohibition against discrimination "because of...sex" also includes discrimination founded on sex-based considerations, including discrimination related to one who identifies as another sex. [FN37] Also, since *Price Waterhouse* decision, the Sixth, First, Ninth, and Eleventh Circuits have recognized that "a transgender plaintiff may rely on evidence of sex stereotyping to establish discrimination on the basis of sex." [FN38] Similar claims have been actionable under both Title IX and the Equal Protection Clause. [FN39] Not all courts have interpreted Title VII to extend protections in this manner, however. For example, in a case involving access to restrooms for transgender individuals, the Tenth Circuit ruled that under Title VII discrimination based on a person's transgender status is not discrimination "because of sex." Further, the court noted that transgender individuals are not members of a protected class under the Fourteenth Amendment's Equal Protection Clause. [FN40]

For K-12 public school students who are transgender, attaining legal rights to be treated in accordance with their gender identities has been complicated, since many federal and state non-discrimination laws do not explicitly provide protections to these students. Most frequently, students who are transgender may rely on Title IX, which prohibits discrimination based on sex in federally-funded programs. As previously indicated, recent guidance from the U.S. Department of Education stipulates that bullying and harassment in schools based on gender identity violates Title IX, and public schools may be held liable for failing to address it. [FN41] While this is certainly an important clarification and step toward improving school environments for transgender youth, they often face additional hurdles to equitable education for which there are not yet explicit legal remedies. These include school staff's recognition of transgender students' preferred names and use of correct gender pronouns, access to sex-segregated facilities (e.g., locker rooms or restrooms) in accordance with gender identities, ability to participate in sex-segregated athletics, dress codes that allow for transgender students to express their gender identities via the clothing they prefer, and privacy protections that prevent staff from revealing information regarding a student's biological sex. [FN42] Students who are transgender may have more difficulty securing their rights to be treated the same as their cisgender peers in these areas, due to lack of clarity or consistency in the legal landscape.

Aside from providing a legal remedy for transgender students who have experienced bullying or harassment related to their gender identities, Title IX also may be implicated in cases of transgender students seeking access to facilities or athletic teams in accordance with their genders. Legal scholars have argued that denying equal access to gender-appropriate facilities (such as locker rooms and restrooms) for students who are transgender violates Title IX, and that other students' rights to privacy are not infringed simply if they are uncomfortable with transgender students in these sex-segregated spaces. [FN43] It has also been asserted that Title IX regulations governing equal opportunities to participate in sports for students of both sexes should extend to transgender stu-

dent athletes. [FN44] In addition to Title IX, scholars have suggested other constitutional or statutory pathways by which transgender students could pursue legal protections. For example, a student who is transgender may wish to express his or her gender identity through a style of dress that does not conform to what is considered to be “normal” for his or her biological sex. A student like this may seek protection under the First Amendment, considering that his or her choice of clothing is a form of protected expression that likely would not cause a disruption in the educational environment. [FN45] Additionally, Lambda Legal created a handbook for youth who wish to change their school records to correspond to their gender identity under the Family Educational Rights and Privacy Act of 1974 (FERPA). [FN46] This guide is posted on their website in the form of frequently asked questions and includes additional resources for those attempting the process of being recognized for their gender identity at school.

Some states, including Washington and Connecticut, have created guidelines stating that transgender students should have access to facilities based on their gender identities, and that this should not be denied due to others' discomfort. [FN47] Several more states, including Washington, Massachusetts, and California, have issued guidelines for athletic participation for transgender students, requiring that students be allowed to participate in activities according to their gender identities. [FN48] The guidelines in California are bolstered by recent state legislative action clarifying that the state's nondiscrimination law applies to transgender students and specifically permits them to participate in sex-segregated extracurricular activities and to access facilities in accordance with their gender identities. [FN49] Most recently, the Minnesota State High School League recently voted to allow transgender students to play on girls' sports teams. [FN50] In these states, in particular, students who are transgender may face fewer obstacles to obtaining access to facilities or athletic teams that correspond with their gender identities, but comprehensive legal protections for transgender students in K–12 schools are still evolving in most areas.

While some school districts and states are attempting to extend protections to transgender students, some are taking a different approach. The media [FN51] highlighted a proposed bill from Kentucky that would permit students to file lawsuits if they see transgender students using restrooms and locker rooms that do not align with their biological sex. The senator sponsoring the bill is doing so on behalf of a conservative foundation that opposes gay marriage and similar issues. The momentum came after a high school in Louisville, Kentucky created a policy permitting transgender students to use restrooms and locker rooms that correspond to their gender identities. The bill would allow for \$2,500 in damages for every instance that a student encountered a transgender student in the “wrong” restroom or locker room if the school did not take steps to prevent the transgender students from utilizing the facilities that do not correspond to their biological sex. The bill would let transgender students use private restrooms, or request other non-integrative accommodations, if the students have their parents' or guardians' consent. Additionally, a lawmaker in Texas proposed a bill that would pay students \$2,000 for informing school officials when transgender students use a restroom that aligns with their gender identity rather than their biological sex. [FN52] Specifically, if a student can prove “mental anguish” when finding someone not of the same biological sex in the restroom, the student could collect \$2,000 in damages from the district. Finally, in Florida a proposed bill would make it illegal for anyone to use a public restroom that does not align with one's biological sex. Anyone in violation, would be charged with a misdemeanor and fined up to \$1,000 or be sentenced to one year in prison. [FN53]

Unlike the non-discriminatory laws of California and Massachusetts, these approaches raise concerns about discrimination, and arguably send the message that fear or discomfort around transgender students is appropriate or necessary. As additional litigation addresses this issue, school leaders will have further guidance in creating policy around access issues. While we wait for more guidance, many school districts are taking a proactive ap-

proach and saying no to discrimination.

