

2013

## Securing Equal Access to Sex-segregated Facilities for Transgender Students

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### Recommended Citation

Harper Jean Tobin & Jennifer Levi, Securing Equal Access to Sex-segregated Facilities for Transgender Students, 28 WIS. J.L. GENDER & SOC'Y 301 (2013).

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# SECURING EQUAL ACCESS TO SEX-SEGREGATED FACILITIES FOR TRANSGENDER STUDENTS

*By: Harper Jean Tobin and Jennifer Levi\**

## ABSTRACT

If Title IX is to have any real meaning for transgender students, it must protect a student's ability to live and participate in school as a member of the gender with which they identify. This means that students must be permitted to use gender-segregated spaces, including restrooms and locker rooms, consistent with their gender identity, without restriction. Denial of equal access to facilities that correspond to a student's gender identity singles out and stigmatizes transgender students, inflicts humiliation and trauma, interferes with medical treatment, and empowers bullies. A student subjected to these conditions is, by definition, deprived of an equal opportunity to learn because of his or her transgender status, and therefore, because of his or her sex. Arguments against equal access reflect broader animus and stereotypes about transgender people, and rely on justifications that have been rejected by courts in related contexts. Access consistent with a student's gender identity is widely practiced, and is the only workable and nondiscriminatory approach that is consistent with Title IX's requirement of equal educational opportunity.

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I. LIVING FULLY AS ONE’S AFFIRMED GENDER IS ESSENTIAL FOR TRANSGENDER STUDENTS.

Most people have an internal gender identity that matches their assigned sex at birth. However, this is not the case for a transgender person. For many transgender youth, their gender identity is manifest at a very early age.<sup>1</sup> A young person who was assigned the male sex at birth, but identifies as female, is a transgender girl.<sup>2</sup> A young person assigned female at birth, who identified as male, is a transgender boy.<sup>3</sup> In order to harmonize the inconsistency between a transgender person’s birth sex and gender identity, the course of care is to live consistent with their gender identity. In other words, the proper course of care allows for a person who identified as female to live fully as a female, and for a person to live fully as a male. This process is known as social role transition.<sup>4</sup> As a transgender young person approaches puberty, medical therapy may be considered to delay hormonal changes in the body.<sup>5</sup> Hormone replacement therapy may be considered for older youth.<sup>6</sup> Increasingly, gender-affirming surgeries may also be recommended for minors, but usually only for older teens.<sup>7</sup>

For transgender youth for whom social role transition is recommended, “life in their assigned gender is very distressing and the relief they get from switching their gender presentation [is] very palpable.”<sup>8</sup> With increased awareness, acceptance, and support from parents and clinicians, there has been “a rapid increase” in the number of children and adolescents presenting for

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1. See, e.g., STEPHANIE BRILL & RACHEL PEPPER, THE TRANSGENDER CHILD 61, 66 (2008); Madison Park, *Transgender kids: Painful Quest to be Who They Are*, CNN (Sept. 27, 2011), <http://www.cnn.com/2011/09/27/health/transgender-kids/index.html>.

2. Laura Edwards-Leeper & Norman P. Spack, *Psychological Evaluation and Medical Treatment of Transgender Youth in an Interdisciplinary ‘Gender Management Service’ (GeMS) in a Major Pediatric Center*, 59 J. HOMOSEXUALITY 321, 322 (2012).

3. *Id.*

4. See, e.g., *Id.* at 326.

5. See E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, Version 7*, 13 INT’L J. TRANSGENDERISM 165, 176-78 (2011).

6. *Id.*

7. *Id.*

8. Edgardo Menvielle, *A Comprehensive Program for Children with Gender Variant Behaviors and Gender Identity Disorders*, 59 J. HOMOSEXUALITY 357, 361 (2012).

treatment and socially transitioning.<sup>9</sup> Thus, more and more students in elementary and secondary schools are undergoing or have undergone social role transition, and are attending school in their affirmed gender.

At the same time, transgender students today face extraordinarily high levels of hostility from peers, and often from teachers and other staff as well. The National School Climate Survey, administered by Gay, Lesbian & Straight Education Network, documents the experiences of LGBT youth in schools.<sup>10</sup> It specifically measures indicators of negative school climate, the effects of a negative climate on academic achievement and aspirations, and students' access to LGBT supportive resource in their school.<sup>11</sup>

The 2011 School Climate Survey found that while LGBT students often faced hostile school climates, transgender students faced the most hostile climates. Among the more than 700 transgender students in grades 6 through 12 who responded to the survey, 80% reported feeling unsafe at school, 75.4% reported being verbally harassed, and 16.8% reported being physically assaulted.<sup>12</sup> Other studies have also found similar, near-universal rates of peer victimization experienced by transgender youth.<sup>13</sup> These surveys have also found that victimization contributes to a host of negative outcomes for transgender youth, including decreased educational aspirations, academic

9. Walter J. Meyer III, *Gender Identity Disorder: An Emerging Problem for Pediatricians*, 129 PEDIATRICS 571, 571 (2012). The description provided here reflects the experience of many, but not all, transgender and gender non-conforming students. Some young people experience a gradual process of understanding and expressing their gender identity, while others may have a strong discomfort with their assigned sex and yet have a gender identity that is neither male nor female. For some of these youth, using sex-segregated facilities for their birth-assigned sex may be just as distressing and inappropriate as it is for youth who have socially transitioned from male to female or from female to male. While Title IX's command of equal opportunity is no less relevant in these circumstances, its precise application is beyond the scope of this article.

10. JOSEPH G. KOSCIW, EMILY A. GREYTAK, MARK J. BARTKIEWICZ, MADELYN J. BOESEN & NEAL A. PALMER, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS, 3-5 (2012), available at [www.glsen.org/download/file/MzlxOQ](http://www.glsen.org/download/file/MzlxOQ).

11. *Id.* at 9.

12. *Id.* at 89.

13. See, e.g., Arnold H. Grossman, Anthony R. D'Augelli & Nickolas P. Salter, *Male-to-Female Transgender Youth: Gender Expression Milestones, Gender Atypicality, Victimization, and Parents' Responses*, 2 J. GLBT FAMILY STUDIES 71, 82-83 (2006) (of 31 trans female youth, 87% reported verbal abuse, and 35% physical abuse, often by peers); Arnold H. Grossman, Anthony R. D'Augelli, Nickolas P. Salter & Steven Hubbard, *Comparing Gender Expression, Gender Nonconformity, and Parents' Responses of Female-to-Male and Male-to-Female Transgender Youth: Implications for Counseling*, 1 J. LGBT ISSUES COUNSELING 41, 47, 51-52 (2005) (of 31 trans male youth, 71% reported verbal abuse, and 17% physical abuse, often by peers); Lydia A. Sausa, *Translating Research into Practice: Trans Youth Recommendations for Improving School Systems*, 3 J. GAY & LESBIAN ISSUES EDUC. 15, 19 (2005) (of 24 trans youth, 96% reported verbal harassment in school and 86% reported physical harassment).

achievement, self-esteem, and sense of belonging in school, and increased absenteeism and depression.<sup>14</sup>

School policies regarding sex-segregated facilities can exacerbate this hostile environment. One rural high school student in the National School Climate Survey reported that a transgender classmate was forbidden to use the boys' locker room at school stating "[b]efore this incident, no one knew he was biologically female. He got made fun of mercilessly."<sup>15</sup> Transgender youth frequently report fear and anxiety about using restrooms and locker rooms associated with their birth-assigned sex because they had experienced harassment by both peers and adults when using them.<sup>16</sup> In the 2009 version of the same survey, more than 55% of transgender students stated that, at times, they avoided school restrooms out of fear of abuse, and more than half (51.7%) stated they avoided locker rooms for the same reason.<sup>17</sup>

A smaller survey of youth also found that many transgender students were "afraid to access school facilities [associated with their birth-assigned sex] and would often avoid them because they were not given any alternatives."<sup>18</sup> One transgender girl reported: "I'm afraid if I go to the bathroom I'll get shoved, cornered, anything like that."<sup>19</sup> In deciding whether to provide transgender students with equal access to school facilities, school administrators face a critical decision, the answer to which will determine whether a school will encourage and exacerbate this hostile environment or strive for truly equal educational opportunity.

A number of legal advocacy organizations around the country regularly receive calls from parents and family members of youth, including young

14. See KOSCIW ET AL., *supra* note 10, at 39-41; see also, JAMIE M. GRANT, LISA A. MOTTET, JUSTIN TANIS, JACK HARRISON, JODY L. HERMAN & MARA KEISLING, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2, 3, 8 (2011), available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf); EMILY A. GREYTAK, JOSEPH G. KOSCIW & ELIZABETH M. DIAZ, HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS, at ix-xiii (2009), available at <http://glsen.customer.def6.com/sites/default/files/Harsh%20Realities.pdf>; Russell B. Toomey, Caitlin Ryan, Rafael M. Diaz, Noel A. Card & Stephen T. Russell, *Gender-Nonconforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, 46 DEVELOPMENTAL PSYCHOL. 1580, 1580-82 (2010).

15. NEAL A. PALMER, JOSEPH G. KOSCIW & MARK J. BARTKIEWICZ, STRENGTHS AND SILENCES: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER STUDENTS IN RURAL AND SMALL TOWN SCHOOLS 17 (2012), available at <http://glsen.org/sites/default/files/Strengths%20%26%20Silences.pdf>.

16. Sausa, *supra* note 13; KOSCIW ET AL., *supra* note 10, at 20.

17. JOSEPH G. KOSCIW, EMILY A. GREYTAK, ELIZABETH M. DIAZ & MARK J. BARTKIEWICZ, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 90 (2010), available at <http://glsen.org/sites/default/files/2009%20National%20School%20Climate%20Survey%20Full%20Report.pdf>.

18. Sausa, *supra* note 13, at 20.

19. *Id.*

children, who face exclusion from school and risk denial of their education because of misunderstanding about the seriousness of their gender identity.<sup>20</sup> For example, a recent caller to the legal information line staffed by volunteers at Gay & Lesbian Advocates & Defenders told this story. The caller was the father of a 6-year-old named Pat. Pat, identified as natal female at birth, had always believed he was a boy. Pat's parents initially brushed off Pat's statements that he was a boy thinking they were cute or funny.

However, when Pat was close to four years old, his parents began to worry that Pat's insistence that he was male would cause disruption to his social development. They started to correct him when he publicly stated that he was male. They also tried to redirect his play, encouraging him to play with other girls, which he never preferred. Additionally, Pat's parents were encouraging him to try some of the toys and activities that most other girls in Pat's pre-school engaged. They told Pat to try to let his hair grow. Pat, who had previously been a happy, gregarious child, began to withdraw. He was often sullen and started to have frequent tantrums.

Pat's parents sought professional help. They learned that Pat had a male gender identity, and that, regardless of his female birth assignment, his gender identity was unlikely to change. With the support and guidance of medical professionals, Pat's parents accepted him as male, as did the pre-school he attended, as well as the friends and families with which he interacted on a daily basis. No one who met Pat, who did not know of his birth assignment, questioned that he was male.

The challenges for Pat and his family began when Pat was ready to matriculate at the local elementary school. Registration at the school required Pat's parents to provide his birth record, which would disclose his assigned birth sex and make his transgender status public. Pat's parents decided to meet with the principal of the school to explain the situation. At this meeting, the principal explained that he had never faced this situation, and that he wanted to be helpful. However, the principal also anticipated that if he allowed Pat to live fully as a boy at the school, he would face objections from parents and other members in the community. The principal said that he would tell the teacher to refer to Pat as male, but that there were some ways in which Pat might not be fully integrated into the school environment as male.

The parents considered the principal's proposal, but after thinking it through and speaking with knowledgeable medical professionals, determined that singling Pat out in the school environment would have a serious negative impact on his social, emotional and educational development. When they went back to speak with the principal again, they found him deeply entrenched in his position and unwilling to reconsider. A week before school was to start, Pat's parents reached out for legal options.

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20. See, e.g., *Victory! CA Bill Will Ensure the Success and Well-being of Transgender Students*, TRANSGENDER LAW CTR., <http://transgenderlawcenter.org/archives/3544> (last visited Mar. 4, 2013) (stating California organizations had heard from "scores of parents" about exclusion of their transgender children from school facilities and activities).

For students like Pat, who have made a social transition, living and participating in school as their affirmed gender is essential to their psychological well-being and academic success.<sup>21</sup> Being forced to use gender-inappropriate or segregated facilities is humiliating for these students.<sup>22</sup> This severely disrupts their social development, instills extraordinary anxiety about how they are seen and treated by peers, and makes it nearly impossible for the student to focus on school.<sup>23</sup> In many cases, transgender students are so distressed by being denied access to gender-appropriate facilities that they will avoid participating in sports or physical education, or even try to avoid using the restroom during the school day.<sup>24</sup> The resulting physical and emotional discomfort, pain, and potential health complications can hinder the student's ability to participate in school.<sup>25</sup> Moreover, forcing a transgender students to

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21. See Edwards-Leeper & Spack, *supra* note 2, at 330.

22. See, e.g., Brief for the Me. Chapter of the Am. Acad. of Pediatrics & the Me. Psychological Assoc., et al. as Amici Curiae Supporting Respondents, *Doe v. Clenchy*, No. 12-582 at 22 (Me. argued June 12, 2013), available at <http://www.glad.org/work/cases/doe-v.-clenchy> ("For a transgender girl in particular, a policy that excludes her from access to the girls' restroom is highly likely to trigger body shame and to leave lasting emotional scars"); Lisa Leff, *Law Would Allow Transgender Students to Use Bathroom of Choice*, NBC (Mar. 5, 2013), <http://www.nbcbayarea.com/news/local/Law-Would-Allow-Transgender-to-Use-Bathroom-of-Choice-195306081.html> (reporting transgender female student's experience being excluded from girls' restrooms and required to attend boys' physical education classes, stating, "I felt very humiliated and very ashamed to be excluded from all the other girls.").

23. See, e.g., Brief for the Me. Chapter of the Am. Acad. of Pediatrics & the Me. Psychological Assoc., et al. as Amici Curiae Supporting Respondents, *supra* note 22, at 19-20 ("Singling out a transgender girl and requiring her to use a separate bathroom—not because of any misconduct or misbehavior, but solely because she has a medical condition that carries a social stigma—disrupts her ability to develop normal peer relationships, marginalizes and isolates her, and exposes her to rejection and discrimination. These are serious harms that prevent a child from feeling safe and from having equal opportunities to learn and to participate at school. They are also likely to have a lasting negative impact on an individual's long term health and well being and the quality of her adult life").

24. See discussion *supra* notes 17-21 and accompanying text; See also, Judy Chiasson, *Success and Opportunity for Transgender Students*, HUFFINGTON POST (Sept. 13, 2013), available at [http://www.huffingtonpost.com/judy-chiasson/success-and-opportunity-for-transgender-students\\_b\\_3744830.html](http://www.huffingtonpost.com/judy-chiasson/success-and-opportunity-for-transgender-students_b_3744830.html) (describing author's experience as Los Angeles school district official that transgender students "may fear going to school and being forced to use bathrooms and lockers rooms that do not reflect their gender identity. They may dread going to gym class and playing sports. They might skip gym class altogether and lose physical education requirements that are necessary for graduation."). Research on the experiences transgender adults also confirms that, when transgender people lack any assurance that their right to use facilities consistent with their gender identity will be respected at school, work or in public places, they experience severe anxiety and often avoid using restrooms altogether. See Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 J. PUB. MANAGEMENT & SOC. POL. 65-80 (2013).

25. Herman, *supra* note 24, at 74-75 (describing transgender adults retrospective reports of experiences in school); *id.* at 75-76 (describing respondents' experiences with urinary tract infections, kidney infections, and other medical problems caused by avoiding restroom use).

use the restroom corresponding to their biological sex or the staff or nurse's restroom, singles these students out and stigmatizes them.<sup>26</sup> Such requirements communicate to the student and the entire community that he or she is not normal. This kind of obvious disparate treatment reinforces any bias that peers may have about the student and empowers them to engage in bullying.

## II. DENIAL OF EQUAL ACCESS TO GENDER-APPROPRIATE FACILITIES VIOLATES TITLE IX.

Title IX of the Education Amendments of 1972 provides that, “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>27</sup> With certain narrow exceptions,<sup>28</sup> this prohibition applies to educational institutions throughout the United States that receive Federal financial assistance.<sup>29</sup> The Department of Education’s implementing regulations provide that a school may not “[d]eny any person any . . . aid, benefit, or service,” or “[o]therwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity” on the basis of sex.<sup>30</sup> The regulations also provide that a school may not “[s]ubject any person to separate or different rules of behavior, sanctions, or other treatment” on the basis of sex.<sup>31</sup>

Title IX regulations provide that schools may have separate restroom and changing facilities for boys and girls.<sup>32</sup> This regulation, however, simply does

26. Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 897-98 (2007) (arguing that requiring transgendered individuals to use the bathrooms designated for their biological gender, or designated “other” facilities unfairly perpetuates gender stereotypes and discriminatory behavior); Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 368 (1999) (arguing that requiring someone to use a “third bathroom” indicates to them that they are “outside society”).

27. 20 U.S.C. § 1681(a) (1997).

28. See *id.* at § 1681(a)(1)-(a)(9) (Title IX does not apply to educational institutions with contrary religious tenants, elementary and secondary school admissions, military training facilities, institutions with a long-established traditional single-sex admissions policy, university-based social fraternities or sororities and various tax-exempt youth service organizations such as the Boy Scouts of America, father-son or mother-daughter activities, or beauty pageant scholarship awards).

29. See 34 C.F.R. § 106.11 (2013).

30. *Id.* at § 106.31(b)(3), (b)(7).

31. *Id.* at § 106.31(b)(4).

32. *Id.* at § 106.33 (“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”). Our analysis proceeds on the assumption that this regulation is valid. It should be noted, however, that while the Title IX statute contains numerous exceptions, the facilities regulation creates wholesale an exception absent from the statute itself by expressly permitting disparate

not address the question: Given that a school has separate facilities for boys and girls, which of those facilities should be available to a student who is assigned the male sex at birth but has a female gender identity and lives in the school community as a girl? The answer to that question is not found in this section of the regulation, but in the statute's command that a student not be deprived of an equal opportunity to attend and participate in school on the basis of sex.<sup>33</sup> Case law arising under other federal laws establishes the clear principle that gender identity discrimination is a form of sex discrimination.<sup>34</sup> The same should apply to Title IX.

To the extent that the separate-facilities regulation is relevant at all, its language must be interpreted in light of how the term "sex" has been construed by courts under Title IX, Title VII, and other laws.<sup>35</sup> The case law on gender identity and gender stereotypes makes clear that, in these statutes, "the term 'sex' encompasses both sex – that is, the biological differences between men and women – and gender."<sup>36</sup> This well-established statutory interpretation is consistent with current scientific understandings of sex, which recognize that a person's sex is not defined by any single biological characteristic, but instead

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treatment "on the basis of sex" through the creation of separate facilities. The regulation, however, established by the Department without explanation in 1976 has never been subjected to legal challenge. *See* Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24128 (proposed June 4, 1975) (codified at 45 C.F.R. pt. 86); *see also* 39 Fed. Reg. 22228 (1974) (proposed June 20, 1974) (codified at 45 C.F.R. pt. 86). The applicable legal analysis were such challenge to be waged is beyond the scope of this Article. In any event, we argue that the regulation must be interpreted to prohibit rules that are applied in a discriminatory manner based on gender identity or transgender status or that impose unequal burdens on transgender students.

33. 20 U.S.C. § 1681(a) (1997).

34. *See, e.g.,* Glenn v. Brumby, 663 F.3d 1312, 1316-17, 1319-20 (11th Cir. 2011); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); Schroer v. Billington, 577 F. Supp. 2d 293, 304 (D.D.C. 2008); Macy v. Holder, EEOC DOC 0120120821, 2012 WL 1435995, at \*1 (April 20, 2012).

35. *Cf., e.g.,* Ratzlaf v. U.S., 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears"). This canon is all the more true when applied to a regulation repeating the words used in the operative statute; *Sorenson v. Sec. of Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that "identical words used in different parts of the same act are intended to have the same meaning");

36. *Holder*, 2012 WL 1435995 at \*5 (quoting *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000)). In determining what types of actions constitute discrimination based on "sex" under Title IX, courts and federal agencies have regularly looked to case law arising under Title VII of the Civil Rights Act of 1964 for guidance, and applied the same reasoning to both statutes. *See* 42 U.S.C. § 2000(e)(k) (2009); *see, e.g.,* *Franklin v. Gwinnet Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (applying Title VII to question of when constitutes sexual harassment "on the basis of sex" under Title IX); U.S. DEP'T OF EDUC. OFFICE OF CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE (2001), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

encompasses a range of traits including gender identity.<sup>37</sup> Title IX only authorizes regulations “to effectuate the provisions of” the statute.<sup>38</sup> The statute does not incorporate strict criteria for determining a person’s sex, but instead prohibits discrimination based on any and all aspects of sex.<sup>39</sup> Accordingly, the regulation’s exception for “provid[ing] separate . . . facilities on the basis of sex,” cannot be read to create a safe harbor for anatomical or other criteria for access that have the result of denying an equal educational opportunity to transgender students.

Schools often justify the denial of equal access to restroom facilities for transgender students based on the student’s anatomy or assumed anatomy.<sup>40</sup> This justification zeroes in on the one characteristic that is uniquely related to the student’s transgender status: the incongruence between his or her gender identity and the anatomy that determined his or her assigned sex at birth.<sup>41</sup> Accordingly, a transgender student denied access to the restroom facility that is consistent with his or her gender identity need not provide additional evidence of invidious motive to make out a claim under Title IX. Denying equal access to school facilities for transgender students effectively singles them out, apart from all others in the community, with a stigmatizing message that a transgender boy is not a normal or real boy, or a transgender girl is not a normal or real girl. This message, which coincides precisely with the cultural messages that drive bullying of transgender youth, is reinforced on a daily basis when students are treated differently from other boys and girls. This is precisely the kind of “badge of inferiority” that antidiscrimination laws, such as Title IX, forbid.<sup>42</sup>

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37. See, e.g., *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (stating that the possibility that gender identity may be biological suggests reevaluating whether transgender people are a protected class for purposes of the Equal Protection Clause); *Billington*, 424 F. Supp. 2d at 211-13 (D.D.C. 2006) (recognizing that scientific observation may confirm that ‘sex is not a cut-and-dried’ matter of chromosomes” but rather consists of “different components of biological sexuality”); cf. also *In re Heilig*, 816 A.2d 68, 73 (Md. 2003) (citing eight medically recognized factors composing a person’s sex); *Lovo-Lara*, 23 I&N Dec. 746, 752 (BIA 2005), available at <http://www.justice.gov/eoir/vll/intdec/vol23/3512%20.pdf>.

38. 20 U.S.C. § 1682 (1997).

39. *Id.* at § 1681(a).

40. See, e.g., *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X (Col. Div. Civ. Rts. Jun. 17, 2013), [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf) (discussing school district’s argument restroom exclusion did not constitute discrimination because it was based on student’s birth certificate and anatomy).

41. *Holder*, 2012 WL 1435995 at \*10 (holding that under Title VII an employer may not take an adverse action “because the employer believe[s] that biological men should consistently present as men and wear male clothing”).

42. *Compare Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), with *id.* at 562 (Harlan, J., dissenting); see also *Lake v. Arnold*, 112 F.3d 682, 688 (3rd Cir. 1997) (“The history of discrimination against individuals with disabilities, while less noted than racial or sex discrimination, is no less a story of a group that has traditionally suffered not only physical barriers but the badge of inferiority emplaced by a society that often shuns their presence.”).

If the concept of gender identity discrimination as sex discrimination is to have any real meaning for transgender people, it must protect a transgender girl's ability to live in her community *as* a girl, and a transgender boy's ability to live *as* a boy.<sup>43</sup> Accordingly, schools cannot accord disparate rights, privileges, opportunities, or sanctions, which includes restricting a student's access to school facilities such as restrooms, based on the inconsistency between a student's gender identity and assigned sex at birth. In essence, a school that denies equal access to facilities consistent with a student's affirmed gender is saying that a transgender girl cannot attend school *as* a transgender girl, but only as a boy, which she is not. Just as it is discrimination to rescind a job offer upon learning that the applicant is undertaking a gender transition,<sup>44</sup> it is also discrimination to say that a transgender student may attend school but only so long as they attend *as* their birth-assigned sex.<sup>45</sup>

### III. STATE AND LOCAL LAWS REQUIRE EQUAL ACCESS AND SHOULD GUIDE INTERPRETATION OF TITLE IX.

Schools and districts around the country have provided equal facility access for transgender students consistent with their gender identity, and some have been doing so for many years.<sup>46</sup> While most schools have provided equal

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43. See, e.g., *Sheridan v. Sanctuary Investments Ltd.*, B.C. Hum. Rts. Trib. Dec. No. 43 (1999) (“[T]ranssexuals in transition who are living as members of the desired sex should be considered to be members of that sex for the purposes of human rights legislation.”).

44. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Holder*, 2012 WL 1435995 at \*7.

45. *Logan v. Gary Cmty. Sch.*, No. 2:07-CV-431, 2008 WL 4411518, at \*1, 5 (N.D. Ind. Sept. 25, 2008) (refusing to dismiss Title IX claim where transgender student was denied entry to prom for wearing a dress); *Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399, at \*1 (Mass. App. Ct. Nov. 30, 2000); *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Sup. Ct. Oct. 11, 2000) (disciplining transgender girl for wearing female clothes permitted for non-transgender female students was gender discrimination), *aff'd sub nom.* More generally, it is well settled that prohibitions on “cross-dressing” cannot constitutionally be applied to prohibit transgender people from living and presenting themselves in a manner consistent with their gender identity, because this is an intrinsic part of who they are. See *Doe v. McConn*, 489 F. Supp. 76, 80 (S.D. Tex. 1980) (holding ordinance unconstitutional as applied to transgender defendant); see also *Chicago v. Wilson*, 389 N.E.2d 522, 522-25 (Ill. 1978); *Columbus v. Zanders*, 266 N.E.2d 602, 602-04 (Ohio Mun. Ct. 1970).

46. See, e.g., BOULDER VALLEY SCH. DIST., GUIDELINES REGARDING THE SUPPORT OF STUDENTS WHO ARE TRANSGENDER OR GENDER NON-CONFORMING, AC-E3 (2012), available at <http://www.bvsvd.org/policies/Polices/AC-E3.pdf>; L.A. UNIFIED SCH. DIST., TRANSGENDER AND GENDER VARIANT STUDENTS—ENSURING EQUITY AND NONDISCRIMINATION, REF-1557.1 (2011), available at [http://notebook.lausd.net/pls/ptl/docs/PAGE/CA\\_LAUSD/FLDR\\_ORGANIZATIONS/FLDR\\_INSTRUCTIONAL\\_SVCS/INSTRUCTIONALSUPPORTSERVICES/EDUCATIONAL\\_EQUITY\\_COMPLIANCE/EEC\\_PROJECT\\_10/TRANSGENDER%20%20GENDER%20NONCONFORMING%20STUDENTS-REF-1557%201%209-11.PDF](http://notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/FLDR_ORGANIZATIONS/FLDR_INSTRUCTIONAL_SVCS/INSTRUCTIONALSUPPORTSERVICES/EDUCATIONAL_EQUITY_COMPLIANCE/EEC_PROJECT_10/TRANSGENDER%20%20GENDER%20NONCONFORMING%20STUDENTS-REF-1557%201%209-11.PDF); MADISON METRO. SCH. DIST., GUIDANCE FOR ADMINISTRATORS: ENSURING EQUAL OPPORTUNITY AND FREEDOM FROM HARASSMENT FOR TRANSGENDER AND GENDER NON-CONFORMING STUDENTS AND

access without having any specific, written policy on transgender students,<sup>47</sup> a growing number of districts across the country are addressing this issue as a part of comprehensive nondiscrimination policies.<sup>48</sup> These school policies follow the rule of equal access based on gender identity.<sup>49</sup>

Moreover, authoritative interpretations of state and local nondiscrimination laws, in education as well as other contexts, conclude that denying a transgender person access to gender-specific facilities consistent with the person's gender identity constitutes discrimination based on a person's transgender status. In some jurisdictions, such as California, New Jersey, and the City of Boston, this application of the nondiscrimination statute or ordinance is spelled out expressly in the law itself.<sup>50</sup> Others, such as Colorado, Oregon, and the District of Columbia, have articulated this interpretation in implementing regulations or guidance that apply broadly to covered entities

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STAFF (2012), *available at*  
<http://library.constantcontact.com/download/get/file/1106382273443-139/MMSD+Model+Policy.pdf>; OAKLAND UNIFIED SCH. DIST., NONDISCRIMINATION/HARASSMENT AND TRANSGENDER POLICY, BOARD POLICY 5143.3 (2012), *available at*  
<http://www.ousd.k12.ca.us/cms/lib07/CA01001176/Centricity/Domain/121/12-2944%20Amendment%20-%20Board%20Policy%205143.pdf>; PORTLAND PUB. SCH., MEMORANDUM: SUPPORTING OUR TRANSGENDER STUDENTS (2012), *available at*  
[http://www.pps.k12.or.us/files/general-counsel/Transgender\\_FAQ\\_final\\_2012\\_\(2\).pdf](http://www.pps.k12.or.us/files/general-counsel/Transgender_FAQ_final_2012_(2).pdf); S.F. UNIFIED SCH. DIST., NON-DISCRIMINATION FOR STUDENTS AND EMPLOYEES, BD. OF EDUC. ADMIN. REG. R5163 (2006), *available at*  
<http://www.casafeschools.org/SFUSDgenderregs.pdf>; SAN RAFAEL CITY SCH. BD., SEXUAL ORIENTATION/GENDER IDENTITY HARASSMENT, BD. POLICY 5145.71(A) (2008), *available at*  
<http://srcs.csbaagendaaonline.net/cgi-bin/WebObjects/srcseAgenda.woa/wo/2.0.7.1.3.0.0.7.3.1.27.9.0.4.1.1.1.3.1.0.0.1.0>; SANTA CRUZ CITY SCH., PROCEDURES FOR REPORTING AND HANDLING COMPLAINTS OF HARASSMENT/DISCRIMINATION, ADMIN. RELEASE 5145.3, *available at*  
[http://www.sccs.santacruz.k12.ca.us/files/Student%20Services/AR%205145\\_3%20Harassment.pdf](http://www.sccs.santacruz.k12.ca.us/files/Student%20Services/AR%205145_3%20Harassment.pdf); UKIAH UNIFIED SCH. DIST., SEXUAL ORIENTATION / GENDER IDENTITY HARASSMENT, ADMIN. REG. 5145.71(A) (2012), *available at*  
[http://www.uusd.net/files/\\_jbKiW\\_/e44cf40241e8e2203745a49013852ec4/AR\\_5145.71a\\_Sexual\\_Orientation\\_Gender\\_Identity\\_Harassment.DOC.pdf](http://www.uusd.net/files/_jbKiW_/e44cf40241e8e2203745a49013852ec4/AR_5145.71a_Sexual_Orientation_Gender_Identity_Harassment.DOC.pdf); WILLITS UNIFIED SCH. DIST., SEXUAL ORIENTATION/GENDER IDENTITY HARASSMENT, BD. POLICY 5145.7 (2012), *available at*  
<http://transstudent.org/Policies/WUSDPolicy.pdf>.

<sup>47</sup>See BRILL & PEPPER, *supra* note 1, at 234 (quoting transgender legal expert stating, "School principals all over the country are finding that they can accommodate transgender children without any legal difficulties").

48. *See supra* note 46.

49. *See, e.g.*, MADISON METRO. SCH. DIST., *supra* note 46 ("Students shall have access to the restroom that corresponds to their gender identity consistently asserted at school. Any student who has a need or desire for increased privacy, regardless of underlying reason, should be provided access to a single stall restroom, but no student shall be required to use such a restroom").

50. CAL. EDUC. CODE § 221.5(f) (2004), *amended by* § 221.5(f) (2013); N.J. STAT. ANN. § 10:5-12(f)(1) (2002); BOSTON, MA, CODE § 12-9.7 (2002).

including schools.<sup>51</sup> Other jurisdictions, including Nevada and the City of Philadelphia, have issued nondiscrimination guidelines for employers that reflect the same approach,<sup>52</sup> and it is reasonable to expect that education laws in these jurisdictions would be interpreted similarly.

In some states, agencies responsible for administering human rights laws have addressed this issue specifically in the context of education. Washington's Superintendent of Public Instruction, for example, publishes guidelines for schools to implement that state's antidiscrimination laws.<sup>53</sup> The most recent such guidance states that:

School districts should allow students to use the restroom that is consistent with their gender identity consistently asserted at school. Any student – transgender or not - who has a need or desire for increased privacy, regardless of the underlying reason, should be provided access to an alternative restroom (e.g., staff restroom, health office restroom). This allows students who may feel uncomfortable sharing the facility with the transgender student(s) the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student. No student, however, should be required to use an alternative restroom because they are transgender or gender nonconforming.<sup>54</sup>

The Connecticut Human Rights Commission has endorsed and published guidelines developed by the Connecticut Safe Schools Coalition, outlining recommendations for schools to ensure compliance with the state's nondiscrimination law.<sup>55</sup> The Connecticut guidelines state:

Students should have access to the restroom that corresponds to their gender identity asserted at school. Schools may maintain separate restroom facilities for male and female students provided that they allow students to access them based on their gender identity and not exclusively based on student's assigned birth sex. Under no

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51. *See, e.g.*, D.C. Mun. Reg. § 4-801 (2006); OR. ADMIN. R. 839-005-0031 (2013); COLO. CODE REGS. § 708-1:81.11 (2007).

52. *See, e.g.*, NEVADA EQUAL RTS. COMM'N, FACTS ABOUT GENDER IDENTITY OR EXPRESSION DISCRIMINATION (2012); Phila. Comm'n on Hum. Rel., A Guide to Gender Identity (2011).

53. WASH. SUPERINTENDENT OF SCH., PROHIBITING DISCRIMINATION IN WASHINGTON PUBLIC SCHOOLS: GUIDELINES FOR SCHOOL DISTRICTS TO IMPLEMENTS CHAPTERS 28A.640 AND 28A.642 RCW AND CHAPTER 392-190 WAC (2012), *available at* <http://www.k12.wa.us/equity/pubdocs/ProhibitingDiscriminationInPublicSchools.pdf>.

54. *Id.* at 30.

55. CONN. SAFE SCH. COAL., GUIDELINES FOR CONNECTICUT SCHOOLS TO COMPLY WITH GENDER IDENTITY AND EXPRESSION NON-DISCRIMINATION LAWS (2012, *available at* [http://www.ct.gov/chro/lib/chro/Guidelines\\_for\\_Schools\\_on\\_Gender\\_Identity\\_and\\_Expressi\\_on\\_final\\_4-24-12.pdf](http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expressi_on_final_4-24-12.pdf)).

circumstances may a student be required to use a restroom facility that is inconsistent with that student's asserted gender identity.<sup>56</sup>

Similarly, the guidelines state "Students should have access to the locker room that corresponds to their gender identity asserted at school."<sup>57</sup> While the guidelines permit and encourage schools to provide optional alternative accommodations for *any* student who feels uncomfortable using shared facilities consistent with their gender identity, for any reason, they also make clear that such "accommodations" should not be forced on anyone.<sup>58</sup> The guidelines explain that:

Requiring a transgender or gender non-conforming student to use a separate, non-integrated space (as opposed to providing a requested alternative), threatens to publicly identify the student as transgender as well as marginalize and stigmatize him or her. Such treatment is likely to result in the deprivation of an equal educational environment for the student and is to be avoided unless such an accommodation is affirmatively sought by the student.<sup>59</sup>

Most recently, the Massachusetts Department of Elementary and Secondary Education issued guidance on "Nondiscrimination on the Basis of Gender Identity" under its state laws.<sup>60</sup> This guidance provides that "In all cases, the principal should be clear with the student (and parent) that the student may access the restroom, locker room, and changing facility that corresponds to the student's gender identity."<sup>61</sup> The guidance encourages administrators to work with students and parents to address the needs of each student with regard to facility access, but cautions that another student's discomfort sharing a facility with a transgender student "is not a reason to deny access to the transgender student."<sup>62</sup>

Some state agencies have also applied these principles in written decisions. In Iowa, a transgender woman complained that while at a county courthouse for a hearing, she was followed into the women's restroom and told to leave by a sheriff's deputy.<sup>63</sup> An administrative law judge determined that, while the deputy's actions "may not have [been] intended to embarrass or

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56. *Id.* at 8.

57. *Id.*

58. *Id.*

59. *Id.*

60. MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., GUIDANCE FOR MASSACHUSETTS PUBLIC SCHOOLS CREATING A SAFE AND SUPPORTIVE SCHOOL ENVIRONMENT: NONDISCRIMINATION ON THE BASIS OF GENDER IDENTITY (2013), available at <http://www.doe.mass.edu/ssce/GenderIdentity.pdf>.

61. *Id.* at 9.

62. *Id.* at 10.

63. Jones v. Johnson County Sheriff's Department, CP # 12-11-61830, Finding of Probable Cause (Iowa Ct. Rts. Comm'n Feb. 11, 2013).

belittle Complainant,” nevertheless, “her statement shows that Complainant would have been allowed to use the women’s restroom if Complainant had been born a biological female rather than merely self-identifying and presenting as a female. Such a statement is direct evidence of discrimination based on Complainant’s gender identity.”<sup>64</sup>

Similarly, in Colorado, the family of a transgender girl complained that, while she had attended school as a girl for much of kindergarten and first grade, midway through first grade the school decided to bar her from the girls’ restrooms.<sup>65</sup> Instead, she would be required to use separate, staff restrooms not normally used by students.<sup>66</sup> The Colorado Division of Civil Rights found that, because the student identified and lived as a girl, this exclusion constituted unlawful discrimination.<sup>67</sup> The agency’s determination letter stated, in part, that “By not permitting the Charging Party to use the restroom with which she identifies, as non-transgender students are permitted to do, the Respondent treated the Charging Party less favorably than other students seeking the same [educational] service.”<sup>68</sup> The letter found that this exclusion constituted unlawful harassment, stating, “Telling the Charging Party that she must disregard her identity while performing one of the most essential human functions constitutes severe and pervasive [disparate] treatment, and creates an environment that is objectively and subjectively hostile, intimidating or offensive.”<sup>69</sup>

In sum, at least eight states, and the District of Columbia, as well as numerous municipalities and school districts have embraced the view that equal educational opportunity for transgender students requires equal access to school facilities based on gender identity. While there has not been an official legal interpretation of federal nondiscrimination laws as applied to this issue, the federal government, acting as the nation’s largest employer, has weighed in on this issue in the context of employment. It adopted a policy that federal workers should have equal access to workplace facilities consistent with their gender identity, as a matter of “dignity and respect,” and to ensure compliance with health and safety rules.<sup>70</sup> This policy reflects a judgment that, across

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64. *Id.* at 8.

65. *Mathis v. Fountain-Fort Carson Sch. Dist.* Charge No. P20130034X, at 3-5 (Col. Div. Civ. Rts. Jun. 17, 2013), [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf).

66. *Id.* at 5.

67. *Id.* at 9, 12.

68. *Id.* at 10.

69. *Id.* at 12.

70. U.S. OFFICE OF PERS. MGMT., GUIDANCE ON THE EMPLOYMENT OF TRANSGENDER INDIVIDUALS IN THE FEDERAL WORKPLACE (2011), available at <http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=3958> (“The Department of Labor’s Occupational Safety and Health Administration (DOL/OSHA) guidelines require agencies to make access to adequate sanitary facilities as free as possible for all employees in order to avoid serious health consequences. For a transitioning employee, this means that, once he or she has begun living and working full-time in the

thousands of diverse federal worksites throughout the country, facility access based on gender identity is the most workable and fair approach.

IV. HEALTH EDUCATION AND OTHER GENDER-SEGREGATED SCHOOL ACTIVITIES AND PRACTICES.

Gender segregation in schools is not limited to separate male and female facilities. Title IX regulations also expressly permit gender segregation in the limited contexts of sexuality education classes and physical education activities involving contact sports<sup>71</sup> The regulation also permits segregation in other classes or activities where sex segregation is both voluntary and “substantially related” to important educational goals.<sup>72</sup> As with the separate-facilities provision, where applicable, these regulations should be interpreted consistent with Title IX’s requirement to provide equal opportunity to transgender students.<sup>73</sup> Thus, in these contexts as well, all students must be provided equal access consistent with their gender identity.<sup>74</sup>

Beyond these defined exceptions,<sup>75</sup> gender segregation in schools is generally not permitted under Title IX. Generally, regulations permit schools to group students by physical ability for physical education and by vocal range or quality for choruses, not to use gender as a proxy for relevant criteria.<sup>76</sup> Yet practices of gender separation persist. In earlier grades, teachers may organize students by gender for classroom activities.<sup>77</sup> In later grades, schools may

gender that reflects his or her gender identity, agencies should allow access to restrooms and (if provided to other employees) locker room facilities consistent with his or her gender identity. While a reasonable temporary compromise may be appropriate in some circumstances, transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to have access to facilities designated for use by a particular gender”).

71. 34 C.F.R. § 106.34(a)(1), (a)(3) (2013).

72. *Id.* at § 106.34(b). This standard mirrors the constitutional Equal Protection standard for gender discrimination. *See* *Craig v. Boren*, 429 U.S. 190, 197 (1976); *see also* *Doe v. Wood Cnty. Bd. of Educ.*, 888 F.Supp.2d 771, 771-73, 776 (S.D.W.Va. 2012) (enjoining single-sex program because all students were included unless they opted out); *A.N.A. v. Breckinridge Cnty. Bd. of Educ.*, 833 F.Supp.2d 673 (W.D. Ky. 2011) (rejecting challenge to program where students opted into all sex segregated classes); ACLU, PRELIMINARY FINDINGS OF ACLU “TEACH KIDS, NOT STEREOTYPES” CAMPAIGN (2012), *available at* [http://www.aclu.org/files/assets/doe\\_ocr\\_report2\\_0.pdf](http://www.aclu.org/files/assets/doe_ocr_report2_0.pdf) (finding that single-sex programs, even where voluntary, often fail to meet standard of substantial relation to improving academic objectives).

73. *See supra* Part II.

74. As with the segregated restroom regulation, the validity of the regulations addressed in this section is also beyond the scope of this Article. *See* discussion *supra* note 33.

75. 34 C.F.R. §§ 106.41. The case law applying them permit sex-segregated sports in some contexts, and is addressed by other articles in this volume and is beyond the scope of this Article.

76. *Id.* at § 106.34(a)(2), (4).

77. *See, e.g.*, HUMAN RIGHTS CAMPAIGN FOUND., AN INTRODUCTION TO WELCOMING SCHOOLS 56 (2009), *available at*

segregate or impose rules of gender conformity when it comes to class pictures, dances, and graduation ceremonies.<sup>78</sup>

Schools should evaluate all gender-based policies, rules, and practices and maintain only those that have a clear and sound pedagogical purpose.<sup>79</sup> Gender-based policies, rules, and practices can have the effect of marginalizing, stigmatizing, and excluding students, whether they are transgender or not. Such unnecessary separation by gender may, in itself, violate Title IX, Equal Protection, or both. Where sex segregation is permissible, the principles of equal opportunity are the same: all students must have an equal opportunity to participate in activities or to conform to gender-specific rules, practices, or policies consistent with their gender identity.

#### V. PROVIDING EQUAL ACCESS FOR TRANSGENDER STUDENTS DOES NOT INFRINGE ANY LEGITIMATE THIRD-PARTY PRIVACY RIGHT.

A commonly asserted justification for discrimination against transgender people in gender-specific settings is that such discrimination is necessary to protect the privacy interests of others who are uncomfortable with the presence of a transgender person.<sup>80</sup> While it may be the case that some people are uncomfortable sharing a public space such as a restroom with a transgender person, another person's desire not to share space with a transgender person does not implicate any legally protected privacy right.

No court has ever held that there is any legal right to privacy that would be violated simply by permitting a transgender person to access a gender-specific facility that corresponds to his or her gender identity. To the contrary, in a case where a non-transgender woman objected to using the restroom alongside a transgender female coworker, and argued that providing equal access to a transgender woman created a hostile environment on the basis of sex and religion, the U.S. Court of Appeals for the Eighth Circuit soundly rejected those claims.<sup>81</sup> The court held that the objecting employee suffered no

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[http://www.hrc.org/files/images/general/An\\_Introduction\\_to\\_Welcoming\\_Schools.pdf](http://www.hrc.org/files/images/general/An_Introduction_to_Welcoming_Schools.pdf) (recommending against this practice and suggesting that teachers organize students by names or birth months).

78. See, e.g., *Sturgis v. Copiah Cnty. Sch. Dist.*, 30-CV-455-DPJ-FKB, 2011 WL 4351355, at \*1 (S.D. Miss. Sept. 15, 2011) (refusing to dismiss Title IX challenge to school requirement of tuxedo for male students and drape for female students for yearbook photo).

79. See MASS. DEPT. OF ELEMENTARY & SECONDARY EDUC., *supra* note 60, at 11.

80. See, e.g., Letter from Anurima Bhargava, Chief of Educ. Opportunities Section of Civil Rights Div. of U.S. Dept. of Justice, & Arthur Zeidman, Director of San Francisco Reg'l Office of Office for Civil Rights of U.S. Dept. of Educ., to Joel Shawn, Arcadia Unified Sch. Dist. (July 24, 2013) (on file with author) [hereinafter Arcadia Resolution Letter], available at <http://www.scribd.com/doc/155984958/Arcadia-Notification-Letter> (describing district's reliance on "generalized concerns about safety and privacy" to deny equal access to transgender student); see also Keller, *supra* note 26, at 330.

81. See *Cruzan v. Special Sch. Dist., #1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (rejecting as insufficient teacher's assertion that her "personal privacy" was invaded when school permitted transgender woman to use women's room); see also Nedda Reghabi,

legally cognizable harm.<sup>82</sup> Similarly, in a case where a non-transgender female prisoner objected to sharing a cell with a transgender woman, a federal court held that no privacy right was implicated.<sup>83</sup>

In fact, to the extent that privacy concerns enter into this calculus, they actually weigh in favor of providing equal access to all students in accordance with their gender identity. Transgender people have a constitutional right to privacy concerning their transgender status.<sup>84</sup> In recognizing this right, the U.S. Court of Appeals for the Second Circuit has stated that “[t]he excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.”<sup>85</sup>

Similarly, an Alaska court recently held that the right to privacy is infringed when a transgender person is unable to change the gender designation on his or her driver’s license to correspond to his or her lived gender.<sup>86</sup> The court reasoned that, because license-holders are routinely obliged to share this document with third parties to verify identity, the licensing agency is in effect disclosing the individual’s transgender status to third parties.<sup>87</sup> Applying this reasoning to the school context, demanding private information about a student’s anatomy before allowing him or her to use a sex-segregated facility, or by forcing a student to use facility for the gender he or she was assigned at birth without regard for gender identity can also violate this privacy right.

While some non-transgender students or staff may feel genuine discomfort with the presence of a transgender person of the same self-identified and lived gender, these feelings of discomfort are rooted in unfortunate cultural bias and stereotypes regarding transgender people. It is well settled law that the discomfort of third parties that is based on a protected characteristic, framed as a “customer preference” defense in the employment context, cannot constitute a

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Comment, *A Balancing Act for Businesses: Transsexual Employees, Other Employees, and Customers*, 43 ARIZ. ST. L.J. 1047, 1048 (2011) (concluding that invasion-of-privacy claims by offended customers in this scenario would also likely fail for lack of actual harm).

82. *Cruzan*, 294 F.3d at 984.

83. *Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991).

84. *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999) (“We now hold . . . that individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality.”).

85. *Id.* at 111; *see also Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (recognizing right to medical confidentiality and finding this right has particular significance in cases of serious and socially stigmatized medical conditions such as HIV).

86. *K.L. v. State of Alaska, Department of Administration, Division of Motor Vehicles*, Case No. 3AN-11-05431 CI, 2012 WL 2685183, at \*3 (Alaska Super. Ct. Mar. 12, 2012).

87. *Id.* The Alaska DMV was ordered to develop new procedures for gender changes, taking into consideration the constitutional issues raised by the court. The new procedures adopted by the agency closely followed the U.S. State Department’s procedures for updating gender designations on passports. *See also In re E.P.L.*, 891 N.Y.S.2d 619, 621 (N.Y. Sup. Ct. 2009) (transgender man was entitled to exemption from publication requirement for obtaining a name change, because he “has a right to feel threatened for his personal safety in the event his transgender status is made public.”).

legitimate, nondiscriminatory motive for adverse treatment.<sup>88</sup> The purpose of Title IX is to ensure that a student's educational opportunities are not subordinated to another person's negative feelings about a group of people, however genuine those feelings may be.<sup>89</sup> These feelings may be sincere, deeply felt, and not consciously malicious, but they are nevertheless a manifestation of bias, not a cognizable right or a justification for discriminatory conduct. The proper response, as noted in the guidance from Massachusetts, is to "work with students to address the discomfort and to foster understanding of gender identity, to create a school culture that respects and values all students."<sup>90</sup>

Anti-discrimination laws, like Title IX, ensure that individuals are not denied equal opportunity based on "prejudice, stereotypes, or unfounded fear."<sup>91</sup> Whether couched in terms of privacy, modesty, or fears about safety, the desire to avoid sharing a facility with a transgender person represents precisely the sort of entrenched cultural bias that our nondiscrimination laws are designed to address.<sup>92</sup>

Given that the presence of a transgender student does not infringe upon the privacy interests of other students,<sup>93</sup> the core issue is simply whether

88. *Schroer v. Billington*, 577 F. Supp. 2d 293, 302 (D.D.C. 2008) (noting that if an employer defers to the biases of others, he is acting discriminatorily, "no less than if [he] act[ed] on behalf of his own prejudices."); *Lam v. Univ. of Hawai'i*, 40 F.3d 1551, 1560 n.13 (9th Cir. 1994) (faculty beliefs about "Japanese cultural prejudices" could not justify gender discrimination in hiring director for Asian legal studies program); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (female employee could not be fired simply because certain foreign clients would only work with men); EEOC Decision No. 78-47, 1978 WL 5798, at \*3 (Oct. 2, 1978) (company discriminated under Title VII when it refused to hire a white, female truck driver because African-American employees of the company were uncomfortable riding with a white woman through predominantly African-American areas). See also *Olsen v. Merritt Inter'l, Inc.*, 75 F. Supp. 2d 1052, 1065 (D. Ariz. 1999) ("Courts have consistently rejected requests for a BFOQ [bona fide occupational qualification] based on customer preference.").

89. Cf. *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at \*10 (April 20, 2012) ("Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, . . . by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort.").

90. MASS. DEPT. OF ELEMENTARY & SECONDARY EDUC., *supra* note 60, at 10.

91. See *Sch. Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 287 (1987).

92. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (explaining that the exclusion of men from flight attendant positions could not be justified on basis of customer expectations, and stating that "[w]hile we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices [Title VII] was meant to overcome."). See also Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 144 (2010) (arguing that arguments for denying equal facility access to transgender people mirror arguments offered in support of long-dead, unconstitutional laws against public cross-dressing).

93. See *supra* Part V.

refusing transgender students equal access to facilities consistent with their gender identity constitutes sex discrimination under Title IX. Unambiguously, it does.

#### VI. ARGUMENTS FOR DENYING EQUAL ACCESS ARE UNPERSUASIVE.

In contrast to the prevailing view of the jurisdictions described above,<sup>94</sup> some courts, in cases not involving education, have held that denying equal access to transgender people in sex-segregated facilities does not constitute unlawful discrimination.<sup>95</sup> In *Goins v. West Group*, the earliest of these cases, the court held that an employer did not violate Minnesota's law prohibiting discrimination based on sexual orientation which was defined to include gender identity.<sup>96</sup> The employer required a transgender woman to use a separate restroom, rather than permitting her to use the women's restroom, despite explicit language in the statute prohibiting discrimination for "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."<sup>97</sup> The court, with little analysis, stated that the legislature could not have intended to upset what it termed "the cultural preference for restroom designation based on biological gender."<sup>98</sup>

Similarly, in *Hispanic Aids Forum v. Estate of Joseph Bruno*, the court held, over a strong dissent, that a nonprofit organization could not pursue nondiscrimination claim for nonrenewal of a lease when the owner objected to transgender clients using the building's restrooms.<sup>99</sup> The majority provided no reasoning for its ruling, simply citing *Goins* and declaring that restricting access based on whether a person is a "biological male" or "biological female" did not violate New York City's human rights law.<sup>100</sup>

In *Etsitty v. Utah Transit Authority*, a transgender woman working as a bus driver was terminated following her transition.<sup>101</sup> The court ruled that the employer's explanation that it was concerned about customer complaints and potential liability from Etsitty's restroom use along her route was a legitimate, nondiscriminatory motive.<sup>102</sup> "Because an employer's requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes," the court reasoned,

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94. *See supra* Part V.

95. *See infra* Part VI.

96. *Goins v. West Group*, 635 N.W.2d 717, 720 (Minn. 2001).

97. *Id.* at 722.

98. *Id.* at 723.

99. *Hispanic Aids Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 46-48 (N.Y. App. Div. 2005)

100. *Id.*

101. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218 (10th Cir. 2007).

102. *Id.*

“UTA’s proffered reason of concern over restroom usage is not discriminatory on the basis of sex.”<sup>103</sup>

The *Etsitty* decision is deeply flawed. The court’s reasoning is entirely premised on the assumption that “*Etsitty* may not claim protection under Title VII based upon her transsexuality per se.”<sup>104</sup> Indeed, the court essentially conceded that its result would be incorrect if anti-transgender discrimination were covered by Title VII, stating: “It may be that use of the women’s restroom is an inherent part of one’s identity as a male-to-female transsexual and that a prohibition on such use discriminates on the basis of one’s status as a transsexual.”<sup>105</sup> Because the court’s thought balloon turns out to be, as explained above, precisely correct, its holding which presumes the opposite, is insupportable.

The *Etsitty* court’s reasoning is flawed for another reason. Noting the lack of precedent for anyone to sue the employer based on an aversion to sharing a restroom with a transgender person, the court stated that because the employer “was nevertheless genuinely concerned about the possibility of liability and public complaints,” “[t]he question of whether UTA was legally correct about the merits of such potential lawsuits is irrelevant.”<sup>106</sup> The court failed to recognize that this is simply a “customer preference” defense dressed up as a fear of frivolous litigation.<sup>107</sup> The possibility that third parties could assert such preferences through non-meritorious litigation changes nothing. This point is underscored by the Supreme Court’s 2009 decision in *Ricci v. De Stefano*, which held that fear of third-party litigation cannot constitute a legitimate nondiscriminatory motive absent “a strong basis in evidence that, had it not taken the [challenged] action, it would have been liable” to third parties.<sup>108</sup> *Etsitty* is thus doubly flawed.

Most recently, in *Doe v. Clenchy*, a Maine trial court dismissed a transgender girl’s complaint against her former school district under the state’s nondiscrimination law.<sup>109</sup> In *Doe*, the student attended school as a girl beginning in the second grade and, with the school’s support, used the girls’

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103. *Id.* at 1225.

104. *Id.* at 1224.

105. *Id.*

106. *Id.* at 1227.

107. *Cf., e.g.,* *Schroer v. Billington*, 577 F. Supp. 2d 293, 302 (noting that if an employer defers to the biases of others, he is acting discriminatorily, “no less than if [he] act[ed] on behalf of his own prejudices.”); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (stating that a female employee could not be fired simply because certain foreign clients would only work with men); EEOC Decision No. 78-47, 1978 WL 5798, at \*3 (Oct. 2, 1978) (company discriminated under Title VII when it refused to hire a white, female truck driver because African-American employees of the company were uncomfortable riding with a white woman through predominantly African-American areas).

108. *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009).

109. Decision and Order on Defendants’ Motion for Summary Judgment at 25, *Doe v. Clenchy*, Docket No.: CV-09-201 (Penobscot Cty. Sup. Ct., Nov. 20, 2012).

restroom for several years.<sup>110</sup> It was not until the fifth grade, when a male student followed her into the girls' restroom and harassed her by calling her names, that the school changed course.<sup>111</sup> From this point, the school required her to only use a separate staff restroom, which no other student was required to do.

While the Maine Human Rights Commission found for the student, the trial court held that the school's conduct did not constitute discrimination based on sexual orientation, which Maine defines to include gender identity.<sup>112</sup> The court reasoned that in light of a longstanding state regulation mirroring Title IX's separate-facilities rule, the state law could not have been intended to prohibit access rules based on "biological sex."<sup>113</sup> The case is currently on appeal and pending a decision from the Maine Supreme Judicial Court.

The handful of negative decisions provide scant reasoning for their conclusions, and all fail to seriously consider the stigmatizing impact of excluding transgender people from equal access to gender-specific facilities. These decisions have been widely criticized.<sup>114</sup> In particular, these cases rely on the assumption that guaranteeing equal access to sex-segregated facilities based on gender identity is "a result not likely intended by the legislature."<sup>115</sup> *Goins*, upon which *Hispanic AIDS Forum* and *Doe v. Clenchy* expressly rely, was decided in 2001 at a time when Minnesota was the lone state with a law expressly prohibitive of gender identity discrimination. Since that time, 16 additional states, plus the District of Columbia, have passed explicit protections for transgender people.<sup>116</sup> Even assuming for purposes of argument that the *Goins* court was correct in holding that the legislature could not have intended to upset what it termed "the cultural preference for restroom designation based on biological gender,"<sup>117</sup> the same could hardly be said now given the proliferation of federal, state, and local policies that specifically authorize restroom use based on gender identity.<sup>118</sup>

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110. *Id.* at 2-3.

111. *Id.* at 4.

112. *Id.* at 14-16.

113. *Id.*

114. See, e.g., Terry S. Kogan, *Transsexuals in Public Restrooms: Law, Cultural Geography, and Etsitty v. Utah Transit Authority*, 18 TEMP. POL. & CIV. RTS. L. REV. 673, 675 (2009); Richard F. Storrow, *Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination*, 55 ME. L. REV. 117, 118-19 (2003); Jenifer M. Ross-Amato, *Transgender Employees & Restroom Designation—Goins v. West Group, Inc.*, 29 WM. MITCHELL L. REV. 569, 570 (2002).

115. *Goins v. West Group*, 635 N.W.2d 717, 723 (Minn. 2001).

116. These states are California, Colorado, Connecticut, Delaware, Illinois, Iowa, Maine, Massachusetts, New Jersey, Nevada, New Mexico, Oregon, Rhode Island, Vermont, Washington State and the District of Columbia. *State Nondiscrimination Laws in the U.S.*, NAT'L GAY & LESBIAN TASK FORCE, [http://thetaskforce.org/downloads/reports/issue\\_maps/non\\_discrimination\\_6\\_13\\_color.pdf](http://thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_13_color.pdf) (last updated June 21, 2013).

117. *Goins v. West Group*, 635 N.W.2d 717, 723 (Minn. 2001).

118. See *supra* Part II.

In addition, a unanimous U.S. Supreme Court in *Oncale v. Sundowner Offshore Oil Services, Inc.* stated “statutory prohibitions often go beyond the principal evil 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.”<sup>119</sup> No matter what any legislator may have imagined about possible exceptions to a non-discrimination law, the language of the law must ultimately control its application. The *Oncale* decision has been extended by courts to cases of anti-transgender bias.<sup>120</sup> So too should it apply to ensure that where transgender people are admittedly covered by law, such as under Title IX, no implied exception to the scope of coverage should be read into it, whether for separate restroom access rules or otherwise.

As *Goins* and its progeny show, it is often assumed that access to public restrooms and similar facilities is traditionally, and must be, restricted on the basis of so-called “biological gender,” assumedly meaning based on real or perceived anatomical differences between men and women.<sup>121</sup> In practice, however, schools and other institutions do not ask facility users for proof of so-called biology or anatomy *unless* a student is known or perceived to be transgender. This makes it clear that the real issue is bias against transgender students.

A rule of access based on anatomy would be unworkable and lead to absurd results. For example, an anatomy-based standard would mean that a teenage transgender boy who lives as a boy, has begun cross-sex hormone therapy and developed a deep voice and facial hair, would be required to use the girls’ bathroom, while a teenage transgender girl who lives as a girl, has begun hormone therapy and is developing breasts would be required to use the boys’ room.<sup>122</sup>

In addition, most schools would be hard-pressed to even state what their biological or anatomical rule of access would be. Some might wish to rely on genitals, others on chromosomes, while still others on primary or secondary sex characteristics. None, one might conjecture, would be willing to stick to the rule in the face of indeterminate or inconsistent markers. This also suggests that its adoption is simply to screen out transgender students.

A common response to the needs of transgender students is to invoke a standard of facility use based on gender designations on government

119. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

120. *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (“The pre-*Price Waterhouse* cases’ reliance on the presumed intent of Title VII’s drafters is also inconsistent with *Oncale* . . . , where the Supreme Court held that original legislative intent must not be given controlling weight in interpreting Title VII.”); *see also* *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008); *Lopez v. River Oaks Imaging and Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Macy v. Holder*, 2012 WL 1435995, at \*9-10 (April 20, 2012).

121. *Goins*, 635 N.W.2d at 723.

122. As already noted, gender-affirming surgeries, such as genital reconstruction procedures are rarely recommended for minors and are never recommended for preadolescent youth. *See supra* note 5.

identification. Such a standard is no more workable, and just as discriminatory. States have widely varying standards for correcting gender designations on these documents, and in many jurisdictions it is virtually impossible for a transgender student (or their family) to obtain updated documents.<sup>123</sup> The National Transgender Discrimination Survey shows that 40% of transgender adult have been unable to acquire an updated state-issued driver's license that reflects their affirmed gender, and 33% of transgender adults report having *no* identification documents or records that list their correct gender.<sup>124</sup> