

Comments

Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the Equal Protection Clause

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ABSTRACT

Claims involving transgender rights are an emerging area of case law and are beginning to gain significant attention in the U.S. The topic is of particular importance in schools and universities where transgender students are repeatedly subject to discrimination with few remedies. Students determined to be treated in accordance with their gender identity often request to use the restrooms and locker rooms of the gender with which they identify. If the students do so without permission, the students face punishment, expulsion from school, and even criminal charges. Although there is little case law on transgender student rights, most cases to have addressed the issue are flawed.

This Comment analyzes the two most effective avenues of recovery for transgender students who suffer discrimination: Title IX and the

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Equal Protection Clause, and explains how these laws can afford protection to transgender students. Additionally, this Comment explains how transgender discrimination is the same as sex discrimination and why the terms “sex” and “gender” should be treated interchangeably. This Comment also advocates for recognition of transgender persons as part of the quasi-suspect “gender” class, or for LGBT persons to be recognized as a quasi-suspect class on their own. Furthermore, with the ultimate goal of recognizing transgender student rights and eliminating transgender discrimination, this Comment recommends that schools replace shared, sex-segregated facilities with single-user, unisex facilities.

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I. INTRODUCTION

“The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”¹ “Identity” can refer to a variety of different things.² “Gender identity” refers to a person’s self-perceived gender.³ The term is often used in reference to transgender people—those people “whose gender identity differs from their sex assigned at birth.”⁴ Transgender people experience “gender dysphoria,” meaning they transform psychologically and emotionally to a different sex.⁵ This change in identity is generally reflected by a transgender person’s appearance and behavior.⁶ Despite the idea of a constitutional right to express one’s identity, transgender people are often left wondering—if I part with my old identity, do I part with my rights too?⁷

1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

2. See Daphna Oyserman et al., *Self, Self-Concept, and Identity*, in HANDBOOK OF SELF AND IDENTITY 69, 73–74 (Mark R. Leary & June Price Tangney eds., 2012).

3. *Gender Identity 101: A Transgender Primer*, TGNET ARIZONA, at 4 (1998–2002), http://www.endabusewi.org/sites/default/files/resources/gender_identity_101_5-05.pdf [hereinafter *Gender Identity 101*].

4. *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 U.S. Dist. LEXIS 31591, at *3 (D. Minn. Mar. 16, 2015) (quoting TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY 620 (Laura Erickson-Schroth ed., 2014)).

5. See generally *Gender Dysphoria*, AM. PSYCHIATRIC ASS’N (2013), <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>.

6. *Gender Identity 101*, *supra* note 3, at 4.

7. See, e.g., *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008) (“[I]n cases where the plaintiff has changed her sex . . . courts have traditionally

Am I prepared to face the “lawful discrimination” that accompanies such a change?⁸

Today’s transgender youth face particularly difficult challenges at school.⁹ In order to be treated consistently with their identity, transgender students desire access to restrooms and locker rooms of the sex with which they identify.¹⁰ Peers and school officials often single out transgender youths by refusing to respect their gender identity and punishing them for expressing that identity.¹¹ This type of treatment leads to discrimination claims.¹²

Two avenues of recovery for transgender students who are discriminated against include Title IX of the Civil Rights Act of 1972¹³ (“Title IX”) and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (“Equal Protection Clause”).¹⁴ Unfortunately, many courts’ holdings suggest that transgender people are not protected from discrimination per se under Title IX or the Equal Protection Clause.¹⁵ Recently, two federal district

carved such persons out of the [Title VII] statute by concluding that ‘transsexuality’ is unprotected.”).

8. See Alissa Scheller & Cameron Love, *Transgender People Are More Visible Than Ever, But It’s Still Legal To Discriminate Against Them In Most States*, HUFFINGTON POST, (Feb. 2, 2016), http://www.huffingtonpost.com/2015/06/03/transgender-discrimination-laws_n_7502266.html.

9. See *The 2013 National School Climate Survey: Key Findings on the Experiences of Lesbian, Gay, Bisexual, and Transgender Youth in Our Nation’s Schools*, GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK at 5, (2013) <http://www.glsen.org/article/2013-national-school-climate-survey> (reporting that in the prior year, 55.2 percent of LGBT students were verbally harassed because of their gender expression, 42.2 percent of transgender students were prevented from using their preferred name, 59.2 percent of transgender students were required to use a bathroom or locker room of their legal sex, and 31.6 percent of transgender students were prevented from wearing clothes considered inappropriate based on their legal sex).

10. See Harper Jean Tobin & Jennifer Levi, Article, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC’Y 301, 301 (2013).

11. See, e.g., *G.G. v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 738–39, 742 (E.D. Va. 2015) (discussing a boy, born female, whose school and community disapproved of him using the men’s bathroom); *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 659, 667 (W.D. Pa. 2015) (discussing a boy, born female, who was expelled and cited for disorderly conduct for using male facilities); *Doe v. Yunits*, 00-1060-A, 2000 Mass. Super. LEXIS 491, at *1 (Mass. Super. Ct. Oct. 11, 2000) (discussing a girl, born male, who was suspended three times for using the girls’ restroom).

12. See, e.g., *Gloucester*, 132 F. Supp. at 738–39, 742; *Johnston*, 97 F. Supp. 3d at 667; *Doe*, 86 A.3d at 602–04; *Yunits*, 2000 Mass. Super. LEXIS 491, at *1.

13. 20 U.S.C. § 1681 (2012).

14. U.S. CONST. amend. XIV, § 1.

15. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F. 3d 1215, 1228 (10th Cir. 2007); *Braninburg v. Coalinga State Hosp.*, No. 1:08-cv-01457-MHM, 2012 U.S. Dist. LEXIS 127769, at *22 (E.D. Cal. Sept. 7, 2012); *Jamison v. Davue*, No. S-11-cv-2056 WBS,

court cases addressed transgender student claims under Title IX and the Equal Protection Clause, both of which denied the claims.¹⁶ One of these cases was reversed on appeal.¹⁷

In this Comment's "background section," Part A will focus on the history of transgender claims under Title VII, which is analogous to Title IX, and explain the difference between per se sex discrimination and sex stereotyping.¹⁸ Part B will focus on transgender claims under the Equal Protection Clause and provide history on the LGBT movement.¹⁹ Part C will discuss three recent federal court cases involving transgender student claims under Title IX and the Equal Protection Clause.²⁰

In the "analysis section," Part A will explain, through the use of case law and agency decisions, why the statutory term "sex" in Title IX protects transgender students under both the sex stereotyping theory and discrimination per se.²¹ Part B will examine the criteria for heightened protection under the Equal Protection Clause and argue that transgender people should be treated as part of the protected "gender" class, or alternatively, that LGBT²² people should be recognized as a quasi-suspect class on their own.²³ Part C will analyze three important federal court decisions addressing these specific issues and explain why two of the courts' reasoning is flawed, including a discussion of the courts' misinterpretation of the word "sex" and failure to defer to government agency decisions.²⁴ Part D will analyze the feasibility of the Department of Education's ("ED") solution to transgender discrimination in schools and point out the challenges with implementing that solution.²⁵

2012 U.S. Dist. LEXIS 40266, at *10 (E.D. Cal. Mar. 23, 2012); *Lopez v. City of New York*, No. 05-cv-10321-NRB, 2009 U.S. Dist. LEXIS 7645, at *39 (S.D.N.Y. Jan. 30, 2009).

16. See *Gloucester*, 132 F. Supp. 3d at 753; *Johnston*, 97 F. Supp. 3d at 683. An earlier federal case was also decided regarding transgender student rights under Title IX. See *Doe v. Clark Cty. Sch. Dist.*, No. 2:06-CV-1074-JCM(RJJ), 2008 U.S. Dist. LEXIS 71204, at *9–13 (D. Nev. Sept. 17, 2008) (holding that Title IX does not entitle transgender students to access bathrooms based on gender identity). This case touches only briefly on the arguments recited in this Comment and, therefore, will not be discussed in full. *Id.* at *11–13.

17. See *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 727 (4th Cir. 2016).

18. See *infra* Part II.A.

19. See *infra* Part II.B.

20. See *infra* Part II.C; *Gloucester*, 132 F. Supp. 3d at 753; *Johnston*, 97 F. Supp. 3d at 661.

21. See *infra* Part III.A.

22. LGBT stands for "lesbian, gay, bisexual, and transgender." See *Young v. Giles Cty. Bd. of Educ.*, No. 1:15-cv-00107, 2015 U.S. Dist. LEXIS 170695, at *2 n.2 (M.D. Tenn. Dec. 22, 2015).

23. See *infra* Part III.B.

24. See *infra* Part III.C.

25. See *infra* Part III.D.

Lastly, in the section “recommendation for protecting transgender students,” this Comment will advocate for a new solution where schools and universities replace their facilities with single-user bathrooms and locker rooms that are not labeled according to sex.²⁶

II. THE BACKGROUND OF TRANSGENDER RIGHTS UNDER TITLE IX AND THE EQUAL PROTECTION CLAUSE

A. *The History of Transgender Claims under Title IX and Title VII*

Title IX of the Education Amendments of 1972 states 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.”²⁷ As a result, students have an implicit private right of action for sex discrimination²⁸ and can bring claims against certain educational institutions on the theory that the institution intentionally discriminated against the student on the basis of sex.²⁹ To establish a prima facie case of discrimination under Title IX, the student must allege that: (1) he or she was subjected to discrimination in an educational program; (2) the program receives federal assistance; and (3) the discrimination was on the basis of sex.³⁰

While transgender individuals who experience discrimination in federally funded schools can bring claims under Title IX,³¹ individuals can similarly bring claims under Title VII of the Civil Rights Act of 1964³² (“Title VII”) for discrimination in the workplace.³³ Although there is a lack of federal case law regarding protection for transgender students under Title IX, the issue can be analogized to Title VII cases because both prohibit discrimination on the basis of sex.³⁴

26. See *infra* Part IV.

27. 20 U.S.C. § 1681 (2012).

28. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979).

29. See *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993).

30. *Bougher v. Univ. of Pittsburgh*, 713 F. Supp. 139, 143-44 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989).

31. See 20 U.S.C. § 1681 (2012).

32. 42 U.S.C. § 2000e-2 (2013).

33. See *id.*

34. See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 74 (1992) (relying on Title VII precedents in recognizing a private cause of action for Title IX sexual harassment); see also *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 315 n.6 (10th Cir. 1987) (“Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX’s substantive standards . . .”).

1. “Sex Stereotyping” Versus Per Se Protection

Under Title VII, most courts have found that transgender people are protected only on the basis of sex stereotyping, not because they are a protected class per se.³⁵ The gender stereotyping theory comes from the case *Price Waterhouse v. Hopkins*,³⁶ in which the U.S. Supreme Court found that evidence of sex stereotyping was sufficient to satisfy Title VII’s “because of sex” requirement.³⁷

In *Price Waterhouse*, a female manager sued her employer when her bid for partnership was rejected, claiming gender discrimination because the other partners said that she was too “macho” and should act more feminine.³⁸ The Court found that these comments were evidence of sex stereotyping and held that a plaintiff can rely on this kind of gender stereotyping evidence to show Title VII discrimination.³⁹

According to the Fifth Circuit, although the *Price Waterhouse* plaintiff was not transgender, the case established a vehicle for transgender people to seek Title VII recovery by establishing that the “because of sex” requirement can be satisfied with evidence of a plaintiff’s perceived failure to conform to traditional gender stereotypes.⁴⁰ Although *Price Waterhouse* allows transgender persons to recover under the gender stereotyping theory if they are discriminated against for not acting feminine or masculine enough, most federal courts have held that discrimination based on transgender status alone is not actionable under Title VII.⁴¹ These courts interpreted the word “sex” in Title VII to only prohibit discrimination against someone for being a man or woman.⁴²

35. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003), *aff’d*, 98 F. App’x 461 (6th Cir. 2004); *Eure v. Sage Corp.*, 61 F. Supp. 3d 651, 660–63 (W.D. Tex. 2014).

36. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989).

37. *Id.* at 235.

38. *Id.* at 228, 251.

39. *Id.* at 235.

40. *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 454 (5th Cir. 2013).

41. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 658 (S.D. Tex. 2008); *Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K, 2003 U.S. Dist. LEXIS 11373, at *2 (S.D. Ind. June 6, 2003).

42. See, e.g., *Ulane*, 742 F.2d at 1085 (“The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men.”).

However, some decisions have come to the opposite conclusion. Discrimination based on one's transsexuality⁴³ was addressed in the D.C. district court decision *Schroer v. Billington*,⁴⁴ in which the court held that an employer's revocation of a job offer because the applicant transitioned from male to female was discrimination per se in violation of Title VII.⁴⁵ Contrary to most courts, the *Schroer* court reasoned that apart from stereotyping, refusing to hire someone because the person changes his or her sex is sex discrimination because doing so targets that person "because of sex."⁴⁶

The Sixth Circuit used a different line of reasoning in *Smith v. City of Salem*,⁴⁷ which involved a firefighter, born male, who was terminated after informing her employer that she was transitioning genders and would begin coming to work as a woman.⁴⁸ The court held that the plaintiff had stated a valid employment discrimination claim under Title VII and, ultimately, the Equal Protection Clause.⁴⁹ The court reasoned that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."⁵⁰ Thus, the court may have been suggesting that discrimination against someone for *being* a transgender person is itself sex stereotyping.⁵¹

The gender stereotyping reasoning has influenced a few courts to adopt the same approach under Title IX, but the approach has generally been limited to harassment claims.⁵² For example, in *Montgomery v.*

43. The term "transsexual" refers to someone who underwent surgery to physically transform from one sex to another. See *Transsexual*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/transsexual> (last visited Mon. Aug. 22, 2016). However, because "transsexual" is encompassed within the term "transgender," the terms will be used synonymously for purposes of this Comment. See *GLAAD Media Reference Guide- Transgender Issues*, GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, <http://www.glaad.org/reference/transgender> (explaining that "transgender" is "[a]n umbrella term").

44. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

45. *Id.* at 305.

46. *Id.*

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

48. *Id.* at 575.

49. *Id.*

50. *Id.*

51. See *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011), for the idea that "the very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior."

52. See, e.g., *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011); *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1151 n.1 (E.D. Cal. 2011); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 822-23 (C.D. Ill., 2008); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 963 (D. Kan. 2005).

Independent School District,⁵³ the court found that students tormenting another male student based on his feminine personality traits, and on the perception that he did not engage in behaviors fitting a male, was prohibited harassment under Title IX.⁵⁴

2. Administrative Decisions

Although case law is lacking, there have been some administrative decisions regarding transgender discrimination per se.⁵⁵ In 2012, the Equal Employment Opportunity Commission (“EEOC”) found per se discrimination based on transgender status to be actionable under Title VII.⁵⁶ The EEOC held that discrimination against an individual because that person is transgender is discrimination because of sex and is therefore prohibited under Title VII.⁵⁷ In 2014, the ED issued policy guidance stating that Title IX’s sex discrimination prohibition extends to claims of “discrimination based on a student’s gender identity.”⁵⁸ The ED reaffirmed this statement in a Dear Colleague Letter issued in 2016.⁵⁹

The ED applied their definition of the word “sex” in a recent investigation at Township High School District 211 in Illinois.⁶⁰ Here, the ED found that the school district violated Title IX’s prohibition against sex discrimination by refusing to allow a transgender student who identifies as female to access the girls’ locker room.⁶¹ The student stated that being required to use separate facilities ostracized her, caused her to

53. *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

54. *Id.*

55. *See, e.g.*, *Twp. High Sch. Dist. 211*, OCR Case No. 05-14-1055 (Dep’t of Educ. Nov. 2, 2015); *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821 at 1 (Apr. 20, 2012).

56. *Macy*, EEOC Appeal No. 0120120821 at 1.

57. *Id.* at 14.

58. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, (2014) [hereinafter QUESTIONS AND ANSWERS], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

59. *See* Catherine E. Lhamon & Vanita Gupta, Joint “Dear Colleague” Letter, U.S. DEP’T. OF EDUC. & U.S. DEP’T OF JUST. (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. Recently, however, 11 states sued the federal government to overturn the Dear Colleague Letter and a federal judge blocked the letter by issuing a preliminary injunction in favor of the states. Tom Benning, *Federal Judge, Siding With Texas, Blocks Obama’s Rules on Bathrooms for Transgender Students*, THE DALLAS MORNING NEWS (Aug. 22, 2016), <http://www.dallasnews.com/news/politics/headlines/20160822-federal-judge-siding-with-texas-blocks-federal-transgender-rules-for-schools.ece>.

60. *See Twp. High Sch. Dist. 211*, OCR Case No. 05-14-1055 9 (Dep’t of Educ. Nov. 2, 2015).

61. *Id.*

be tardy for gym class, and excluded her from activities planned by students in the locker room.⁶²

The ED concluded that the student was not afforded the opportunity to participate equally in a school program because she was forced to change in a separate bathroom.⁶³ The ED stated that the school should allow the transgender student to change in the girls' locker room and that the other students' interests could be accommodated by providing additional privacy curtains to keep their bodies from being exposed to others.⁶⁴

While these administrative decisions demonstrate victories for transgender persons, the decisions are not necessarily binding on courts.⁶⁵ Courts will only accord deference to a federal agency's interpretation of a statute that an agency is responsible for administering when the statute is ambiguous and the agency's interpretation is based on a "permissible construction of the statute."⁶⁶ However, these decisions are an important step towards recognizing transgender student rights under Title IX.

B. The History of Transgender and LGBT Claims under the Equal Protection Clause

The Equal Protection Clause states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁶⁷ Equal protection is essentially a direction that all persons similarly situated should be treated alike.⁶⁸

When reviewing a claim that state action violates the Equal Protection Clause, a court must first determine the correct standard of review.⁶⁹ The highest standard, "strict judicial scrutiny," is used for two types of cases: those involving laws that operate to the disadvantage of suspect classes and those that interfere with the exercise of fundamental rights.⁷⁰ To survive strict judicial scrutiny, a law or regulation must advance a compelling state interest and be narrowly tailored to meet that

62. *Id.*

63. *Id.*

64. *Id.* Similarly, in 2013, the Office of Civil Rights ("OCR") required the Arcadia Unified School District to give a transgender boy access to male locker rooms and restrooms. *Arcadia Unified Sch. Dist.*, OCR Case No. 09-12-1020 3 (Dep't of Educ. July 24, 2013).

65. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

66. *Id.* at 843.

67. U.S. CONST. amend. XIV, § 1.

68. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

69. *See Donatelli v. Mitchell*, 2 F.3d 508, 513 (3d Cir. 1993).

70. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

interest.⁷¹ If the strict judicial scrutiny standard does not apply, the “rational basis test” is normally used, meaning the law must rationally further a legitimate state interest.⁷²

Somewhere in between the rational basis test and strict judicial scrutiny, courts have applied another standard of review known as “intermediate scrutiny.”⁷³ Intermediate scrutiny is typically used to review laws that affect “quasi-suspect” classes, such as gender.⁷⁴ Under this test, the proffered justification for a law or regulation that distinguishes based on gender, for example, must be “exceedingly persuasive,”⁷⁵ and the discriminatory classification must be substantially related to an important government purpose.⁷⁶

1. *Glenn v. Brumby* and *Smith v. City of Salem*: Transgender Persons are Part of the “Gender” Classification

The U.S. Supreme Court applies intermediate scrutiny to sex-based classifications in order to “eliminate discrimination on the basis of gender stereotypes.”⁷⁷ However, most federal courts have held that transgender people are excluded from this protection and that transgender people are not a suspect class under the Equal Protection Clause.⁷⁸ In contrast, the Sixth Circuit in *Smith* and the Eleventh Circuit in *Glenn v. Brumby*⁷⁹ determined that transgender people are part of the protected gender class, just like non-transgender men and women.⁸⁰

In *Smith*, a transgender plaintiff successfully brought a Title VII sex discrimination claim, which also constituted an equal protection claim, when she was forced to resign from her job after being diagnosed with gender identity disorder and coming to work as a woman.⁸¹ The Sixth

71. *Donatelli*, 2 F.3d at 513.

72. *Rodriguez*, 411 U.S. at 17.

73. *See* *Clark v. Jeter*, 468 U.S. 456, 461 (1988).

74. *Ramos v. Town of Vernon*, 353 F.3d 171, 175 (2d Cir. 2003) (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

75. *United States v. Virginia*, 518 U.S. 515, 533 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

76. *Id.* (citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985).

77. *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (consolidating sex-based discrimination cases).

78. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir. 2007); *Gomez v. Maass*, 918 F.2d 181, 181 (9th Cir. 1990); *Braninburg v. Coalinga State Hosp.*, No. 1:08-cv-01457-MHM, 2012 U.S. Dist. LEXIS 127769, at *22 (E.D. Cal. Sept. 7, 2012); *Jamison v. Davue*, No. S-11-cv-2056 WBS, 2012 U.S. Dist. LEXIS 40266, at *10 (E.D. Cal. Mar. 23, 2012); *Lopez v. City of New York*, No. 05-cv-10321-NRB, 2009 U.S. Dist. LEXIS 7645, at *39 (S.D.N.Y. Jan. 30, 2009).

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

80. *Id.* at 1319.

81. *Smith v. City of Salem*, 378 F.3d 566, 575–76 (6th Cir. 2004).

Circuit reasoned that discrimination against someone for being a transsexual is sex stereotyping, and individuals have a right under the Equal Protection Clause to be free from discrimination on the basis of sex.⁸²

Similarly, in *Glenn*, a transgender female brought a claim alleging sex discrimination in violation of the Equal Protection Clause when she was terminated from job.⁸³ Although the defendant employer asserted that the plaintiff was fired because other employees threatened to sue over the plaintiff's use of the women's restroom, there was no evidence that this was the defendant's true motivation.⁸⁴

Relying on *Price Waterhouse* and other Title VII precedent, the *Glenn* court held that the defendant discriminated against the plaintiff based on sex by terminating her for transitioning from male to female.⁸⁵ The court reasoned that discrimination based on a transgender person's gender nonconformity⁸⁶ is itself sex discrimination that violates the Equal Protection Clause.⁸⁷ The court further held that discrimination based on sex stereotypes is subject to intermediate scrutiny.⁸⁸

The *Glenn* court reasoned that a person is considered transgender "precisely because of the perception that his or her behavior transgresses gender stereotypes."⁸⁹ As a result, there is a "congruence" between discrimination against transgender individuals and discrimination on the basis of "gender-based behavioral norms."⁹⁰ Thus, transgender individuals must be afforded the same protection against discrimination based on sex stereotypes as everyone else because the nature of the discrimination is the same.⁹¹

2. The LGBT Movement Towards Equality

An examination of the LGB⁹² Rights Movement may provide insight into the future of LGBT rights collectively and, specifically,

82. *Id.*

83. *Glenn*, 663 F.3d at 1314.

84. *Id.* at 1321.

85. *Id.*

86. "Gender nonconformity" refers to a person identifying as a gender different from that person's biological sex; for example, a biological man who identifies as a woman. *See id.* at 1317, 1320–21.

87. *Id.* at 1317.

88. *Id.* at 1319.

89. *Id.* at 1316.

90. *Id.*

91. *Id.* at 1318.

92. "LGB" stands for Lesbian, Gay, and Bisexual. *See* M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, 84 CHI.-KENT L. REV. 559, 561 (2009).

transgender equal protection.⁹³ Equal protection claims have historically been premised on a person's identity rather than particular acts or practices.⁹⁴ In fact, the Civil Rights Movement began on the premise that race is an immutable characteristic and racial categories are rooted in biological differences, and as a result, a person should not be treated differently because of that person's race.⁹⁵ Other groups seeking protection from discrimination, such as gay and lesbian persons, similarly adopted the argument that a person should not be treated differently based on biological, immutable differences.⁹⁶

In accordance with this idea of equality, several federal courts have held that gay and lesbian persons compose a quasi-suspect class, receiving heightened protection under the Fourteenth Amendment.⁹⁷ For example, the Ninth Circuit held that since sexual orientation and sexual identity are essential to one's identity, a person should not have to abandon them.⁹⁸ These findings may affect transgender people's status because some of the decisions specifically address gender identity, and because sexual minorities are closely associated and often considered collectively as "LGBT."⁹⁹

Cases involving sexual orientation have been progressive, resulting in greater victories for plaintiffs that reflect society's increasingly liberal views in this area.¹⁰⁰ In 1971, the Minnesota Supreme Court upheld a

93. See SHANNON PRICE MINTER, *DO TRANSSEXUALS DREAM OF GAY RIGHTS? GETTING REAL ABOUT TRANSGENDER INCLUSION* (Paisley Currah, Richard M. Juana, & Shannon Price Miller eds., 2006) (discussing the historical interdependence of transgender, lesbian, bisexual, and gay communities).

94. See Remarks at a Reception Honoring Lesbian, Gay, Bisexual and Transgender Pride Month, 1 PUB. PAPERS 927, 928 (June 29, 2009) ("We seek an America in which no one feels the pain of discrimination based on who you are . . .").

95. See JOHN D. SKRENTNY, *AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE* 4 (2014) (discussing the liberal view of immutable differences as institutionalized in American civil rights law).

96. See Samuel A. Marcossan, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 649 (2001) (arguing that immutability can be a great force in winning the fight for sexual minorities).

97. See, e.g., *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled in part on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 430 (M.D. Pa. 2014); *Golinski v. U.S. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 989–90 (N.D. Cal. 2012); *Pedersen v. Office of Personnel Mgmt.*, 881 F. Supp. 2d 294, 333 (D. Conn. 2012).

98. *Hernandez-Montiel*, 225 F.3d at 1093.

99. See MINTER, *supra* note 93 (discussing the historical interdependence of LGBT communities). However, transgender status in no way indicates a person's sexual orientation. See *Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation*, in *The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, AM. PSYCHOLOGICAL ASS'N (February 18–20, 2011), <http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> [hereinafter *Definition of Terms*].

100. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012).

statute denying marriage to same-sex couples.¹⁰¹ In 1986, the U.S. Supreme Court upheld a law banning sodomy, holding that the law had a rational basis.¹⁰² This trend changed in 1996 when the U.S. Supreme Court found no rational basis for legislation banning Colorado cities from extending anti-discrimination legislation to gays, lesbians, and bisexuals.¹⁰³ In 2003, the Court expanded gay rights by finding that same-sex couples have the fundamental right to private intimate relations.¹⁰⁴ Then, in 2013, the Court held that section three of The Defense of Marriage Act (“DOMA”),¹⁰⁵ which stated that the federal government would not recognize same-sex marriages, was unconstitutional.¹⁰⁶

Finally, in 2015, the Supreme Court held in *Obergefell v. Hodges*¹⁰⁷ that marriage is a fundamental right and to deny this right to same-sex couples is a violation of the Equal Protection Clause.¹⁰⁸ In doing so, the Court recognized that sexual orientation is an immutable characteristic.¹⁰⁹ Importantly, gender identity is also immutable.¹¹⁰ Thus, the reasoning in *Obergefell* may serve to expand the rights of transgender people as well.¹¹¹

101. Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).

102. The court found sentiments against the “morality of homosexuality” to be a rational basis. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

103. Romer v. Evans, 517 U.S. 620, 624 (1996).

104. Lawrence v. Texas, 539 U.S. 558, 578 (2003). This holding is limited to adult, consensual behavior. *Id.* at 567.

105. DOMA § 3, 1 U.S.C. § 7 (1996).

106. United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

107. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

108. *Id.* at 2604–05.

109. *Id.* at 2596 (“[S]exual orientation is both a normal expression of human sexuality and immutable.”).

110. See Hernandez-Montiel v. INS, 225 F.3d 1084, 1092 (2000) (finding a man’s female sexual identity to be immutable because it is a trait that one “cannot change, or should not be required to change because it is fundamental to their individual identities or consciences”).

111. See Wilson v. Phoenix House, 978 N.Y.S.2d 748, 756 (N.Y. App. Div. 2013) (“[A]cknowledgement that gender [identity] is immutable and not chosen is more likely to result in decisions that do find discrimination.”); see also Norsworthy v. Beard, 74 F. Supp. 3d 1100, 1117 n.7 (N.D. Cal. 2014) (“The Ninth Circuit’s conclusion that heightened scrutiny should be applied to Equal Protection claims involving discrimination based on sexual orientation . . . applies with at least equal force to discrimination against transgender people, whose identity is equally immutable . . .”).

C. *Federal Case Law Regarding Transgender Student Protections under Title IX and the Equal Protection Clause*

1. *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*

Two important federal cases were recently decided in the context of transgender student rights under Title IX and the Equal Protection Clause.¹¹² At the district court level, both courts ruled against the plaintiff students.¹¹³ However, one of these cases was reversed on appeal.¹¹⁴

In March 2015, the U.S. District Court for the Western District of Pennsylvania decided *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*.¹¹⁵ The court held that “transgender” is not a protected characteristic under Title IX and that transgender people are not a protected class under the Equal Protection Clause.¹¹⁶

The *Johnston* case arose from a student’s allegation that his college discriminated against him based on his sex and transgender status by prohibiting him from using male-segregated locker rooms and restrooms.¹¹⁷ When the student continued to use the male facilities where he felt most comfortable, the university called the police, who cited the student for disorderly conduct, and eventually, expelled him from the university.¹¹⁸ The court ruled that a federally funded university does not violate Title IX or the Equal Protection Clause by prohibiting a transgender male student from using male-designated restrooms and locker rooms.¹¹⁹

The *Johnston* court determined that the claim failed under the Equal Protection Clause because transgender people are not a recognized protected class, and other students’ privacy interests provides a rational

112. See *G.G. v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015); *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015). Another earlier federal case addressed a transgender student’s Title IX claim, but only briefly touched on the arguments set forth in this Comment. See *Doe v. Clark Cty. Sch. Dist.*, No. 206-cv-1074-JCM-RJJ, 2008 U.S. Dist. LEXIS 71204, at *9–13 (D. Nev. Sept. 17, 2008) (arguing primarily that a bathroom is not an “education program” under Title IX).

113. *Gloucester*, 132 F. Supp. 3d at 753; *Johnston*, 97 F. Supp. 3d at 683.

114. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 727 (4th Cir. 2016).

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

116. *Id.* at 668–69, 674.

117. *Id.* at 661.

118. *Id.* at 664.

119. *Id.* at 669, 672, 681–82.

basis for separate facilities.¹²⁰ The court, citing several cases, also found transgender individuals to be an unprotected class under Title IX.¹²¹ The 1984 case *Ulane v. Eastern Airlines, Inc.*¹²² was a primary focus in this decision and held that Title VII affords no protection to transgender victims of sex discrimination.¹²³ The *Ulane* court also stated that if the term “sex” was to mean more than biological male or female, the new definition would have to come from Congress.¹²⁴ The *Johnston* court ultimately chose to adopt this narrow meaning of the statutory term “sex,” limited only to biological sex, because Title IX’s original purpose was to establish equal educational opportunities for women and men.¹²⁵

2. *G.G. v. Gloucester County School Board in Virginia*

In September 2015, the U.S. District Court for the Eastern District of Virginia decided *G.G. v. Gloucester County School Board*.¹²⁶ In *Gloucester*, G.G., the plaintiff student, challenged a school policy that limited students’ restroom and locker room access to facilities corresponding with their biological sex and provided students with “gender identity issues” alternative, private facilities.¹²⁷ In accordance with the policy, the school installed three unisex, single-stall restrooms.¹²⁸ G.G., who identified as a male, preferred to use the male facilities and felt stigmatized and humiliated when forced to use alternative restrooms.¹²⁹

The *Gloucester* court ruled that the student was not protected under Title IX because one of Title IX’s provisions states that recipients are allowed to provide separate restrooms and locker rooms for students according to sex.¹³⁰ In coming to this decision, the court acknowledged

120. *Id.* at 669–70.

121. *Id.* at 674 (citing *Etsitty v. Utah Transit Auth.*, 502 F. 3d 1215, 1221–22 (10th Cir. 2007); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 658 (S.D. Tex. 2008)); *see also Doe v. Clark Cty. Sch. Dist.*, No. 206-cv-1074-JCM-RJJ, 2008 U.S. Dist. LEXIS 71204, at *12–13 (D. Nev. Sept. 17, 2008) (stating that discrimination “because of sex” only includes discrimination for being or acting like a male or female).

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

123. *See id.* at 1081.

124. *Id.* at 1081, 1085–87.

125. *See Johnston*, 97 F. Supp. 3d at 677 (citing *Lothes v. Butler Cty. Juvenile Rehab. Ctr.*, 243 F. App’x 950, 955 (6th Cir. 2007)).

126. *G.G. v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015).

127. *Id.* at 740.

128. *Id.* at 741.

129. *Id.* at 749.

130. *Id.* at 744, 746; *see* 34 C.F.R. § 106.33 (2015) (“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities

the ED's interpretation of this provision,¹³¹ issued in a letter in 2015, which states:

The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, *a school must treat transgender students consistent with their gender identity.*¹³²

However, the court did not give deference to the letter because the letter's interpretation seemingly based restroom access only on gender-identity, which was erroneous and inconsistent with Title IX.¹³³ Therefore, the regulation was given deference, meaning the school could separate bathrooms based on biological sex and prevent G.G. from accessing male facilities.¹³⁴ Furthermore, the court found that the other students' fundamental right to privacy¹³⁵ outweighed G.G.'s interests.¹³⁶ For these reasons, the court concluded that the school's policy did not violate Title IX and did not rule on the Equal Protection claim.¹³⁷

3. Reversing *Gloucester*: The Fourth Circuit Becomes the First Federal Court to Rule in Favor of Transgender Bathroom Rights

The district court's decision in *Gloucester* was appealed to the U.S. Court of Appeals for the Fourth Circuit, which handed down its decision on April 19, 2016.¹³⁸ In *G.G. v. Gloucester County School Board*,¹³⁹ the Fourth Circuit reversed the district court's dismissal of G.G.'s Title IX claim and remanded for further proceedings because the district court did not accord appropriate deference to the ED's interpretation of its regulation.¹⁴⁰ Specifically, the court held that the ED's regulation was ambiguous, the ED's interpretation of the relevant Title IX provision was not inconsistent or erroneous, and the ED's interpretation was the result of the agency's fair and considered judgment.¹⁴¹

provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”).

131. *Gloucester*, 132 F. Supp. 3d at 744.

132. Letter from James A. Ferg-Cadima, Deputy Assistant Secretary for Policy, Office for Civil Rights, to Emily T. Prince, Esq. (Jan. 7, 2015) (emphasis added).

133. *Gloucester*, 132 F. Supp. 3d at 746.

134. *Id.*

135. See U.S. CONST. amend. IV.

136. *Gloucester*, 132 F. Supp. 3d at 752–53.

137. *Id.* at 753.

138. See *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 727 (4th Cir. 2016).

139. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).

140. *Id.* at 715.

141. *Id.* at 720–24.

The decision came in the middle of a national debate over Title IX and gender identity and was considered a huge victory for transgender rights.¹⁴² This case was the first time a United States court held that Title IX protects the rights of transgender students to use the bathroom that corresponds with their gender identity.¹⁴³

III. ANALYSIS OF TRANSGENDER STUDENT RIGHTS UNDER TITLE IX AND THE EQUAL PROTECTION CLAUSE

A. *Transgender Students Should be Protected from Discrimination under Title IX*

Discrimination “on the basis of sex” should include discrimination on the basis of gender identity. There is a valid avenue of recovery for transgender students under both the sex stereotyping theory and the theory that gender is encompassed in the definition of the word “sex.”

1. The Sixth Circuit and D.C. District Court Got it Right: Discrimination Based on Sex Stereotyping *is* Discrimination Against Someone for Being a Transgender Person

Some courts have extended protection to transgender students under the “sex stereotyping” framework from the Title VII cases.¹⁴⁴ However, this protection should not be limited to discrimination based on what was previously understood as non-conformance to sex stereotypes.¹⁴⁵ Rather, the protection should extend to discrimination against someone for simply *being* a transgender person.

In *Smith*, the Sixth Circuit found that discrimination against a transsexual plaintiff is the same as discrimination against the *Price Waterhouse* plaintiff, a non-transgender female who did not act in

142. Richard Fausset, *Appeals Court Favors Transgender Student in Virginia Restroom Case*, N.Y. TIMES, Apr. 19, 2016, http://www.nytimes.com/2016/04/20/us/appeals-court-favors-transgender-student-in-virginia-restroom-case.html?_r=0.

143. *Id.* Unfortunately, a divided Supreme Court agreed to block the Fourth Circuit’s order until the Court can consider a petition for a writ of certiorari. *See* Gloucester Cty. Sch. Bd. v. G.G., 136 S. Ct. 2442, 2442 (2016).

144. *See, e.g.*, Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011); Walsh v. Tehachapi Unified Sch. Dist., 827 F. Supp. 2d 1107, 1151 n.1 (E.D. Cal. 2011); Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 822–23 (C.D. Ill. 2008); Seiwert v. Spencer-Owen Comm. Sch. Corp., 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 963 (D. Kan. 2005).

145. In other words, the protection should extend to circumstances beyond just those involving people who do not *behave* or *appear* sufficiently feminine or masculine. *See* Dawson v. Bumble & Bumble, 398 F.3d 211, 221 (2d Cir. 2005) (stating that one can generally fail to conform to gender stereotypes either through behavior or through appearance).

accordance with “typical” female traits, because both involve stereotyping someone based on their gender non-conforming behavior.¹⁴⁶ The label “transsexual” should not destroy a sex discrimination claim.¹⁴⁷ Concluding that “gender non-conformance” includes *being* a transgender person is logical because, by definition, a transgender person does not conform to the sex that person was assigned to at birth.¹⁴⁸

In *Schroer*, the D.C. District Court explained through an analogy why this approach makes sense:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion,” . . . [which] easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that “transsexuality” is unprotected by Title VII. In other words, courts have allowed their focus on the label “transsexual” to blind them to the statutory language itself.¹⁴⁹

Furthermore, applying the gender-stereotyping model only to the *actions* of transgender individuals, such as the way they walk, talk, or dress, rather than their *identity* as transgender persons, would be fundamentally unfair. Such an application would force transgender persons to “sacrifice [their] transgender identity” by filing claims based on how they act, rather than who they are.¹⁵⁰ Therefore, discrimination against someone for being a transgender person is sex stereotyping and is grounds for a discrimination claim “because of sex.”

146. *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).

147. *Id.* at 575.

148. *See Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 U.S. Dist. LEXIS 31591, at *3 (D. Minn. Mar. 16, 2015) (“[Transgender] may be used to describe people . . . whose gender identity is different from their sex assigned at birth.”) (citing *TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY* 620 (Laura Erickson-Schroth ed., 2014)).

149. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008) (emphasis added).

150. Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARV. J. L. & GENDER 423, 445–46 (2012).

2. The EEOC and the ED Make it Simpler: “Gender” is Included in the Definition of the Word “Sex”

The sex stereotyping theory would be unnecessary if transgender students were protected *per se* under Title IX. Transgender should be a protected characteristic *per se* under Title IX because gender identity is encompassed in the word “sex.” Unlike sex stereotyping, this bright-line rule is easier for courts to apply and will more genuinely depict the claims at issue.¹⁵¹

The issue with the word “sex” is that, scientifically speaking, sex refers to the biological difference between males and females, while gender refers to the feeling of identifying and acting as either male or female.¹⁵² For statutory purposes, however, “sex” and “gender” are synonymous.¹⁵³ While several courts have incorrectly barred discrimination based only on the scientific definition of the word “sex,” the Eleventh Circuit, the EEOC, and the ED agree that gender is included in the word “sex” as used in Title VII and Title IX.

The ED stated in a letter that Title IX’s definition of “sex” also extends to gender identity.¹⁵⁴ The EEOC agreed, explaining that any sort of transgender discrimination *is* sex discrimination because it inherently involves taking sex into account.¹⁵⁵ This interpretation of the word “sex” is favorable because it supports the statutory purpose of barring discrimination,¹⁵⁶ aligns with Title IX’s broad scope,¹⁵⁷ and provides a simpler framework for courts to apply. For example, in *Macy v. Department of Justice*,¹⁵⁸ the EEOC determined that the claim was mistakenly separated into several claims, including “discrimination based on sex,” “sex stereotyping,” “gender transition/change of sex,” “gender

151. See Joanna Grossman, *The EEOC Rules That Transgender Discrimination is Sex Discrimination: The Reasoning Behind that Decision*, JUSTIA, May 1, 2012, <https://verdict.justia.com/2012/05/01/the-eec-rules-that-transgender-discrimination-is-sex-discrimination>.

152. See *Definition of Terms*, *supra* note 99.

153. See *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (“[F]or Title VII purposes, the terms ‘sex’ and ‘gender’ have become interchangeable.”).

154. QUESTIONS AND ANSWERS, *supra* note 58.

155. *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012) (“As used in Title VII, the term ‘sex’ ‘encompasses both sex - that is, the biological difference between men and women - *and* gender.’”) (quoting *Schwenk*, 204 F.3d at 1202).

156. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (“Title IX, like its model Title VI, sought . . . to avoid the use of federal resources to support discriminatory practices . . . [and] provide individual citizens effective protection against those practices.”).

157. See *United States v. Price*, 383 U.S. 787, 801 (1966) (“[I]f we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.”).

158. *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012).

identity,” and “gender identity stereotyping.”¹⁵⁹ Each of these confusing formulations was simply a different way of stating a claim based on sex.¹⁶⁰ Filing a sex discrimination claim would have been appropriate and much simpler.

3. The EEOC and ED’s Interpretations of the Word “Sex” Should be Given *Chevron* Deference

A court will generally accord deference to a federal agency’s interpretation of a statute that the agency is responsible for administering when “the statute is silent or ambiguous with respect to the specific issue” and “the agency’s answer is based on a permissible construction of the statute.”¹⁶¹ The agency’s interpretation does not need to be the only or most reasonable interpretation, just a reasonable interpretation of the statute in general.¹⁶²

The ED is the relevant agency in interpreting Title IX because the ED adopted the regulations upon the agency’s establishment in 1979.¹⁶³ Also, Title IX is ambiguous because the statute does not define the word “sex.”¹⁶⁴ Confusion exists regarding whether the word “sex” includes “gender.”¹⁶⁵

The ED’s decision that the terms “sex” and “gender” are interchangeable is reasonable because the terms are closely intertwined and because transgender status derives from a person’s sex, or, more specifically, a *change* of sex.¹⁶⁶ Furthermore, a statute is best interpreted by the agency that administers the statute.¹⁶⁷ Therefore, courts should defer to the ED’s decision that “gender” is included in the term “sex,” and transgender people should be protected from discrimination per se under Title IX.

159. *Macy*, EEOC Appeal No. 0120120821, at 3–5, 13.

160. *Id.* at 13.

161. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

162. *Id.* at 843–44.

163. *See* Department of Education Organization Act of 1979, Pub. L. No. 96-88, § 201, 93 Stat. 668, 671 (1979).

164. *See* 20 U.S.C. § 1681 (2012).

165. *See* Milton Diamond, *Sex and Gender are Different: Sexual Identity and Gender Identity are Different*, 7 *CLINICAL CHILD PSYCHOLOGY & PSYCHIATRY* 320, 320 (2002).

166. *See Transgender FAQ*, GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, <http://www.glaad.org/reference/transgender> (“Transgender is a term used to describe people . . . whose *sex* they were assigned at birth and . . . own internal *gender* identity do not match.”) (emphasis added).

167. *See* Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 285, 292–93 (Daniel A. Farber & Joseph O’Connell eds., 2010) (stating that an agency may have “information advantages” over a court about the connection between interpretive choices and actual outcomes).

B. Transgender Persons Should be Protected as a Quasi-Suspect Class under the Equal Protection Clause

Although most courts do not recognize transgender individuals as a protected class,¹⁶⁸ transgender persons should be protected from sex discrimination under the Equal Protection Clause. Transgender people should be part of both the “gender” classification, which is a quasi-suspect class,¹⁶⁹ and the LGBT class, which has not yet acquired protected status but should be treated as quasi-suspect. Courts should provide one avenue, or both, for transgender plaintiffs to obtain relief from discrimination.

1. *Glenn and Smith: Transgender Persons are Part of the “Gender” Classification*

Transgender people should be included in the “gender” class, which is a quasi-suspect class under the Fourteenth Amendment.¹⁷⁰ While most courts apply the gender class only to the categories of biological males and females,¹⁷¹ the class should also include transgender people because the discrimination they suffer is based on their gender identity.¹⁷²

The Supreme Court’s purpose in applying intermediate scrutiny to sex-based classifications is to eliminate discrimination based on gender stereotypes.¹⁷³ Protecting transgender people from discrimination comports with this purpose because a person who is transgender, by definition, contradicts gender stereotypes by failing to conform to the sex that person was assigned at birth.¹⁷⁴

168. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir. 2007); *Gomez v. Maass*, 918 F.2d 181, 181 (9th Cir. 1990); *Braninburg v. Coalinga State Hosp.*, No. 1:08-cv-01457-MHM, 2012 U.S. Dist. LEXIS 127769, at *22 (E.D. Cal. Sept. 7, 2012); *Jamison v. Davue*, No. S-11-cv-2056 WBS, 2012 U.S. Dist. LEXIS 40266, at *10 (E.D. Cal. Mar. 23, 2012); *Lopez v. City of New York*, No. 05-cv-10321-NRB, 2009 U.S. Dist. LEXIS 7645, at *39 (S.D.N.Y. Jan. 30, 2009).

169. See *Craig v. Boren*, 429 U.S. 190, 210 (1976); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982).

170. See *Boren*, 429 U.S. at 210; *Hogan*, 458 U.S. at 733.

171. See, e.g., *Boren*, 429 U.S. at 210; *Hogan*, 458 U.S. at 733.

172. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008) (explaining that discrimination because of a *change* in sex is sex discrimination).

173. *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011); see also *Hogan*, 458 U.S. at 726 (explaining the purpose of heightened scrutiny as ensuring that sex-based classifications rest upon “reasoned analysis rather than . . . traditional, often inaccurate, assumptions about the proper roles of men and women”).

174. See *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 U.S. Dist. LEXIS 31591, at *3 (D. Minn. Mar. 16, 2015) (“[Transgender] may be used to describe people whose gender expression does not conform to cultural norms and/or whose gender identity is different from their sex assigned at birth.”) (citing TRANS BODIES, TRANS

The Eleventh Circuit and the Sixth Circuit support this position.¹⁷⁵ In *Smith*, the Sixth Circuit found that discrimination based on the plaintiff's transsexualism was discrimination based on that person's failure to conform to sex stereotypes by "expressing a less masculine[] and more feminine appearance."¹⁷⁶ Similarly, in *Glenn*, a transgender woman succeeded in her equal protection claim when she was fired for transitioning from male to female.¹⁷⁷ The Eleventh Circuit reasoned that discrimination against transgender individuals and discrimination on the basis of "gender-based behavioral norms" are essentially one and the same.¹⁷⁸ The *Glenn* court further reasoned that discrimination against someone for being a transgender person is due to traditional beliefs that men and women should act a certain way and conform to their birth-sex, which is gender stereotyping.¹⁷⁹

Therefore, discrimination based on a person's gender non-conformity or transgender status should be subject to intermediate judicial scrutiny like discrimination based on one's status as a man or woman. This means that such discrimination must serve important governmental objectives and the discriminatory means used must be substantially related to achieving those objectives.¹⁸⁰

2. The LGBT Community as a Protected Class

LGBT persons should be recognized as a quasi-suspect class. Although the U.S. Supreme Court has not ruled on this issue, two circuit courts have held that classifications based on sexual orientation are subject to heightened scrutiny.¹⁸¹ Also, society has demonstrated an increasing interest in protecting the LGBT community in recent years,

SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY 620 (Laura Erickson-Schroth ed., 2014)).

175. See *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004); *Glenn*, 663 F.3d at 1313–14.

176. *Smith*, 378 F.3d at 572.

177. *Glenn*, 663 F.3d at 1313–14.

178. *Id.* at 1316.

179. See *id.* at 1316–17; see also *Rosa v. West Bank & Tr. Co.* 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that a transgender plaintiff could state a claim under the Equal Credit Opportunity Act for being denied a loan application because of her feminine attire); see also *Schwenk v. Hartford*, 204 F.3d 1187, 1198–1203 (9th Cir. 2000) (holding that a transgender plaintiff could state a claim under the Gender Motivated Violence Act for discrimination stemming from her presentation as a woman).

180. See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

181. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012).

particularly gays and lesbians.¹⁸² This is legally significant because the U.S. Supreme Court has recognized that “new insights and societal understandings can reveal unjustified inequality,”¹⁸³ and public support can make it easier for the Court to pass policy-based decisions.¹⁸⁴ Although transgender individuals’ concerns have not been widely recognized,¹⁸⁵ courts’ responses to the gay rights movement can provide guidance on the transgender movement because the two are closely related.¹⁸⁶

LGBT people likely meet the criteria for a quasi-suspect class. The Supreme Court has identified two factors that must be met for a group to be accorded protected status: (1) the group must have suffered a history of purposeful unequal treatment,¹⁸⁷ and (2) the group members’ distinguishing characteristic must bear no relation to the members’ ability to perform or contribute to society.¹⁸⁸ The Court has also cited two other considerations that, in a given case, may be relevant to protected status, including: (1) whether the group is a minority or politically powerless,¹⁸⁹ and (2) whether the characteristic that defines the members is immutable.¹⁹⁰ All four factors apply less strictly to quasi-suspect class determinations than suspect class ones.¹⁹¹

182. See Ellen Decoo, Changing Attitudes Toward Homosexuality in the United States from 1977 to 2012 (June 10, 2014) (unpublished M.S. thesis, Brigham Young University) (on file with the Brigham Young University Scholars Archive).

183. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

184. See JASON PIERCESON, SEXUAL MINORITIES AND POLITICS: AN INTRODUCTION 129 (Rowman & Littlefield 2016) (explaining how the rise in support made it easier for the Court to rationalize the policy in *Obergefell*).

185. This is likely because transgender civil rights are an emerging area of case law. See Duaa Eldeib, *Transgender Student Rights: Education Department, Courts Not on Same Page*, CHI. TRIB. (Nov. 3, 2015), <http://www.chicagotribune.com/news/ct-transgender-students-legal-questions-met-20151103-story.html>.

186. See SHANNON PRICE MINTER, TRANSGENDER RIGHTS 146 (Paisley Currah, Richard M. Juana & Shannon Price Miller eds., 2006) (“Gender variance is a deep and recurring theme in gay culture and gay life”); see also Chryss Cada, *Issue of Transgender Rights Divides Many Gay Activists: Transgender Activists Seek a Greater Voice*, BOS. GLOBE, Apr. 23, 2000, at A8 (“Saying the transgender movement ‘isn’t part of the gay movement is like saying water isn’t part of the earth.’”) (quoting Riki Anne Wilchins, executive director of GenderPAC).

187. See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam).

188. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion); accord *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

189. See *Murgia*, 427 U.S. at 313–14.

190. See *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). The significance of the immutability and political powerlessness factors is uncertain. See Ginger Grimes, *Masking the Reemergence of Immutability with “Outcomes for Children,”* 5 U.C. IRVINE L. REV. 683, 684–85 (2015); William N. Eskridge Jr., *Is Political Powerless a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 11–12 (2010). However, concerns about these two criteria often arise in LGBT litigation. See,

First, transgender individuals¹⁹² have suffered from purposeful unequal treatment, including discrimination and violence, due to bias against them.¹⁹³ Second, being transgender bears no relation to one's ability to perform or contribute to society. In other words, an individual's gender identity has no bearing on that person's "ability to cope with and function in the everyday world."¹⁹⁴

Third, transgender people are generally accepted as a minority group.¹⁹⁵ Fourth, gender identity is an immutable characteristic.¹⁹⁶ A trait is "immutable" when the trait exists "solely by the accident of birth."¹⁹⁷ Members of the class are not required to be physically unable to change the trait, but changing the trait must involve great difficulty, such as a "major physical change or a traumatic change of identity."¹⁹⁸ Changing one's gender identity would require a "traumatic change of identity" because a person's desire to live as a member of the opposite sex is "deep seated, unavoidable and overwhelming."¹⁹⁹

Therefore, transgender individuals should receive quasi-suspect status because such individuals experienced a history of purposeful unequal treatment, transgender status bears no relation to one's ability to

e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Steffan v. Cheney*, 780 F. Supp. 1, 6–10 (D.D.C. 1991).

191. *See Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012).

192. Although protected status should be afforded to the LGBT community as a whole, this analysis will focus on transgender individuals for purposes of this Comment.

193. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners at 6, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (finding animus towards LGBT people to be the second-most common motivation for hate crimes); *see also* JAIME M. GRANT, ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* (2011), http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf (finding that 63 percent of survey participants experienced a serious act of discrimination that caused job loss, eviction, school bullying, or assault, due to bias).

194. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (holding that mentally retarded people have a reduced ability to contribute to society).

195. *See* Judith B. Bradford et al., *Sexual and Gender Minority Health: What We Know and What Needs to Be Done*, *AM. J. PUB. HEALTH*, 989–95 (June 2008) (“[LGBT] persons constitute sexual and gender minorities . . .”).

196. *See, e.g.*, *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005) (holding that sexual identity is immutable because it is “inherent to one’s identity”).

197. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J., plurality opinion).

198. *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989); *see also The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 *HARV. L. REV.* 1285, 1303 (1985).

199. MINTER, *supra* note 186, at 18 (quoting Brief of *Amici Curiae* Harry Benjamin International Gender Dysphoria Association 4, *Brandon v. Richardson*, 624 N.W.2d 604 (Neb. 2001)). *See Hernandez-Montiel*, 225 F.3d at 1093 (concluding that sexual identity is immutable because it is “inherent to one’s identity”).

contribute to society, transgender people are a minority sexual group, and gender identity is an immutable characteristic. Also, courts' increasing recognition of the right to express one's identity in the gay rights context should serve as a stepping stone in creating greater protections for transgender and LGBT people as a whole.²⁰⁰

Although transgender people meet the criteria for a quasi-suspect class, the Supreme Court may disfavor the creation of a new suspect class,²⁰¹ in which case courts should choose to recognize transgender as part of the gender classification. Under either avenue, laws that distinguish transgender individuals based on their transgender status would only be valid if the laws were substantially related to an important government purpose.²⁰²

C. *The Federal District Courts That Addressed This Specific Issue Were Flawed in Their Reasoning*

1. *Johnston*: Failing to Properly Define "Sex"

Regarding the equal protection claim, the *Johnston* court held that the plaintiff, a transgender male, was not discriminated against when he was banned from using the university's male facilities.²⁰³ The court used the rational basis test because neither the Third Circuit nor the Supreme Court has held that transgender is a protected characteristic.²⁰⁴ The *Johnston* court also did not recognize the plaintiff's claim as gender discrimination, determining that the word "sex" only encompasses biological males and females.²⁰⁵ This reasoning is flawed on several grounds.

First, the *Johnston* court's primary support was *Ulane v. Eastern Airlines*, a pre-*Price Waterhouse* case holding that Title VII affords no protection to transgender victims of sex discrimination.²⁰⁶ However, numerous federal courts recognize that Title VII protects transgender persons from sex discrimination because, if nothing else, transgender

200. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) ("The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.").

201. This could be due to concern with extending protection to too many groups, growing conservatism of the Court, or a strict interpretation of the elements that is difficult for classes to meet. Bretrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 325–26 (2016).

202. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

203. *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668, 683 (W.D. Pa. 2015).

204. *Id.* at 668.

205. *Id.* at 670.

206. *Ulane v. E. Airlines*, 742 F.2d 1081, 1086–87 (7th Cir. 1984).

persons fail to comply with stereotypical gender norms.²⁰⁷ Therefore, whether *Ulane* is reliable law is questionable in light of the *Price Waterhouse* jurisprudence, which has set many courts on the opposite path.²⁰⁸

Also, the *Johnston* court implied that a gender discrimination claim brought by the plaintiff as a male, rather than a transgender person, would only be valid if the plaintiff underwent a physical transformation from female to male.²⁰⁹ Despite the court's effort to force sex into a narrow definition based only on genitalia, a transgender individual is discriminated against because of their sexual identity, regardless of whether physical surgery has occurred.²¹⁰ Furthermore, such an opinion could convince transgender individuals that undergoing costly and unsafe surgery is the key to obtaining equality and freedom from discrimination, which would be unjust.²¹¹

Finally, the *Johnston* court noted that even if it did apply heightened scrutiny, the result would be the same because the privacy interest in segregated bathrooms is substantially related to an important government interest.²¹² However, the plaintiff's interest in "performing some of life's most basic functions . . . in an environment consistent with his male gender identity"²¹³ should tip the scales in the plaintiff's favor because the other students' can maintain their privacy by using private changing areas.²¹⁴ Therefore, the court should have applied heightened scrutiny

207. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 659–61 (S.D. Tex. 2008); *Schroer v. Billington*, 424 F. Supp. 2d 203, 211 (D.D.C. 2006); *Mitchell v. Axcan Scandipharm*, No. 05-243, 2006 U.S. Dist. LEXIS 6521, at *4 (W.D. Pa. Feb. 21, 2006).

208. See *Schwenk*, 204 F.3d at 1201–02 (observing that *Ulane* was overruled by *Price Waterhouse*); *Smith*, 378 F.3d at 573 (stating that the approach in *Ulane* has been "eviscerated" by *Price Waterhouse*).

209. *Johnston*, 97 F. Supp. 3d at 671.

210. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (stating that it was inconsequential whether the discrimination was because the plaintiff was "an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual" because the sex-stereotyping vehicle provided relief regardless).

211. See Jay Zitter, *Gender Reassignment or "Sex Change" Surgery as Covered Procedure Under State Medical Assistance Program*, 60 A.L.R. 627 (2010) (mentioning the dangerous nature of sex-reassignment surgery); Alyssa Jackson, *The High Cost of Being Transgender*, CNN, July 31, 2015, <http://www.cnn.com/2015/07/31/health/transgender-costs-irpt/> (stating that sex-reassignment surgery can cost more than \$100,000).

212. *Johnston*, 97 F. Supp. 3d at 669.

213. *Id.* at 668.

214. See Twp. High Sch. Dist. 211, OCR Case No. 05-14-1055 12 (Dep't of Educ. Nov. 2, 2015); see also *Tobin & Levi*, *supra* note 10, at 301 (arguing that transgender students have the greater privacy interest in this situation because denying transgender

and found that the balancing test weighed in favor of the transgender student.

Regarding the Title IX claim, the *Johnston* court emphasized that most federal courts have held that transgender status is not protected under the statute.²¹⁵ However, the court did not address that the EEOC, interpreting Title VII, and the ED, interpreting Title IX, determined that “sex” encompasses gender and that these statutes prohibit discrimination based on transgender status. The court also disregarded the ED’s letter stating that transgender students must be treated in accordance with their gender identity.²¹⁶ Although not binding, these decisions should be given deference because they are reasonable interpretations by the agencies that administered the statutes.²¹⁷

To support its Title IX decision, the *Johnston* court relied on *Vorchheimer v. School District of Philadelphia*,²¹⁸ a case brought by a non-transgender female who wanted to attend an all-male school.²¹⁹ Such reliance is misplaced because the *Vorchheimer* plaintiff did not feel ostracized due to bias against her, but wanted to switch schools as a matter of personal preference.²²⁰ In contrast, the *Johnston* plaintiff was not arguing that every student should be able to access any restroom they choose. The argument is that transgender students should be able to use the restroom of the sex with which they identify.²²¹ Furthermore, reliance on a forty-year-old case is unsound when, as the court notes, “society’s views of gender, gender identity, sex, and sexual orientation have significantly evolved in recent years.”²²²

The *Johnston* court then analyzed the Title IX claim under the sex-stereotyping theory.²²³ The court relied on Third Circuit precedent, *Bibby v. Coca Cola Bottling Co.*²²⁴ and *Prowel v. Wise Business Forms, Inc.*,²²⁵ to conclude that the plaintiff was required, and failed, to plead

students access to facilities singles them out and exposes the intimate nature of their transsexualism) (citing *Powell v. Schriver*, 175 F.3d 107, 111–12 (2d Cir. 1999)).

215. *Johnston*, 97 F. Supp. 3d at 674.

216. QUESTIONS AND ANSWERS, *supra* note 58; *see also* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (requiring a court to accept an agency’s statutory construction, even if the agency’s reading differs from what the court believes is the best interpretation).

217. *See Chevron*, 467 U.S. at 843–44.

218. *Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880 (3d Cir. 1976), *aff’d*, 403 U.S. 703 (1977).

219. *Id.* at 881.

220. *Id.* at 882.

221. *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 681 (W.D. Pa. 2015).

222. *Id.* at 668.

223. *Id.* at 680.

224. *Bibby v. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001).

225. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009).

discrimination based on how he looked, acted, or spoke.²²⁶ However, reliance on these cases is misplaced because *Bibby* and *Prowel* were cases concerning sexual orientation.²²⁷ More persuasive authority is *Glenn v. Brumby* and *Smith v. City of Salem*, which found that gender stereotyping is the same as discrimination against someone for being a transgender person.²²⁸ Although *Glenn* and *Smith* are not binding on the *Johnston* court, they are more persuasive because they involve claims based on gender identity.²²⁹

Finally, the *Johnston* court reasoned that Title IX was enacted with the categories of men and women in mind.²³⁰ However, many laws have been created with one group of people in mind, but apply to protect various others as well.²³¹ For example, in *Oncale v. Sundowner Offshore Services*,²³² the Supreme Court held that same-sex harassment is sex discrimination under Title VII.²³³ Justice Scalia noted:

[While same-sex harassment was] assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.²³⁴

Thus, even if an insufficient complaint precluded the sex-stereotyping theory, the *Johnston* court should have recognized the transgender claim as valid sex discrimination per se under Title IX.

226. *Johnston*, 97 F. Supp. 3d at 680.

227. See *Bibby*, 260 F.3d at 264 (holding that a gay man failed to state a harassment claim because he could not prove sex-stereotyping); *Prowel*, 579 F.3d at 292 (holding that a gay man could submit his gender stereotyping claim to the jury in an attempt prove sex discrimination).

228. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004).

229. The distinction between cases involving sexual orientation and cases involving gender identity is important because the latter lends itself to the reasoning in *Glenn* and *Smith* that transgender discrimination is sex stereotyping, while the same may not be true for sexual orientation discrimination. See *Refusal to Hire Homosexual*, EEOC Dec. No. 76-67, P 6493, at 4263 (stating that sexual orientation is “in no way synonymous” with sex and gender).

230. *Johnston*, 97 F. Supp. 3d at 677.

231. See, e.g., *Slaughter-House Cases*, 83 U.S. 36, 72 (1872) (“Undoubtedly while negro slavery alone was in the minds of Congress when it passed the [T]hirteenth [Amendment]. . . [w]e do not say that no one else . . . can share in this protection.”); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (explaining that the central purpose of the Equal Protection Clause was the “prevention of official conduct discriminating on the basis of race” at one point).

232. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

233. *Id.* at 82.

234. *Id.* at 79.

Therefore, the *Johnston* court should not have dismissed the plaintiff's claims because the court, relying on outdated and factually dissimilar cases, failed to properly define sex as encompassing gender. Even if the court was not prepared to recognize transgender as a suspect class, the court should have allowed the plaintiff to recover under the sex discrimination theory and upheld both the Equal Protection and Title IX claims.

2. *Gloucester*: Failing to Give Deference to the ED's Interpretation

The *Gloucester* district court dismissed the plaintiff student's Title IX claim,²³⁵ referring to his struggles in school as "unsubstantiated claims of hardship," and his view on student privacy as a "self-serving assertion."²³⁶ The Fourth Circuit acknowledged this decision's unsoundness in their reversal.²³⁷ The lower court's reasoning was flawed because it ignored the ED's interpretation of its own Title IX regulation, which was issued in a letter stating that schools must treat transgender students consistent with their gender identity.²³⁸

An agency's interpretation of its own regulation is given controlling weight if: (1) the regulation is ambiguous, and (2) the interpretation is not plainly erroneous or inconsistent with the regulation.²³⁹ Although the district court argued that the regulation is not ambiguous because it allows for bathrooms to be separated according to sex,²⁴⁰ the regulation *is* ambiguous regarding whether a transgender student should be treated as male or female for purposes of bathroom access.²⁴¹ The regulation could be interpreted to mean that bathroom access is based on a student's biological sex, or to mean that access is based on gender identity.²⁴²

Secondly, the ED's interpretation is not erroneous or inconsistent because, according to the Fourth Circuit, sex is not just biological; there are different "physical, psychological, and social aspects" included in the term "sex."²⁴³ Also, the ED's letter still supports the original Title IX

235. Although the court also erroneously dismissed the equal protection claim, this claim was not analyzed by the court. *See* G.G. v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 747 (E.D. Va. 2015).

236. *Gloucester*, 132 F. Supp. 3d at 751–52.

237. G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 719–23 (4th Cir. 2016).

238. *See* Ferg-Cadima, *supra* note 132.

239. *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997).

240. *Gloucester*, 132 F. Supp. 3d at 746.

241. *Gloucester*, 822 F.3d at 720–21.

242. *Id.* The Fourth Circuit also stated that the regulation is ambiguous regarding other situations, such as which restroom students who are transsexual, intersex, or who lost their genitalia in an accident would use. *Id.*

243. G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 722 (4th Cir. 2016).

regulation and the continued practice of having sex-segregated facilities.²⁴⁴ Contrary to the district court's interpretation that the letter requires bathrooms to be separated only by gender identity,²⁴⁵ the letter simply states that transgender students must be treated consistent with their gender identity.²⁴⁶ Thus, bathrooms will still be sex-segregated for the majority of students, with an exception for transgender students.

Finally, the argument that following the ED's letter would degrade the federal government's system of checks and balances²⁴⁷ is speculative. The Supreme Court has determined that agency interpretations, even those in letters, can be controlling when the above requirements are met.²⁴⁸ Regardless, the ED, not the courts, is in the best position to interpret the regulation,²⁴⁹ and the ED interpreted the regulation using fair and considered judgment.²⁵⁰ Therefore, the district court should have given deference to the ED's interpretation and recognized the student's Title IX claim as valid.²⁵¹

D. A Questionable Solution: The ED's Decision in OCR Case No. 05-14-1055

In determining if discrimination exists, the Education Department's Office of Civil Rights ("OCR") determines if there are "any apparent differences in the treatment of similarly-situated individuals."²⁵² When OCR completed the investigation of Township High School District 211, OCR found that the transgender student was treated unfairly by being required to use a private restroom to change for gym class and sports.²⁵³ Also, the ED suggested that having the transgender student use private changing curtains would not suffice if the student did not consent to using them.²⁵⁴ Therefore, the ED takes the position that transgender

244. See Ferg-Cadima, *supra* note 132.

245. *Gloucester*, 132 F. Supp. 3d at 746.

246. See Ferg-Cadima, *supra* note 132.

247. *Gloucester*, 132 F. Supp. 3d at 747.

248. *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000).

249. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 856–66 (1984) (explaining that filling gaps where ambiguities exist involves difficult policy choices that agencies are better equipped to make).

250. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 722 (4th Cir. 2016) (stating that "novelty is not a reason to refuse deference" and that the interpretation is not "merely a convenient litigating position" or a "post hoc rationalization").

251. See *id.*

252. *Twp. High Sch. Dist. 211, OCR Case No. 05-14-1055 10* (Dep't of Educ. Nov. 2, 2015).

253. *Id.*

254. See *id.*

students must be able to enter and freely change in the locker room that corresponds with their gender identity.²⁵⁵

The school's, in its defense, explained that its decision to prohibit the transgender student from entering the women's locker room, and, later, to require her to change behind a curtain, was based on the other students' privacy needs.²⁵⁶ The school believed that female students would feel uncomfortable undressing in front of a biological male and seeing a person who is biologically male undress.²⁵⁷ The OCR's solution was that any student wishing to prevent their body from exposure could change behind a curtain.²⁵⁸

However, it is uncertain whether curtains are really the solution to this issue. Forcing a transgender student to change in a separate bathroom or behind a curtain is unfair.²⁵⁹ Instead, the ED suggests that the non-transgender students should change behind curtains.²⁶⁰ Not only does this also seem unfair, but what might happen next presents an issue. When the transgender student feels ostracized because that student is the only one not changing behind a curtain, the student will desire to change behind a curtain too, at which point the majority of students may decide they no longer need to. The pattern continues because no matter how much the transgender student strives for equality, the student is viewed as inherently different.²⁶¹

IV. RECOMMENDATION FOR PROTECTING TRANSGENDER STUDENTS

So what can be done to ensure that transgender students are treated as equally as possible? Bathrooms and locker rooms should no longer be separated according to sex, but rather, be gender-neutral with equal

255. *See id.* Families in the Township High School District recently challenged this decision by suing the school district, the ED, and the Justice Department. *See* Complaint at 2, *Students & Parents for Privacy v. United States Dep't of Educ.*, No. 16 C 4945, (N.D. Ill. 2016).

256. OCR Case No. 05-14-1055, at 11.

257. *Id.*

258. *Id.* at 12.

259. *See id.*

260. *Id.*

261. This pattern is common among those who harbor prejudice. Dr. Seuss once wrote a tale about yellow creatures called Sneetches, some who have "bellies with stars," and others who have "none upon thars [sic]." DR. SUESS, *THE SNEETCHES AND OTHER STORIES* 2 (1916). The star-bellied Sneetches discriminate against the plain-bellied Sneetches, so the plain-bellied Sneetches use McBean's "star-on" machine. *Id.* at 8–9. The original star-bellied Sneetches get angry, so they use McBean's "star-off" machine. *Id.* The pattern escalates and chaos breaks out. *Id.* at 23. While this story ends with the Sneetches learning that "no kind of Sneetch is the best on the beaches" and that they can get along despite their differences, real-life society is not always as sophisticated. *Id.* at 23.

access available to everyone.²⁶² To protect privacy, schools should institute a policy that *all* students must change behind a privacy curtain and use single stall toilets, and the ED should actively enforce this approach nationwide. Schools should also consider privacy enhancements such as installing flaps to cover the gaps between the stall door and wall.²⁶³ If schools are uncomfortable with the comingling of men and women, another solution is to install single-person, unisex bathrooms and changing rooms.²⁶⁴

Although the ED allows for separate bathrooms and locker rooms for different sexes, such a system no longer seems adequate. Before now, no one would have questioned the inherent inequality in separate restrooms. Today, however, the “separate but equal” doctrine²⁶⁵ is before us once again and is calling Title IX recipients to action. Thus, in order to achieve the highest level of equality for transgender students, while simultaneously protecting privacy interests, bathrooms and changing areas should be for single users and no longer labeled according to sex.

V. CONCLUSION

Transgender students are subject to unfair discrimination for expressing their identities and must be provided a remedy. In accordance with Title VII case law, EEOC and ED decisions, and the Fourth Circuit in *Gloucester*, transgender students should be protected from sex discrimination under Title IX. Similarly, the reasoning in *Glenn* and *Smith*, gay rights case law, and the characteristics of transgender persons as a class demonstrate that transgender persons should be protected from sex discrimination under the Equal Protection Clause as part of the gender class or the LGBT class.

Schools and universities should replace their facilities with single-user restrooms and changing areas that are not labeled according to sex. When transgender students face sex discrimination at school, courts should refrain from using the flawed *Johnston* and *Gloucester* reasoning,

262. See Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133 (2010) (discussing the problems with segregated bathrooms).

263. *Restroom Access for Transgender Employees*, THE HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/restroom-access-for-transgender-employees>.

264. Although this solution is more costly, if done correctly, these structures can be less expensive to construct than multiple-user bathrooms. See Emily Peck, *We Don't Need Separate Bathrooms for Men and Women*, THE HUFFINGTON POST, March 31, 2016, http://www.huffingtonpost.com/entry/gender-neutral-bathrooms_us_56fd6ccbe4b083f5c607262c.

265. See *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1986).

and recognize the validity of the transgender students' claims in accordance with society's evolving views on gender identity.

This is about the dignity and respect we accord our fellow citizens [] and the laws that we . . . have enacted to protect them . . . [and] what we must never do [] is turn on our neighbors, our family members, our fellow Americans for something they cannot control, and deny what makes them human.²⁶⁶

It is time for courts to set a precedent in this fight against discrimination and vindicate transgender students by holding that they are protected per se under Title IX and the Equal Protection Clause.

266. Press Release, U.S. Dept. of Justice, Justice Department Files Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals (May 9, 2016), <https://www.justice.gov/opa/pr/justice-department-files-complaint-against-state-north-carolina-stop-discrimination-against> (quoting U.S. Attorney General Loretta Lynch).