Recent K–12 Legal Controversies [FN54]

Infusing both methods of social science and legal analyses, we searched for judicial opinions and government compliance decisions (e.g., administrative policy decrees and federal investigations) involving transgender students' challenges against K–12 public schools. Analyzing the documents as cases, [FN55] we investigated facts and outcomes, which offer a depiction of the controversies by investigating the discussions within and among cases. [FN56]

There has only been one state court case involving transgender students and restrooms and two other lawsuits recently filed in federal district court. The other controversies involve complaints filed with a civil rights division and/or complaints filed with the U.S. Justice Department and U.S. Department of Education. In the state court case from Maine, a transgender student who was born biologically male began to identify as female from a very young age. As a fifth grader, Susan Doe, was permitted to use the girls' restroom. The school ended up changing this plan after a complaint from another student's grandfather. Maine's Human Rights Act bars discrimination based on sex or sexual orientation. Relying on this law, Susan's parents and the Maine Human Rights Commission filed a lawsuit against the district after school officials no longer allowed her to use the girls' restroom. Also Maine's chapter of the American Academy of Pediatrics filed a brief in the case on behalf of Susan urging the court to find that transgender students be permitted to use the restroom of their choice. The school district was successful at the trial court level because of a state law requiring separate restrooms for girls and boys in public schools. On appeal, the state's high court found that the school district had violated Maine's Human Rights Act, holding that transgender people are entitled to use the restrooms appropriate to their gender identity instead of their biological sex. [FN57] It ruled that “where ... it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal restroom consistent with her gender identity, denying access to the appropriate restroom constitutes sexual orientation discrimination....” [FN58] Susan's family was awarded \$75,000. [FN59]

A similar issue arose in Colorado where a first grade student, Coy, was born biologically male but began to identify as female at an early age. The school district permitted Coy to use the girls' restroom at the start of the first grade year. However, after school officials became concerned that other students may become uncomfortable if Coy used the girls' restroom as she grew older, they changed the policy. Under the new policy school personnel suggested that Coy use the nurse's restroom, the boys' restroom, or the faculty restrooms. Coy's parents believed that she would feel marginalized if she was not permitted to use the restroom that matched her gender identity. [FN60] A complaint was filed by the Transgender Legal Defense and Education Fund with the Colorado Civil Rights Division on behalf of Coy. [FN61]

Finding that Coy had the right to use the girls' restroom, the Civil Rights Division reasoned that the school district's restroom restriction violated Colorado's anti-discrimination law because it created an exclusionary environment. The decision cited studies to highlight that “compartmentalizing a child as a boy or a girl solely based on their visible anatomy, is a simplistic approach to a difficult and complex issue.” [FN62] In its decision the Division also noted that the fact that “she must disregard her identity while performing one of the most essential human functions constitutes severe and pervasive treatment, and creates an environment that is objectively and subjectively hostile, intimidating or offensive.” [FN63]

In California a ninth grade student who was born biologically female started to identify as male at an early

age and began a gender transition in fifth grade. While the student was in middle school, school personnel became concerned with safety and privacy issues and did not allow him to use the boys' facilities. Additionally, while on an overnight school-sponsored fieldtrip in seventh grade, school personnel required him to stay in a private cabin with one of his parents as a chaperone. After the field trip, the boy's family filed a complaint with the U.S. Justice Department and the Department of Education's Office for Civil Rights. At this time, the student also obtained documentation that identified him as male. When school officials learned about this documentation, they permitted him to use the boys' facilities in the school. Because the parents were concerned about his transition into the high school, the investigation continued. The school district eventually entered into a voluntary resolution agreement with the federal civil rights office, which permitted the student to use the male facilities and addressed policies and training. [FN64]

In a more recent example from California, the Office for Civil Rights (OCR) entered into a settlement agreement with a California school district to resolve a complaint involving a transgender student who was harassed at school. Part of the agreement addressed access issues to sex-designated facilities. [FN65] Considering these controversies, it is not surprising that California lawmakers passed the Transgender Bathroom Rights Bill in July 2013. The new law requires that all students have access to school-based resources and facilities. [FN66] The Massachusetts Department of Education has taken a similar approach and issued guidance to public school personnel about how to accommodate transgender students. This policy was in response to state legislation prohibiting discrimination based on gender identity. [FN67] Under the law, it is recommended that transgender students be allowed to use the school restrooms that correspond with their gender identities and that private or gender-neutral restrooms be made available. To be certain, this guidance stresses that school personnel and staff should work with transgender students to find options that will alleviate their discomfort in restroom or locker room facilities and that the discomfort of other students is no reason to deny access to these spaces to transgender students.

In another case, the American Civil Liberties Union (ACLU) of Virginia filed a federal complaint with the U.S. Departments of Education and Justice against a school district after school officials adopted a policy that limited facility choices for a transgender student. [FN68] The policy required that transgender students use single-stall restrooms or facilities assigned to their biological gender. The student in this school was transitioning from female to male. School officials initially allowed him to use the restroom in the nurse's station and some of the staff restrooms. School officials had offered three unisex restrooms to the entire student body because the district was concerned with the privacy of all students. The student explained that this arrangement made him feel uncomfortable and the principal then allowed him to use the boys' restroom. Although there were no complaints about his use of the boys' restrooms, the school board adopted the above policy. In the complaint the ACLU highlighted how the student had become an outcast because of the new policy. At a school board meeting, he was referred to as a "freak" and a "girl." The legal director of ACLU-VA said that "[c]onsigning transgender students to segregated restrooms prevents them from participating in school activities on an equal basis and causes exclusion and isolation" and noted that courts have consistently held that discriminating against people on the basis of gender identity is sex discrimination. [FN69]

In July 2015, a federal district court judge stated that it was highly unlikely that he would grant the plaintiff student's motion for a preliminary injunction, which would allow him to use the male restroom until a decision on the merits of the claim. The judge also dismissed the Title IX claims against the district because this law permits schools to have separate restrooms based on sex. The student's Equal Protection Clause argument is still at play. The judge indicated that after he has issued a written opinion on the motion for a preliminary injunction, a trial date will be set. This case will be particularly interesting to follow because it will be the first time a federal

court addresses this issue at the K–12 level.

In another recent case, a school board was met with some public resistance regarding its policy for restroom access for a transgender student who was born biologically male but identified as female for several years. After consultation with a lawyer, officials in a Michigan school district decided that allowing a transgender student to use the girls' restroom would be in accordance with the existing non–discrimination policy. Subsequently, at a school board meeting, several parents of students in the school voiced their opposition to this policy, stating their concern that their daughters might feel “uncomfortable or threatened” by the presence of a transgender student in their restroom. [FN70] Despite this dissension from parents, the school board has not changed its policy, and there is currently no case law in Michigan to guide their decision–making. However, this legal guidance may be forthcoming, as another transgender student in Michigan has initiated a federal lawsuit against four school districts, claiming discrimination based on his gender identity. [FN71] The transgender student in this case claims that the school districts shared his private information, did not allow him access to a unisex restroom, failed to address instances of bullying, and refused to call him by his preferred male name, all of which led to him changing schools several times. Additionally, the student alleges that when a male student saw the transgender student, who was transitioning to a boy, leave the women's restroom he was called a “fag” and asked “do you need a tampon?” [FN72] The outcome of this case will be an important one for transgender students and the schools serving them, particularly since several federal government agencies, including the U.S. Department of Education, the Department of Justice Civil Rights Division, and U.S. Attorney Barbara McQuade, have filed a brief in support of the student. [FN73] In its brief, the government argues that “a person may establish sex discrimination through discriminatory conduct based on gender identity or transgender status, regardless of whether there is evidence of sex stereotyping.” [FN74] The outcome of this case and others will certainly provide much needed guidance in this area.

Recommendations for School Leaders

To conclude, we offer recommendations on how school leaders can help to improve school climates for transgender students and avoid costly legal action related to discrimination, bullying, or harassment of these students. As discussed, this issue has not been litigated in many jurisdictions. Nevertheless, it seems that transgender students who have experienced discrimination in schools may have viable legal arguments under Title IX and/or the Equal Protection Clause. Claims of discrimination have arisen when transgender students are denied access to sex–segregated facilities corresponding to their gender identities. School officials should try to accommodate transgender students' reasonable requests to use the restrooms that match their gender identities. School personnel might argue against accommodating transgender students' restroom requests because it will make some students uncomfortable. However, as legal scholars and at least one court have reasoned, the discomfort of another is no reason to discriminate against transgender students. [FN75] Furthermore, although this article specifically focused on restrooms, the Office for Civil Rights' Dear Colleague Letter requires school districts to respond immediately to eliminate a hostile environment in any school–sponsored activity. [FN76] To prevent these kinds of hostile environments, school districts should consider policies that include gender identity within their broader anti–discrimination policies and work with staff and students to ensure transgender students' rights are protected. They might rely on existing model policies that address these issues. For example, the National Center for Transgender Equality has written a model district policy [FN77] and the National School Board Association Council of Attorneys has had a presentation on accommodations for transgender students at their conference. [FN78]

[FNa1] The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 321 Ed.Law Rep. [1] (October 22, 2015).

[FNaa1] Suzanne E. Eckes is a professor in Educational Leadership and Policy Studies at Indiana University. Colleen E. Chesnut is a Research Associate at the Center for Evaluation and Education Policy at Indiana University.

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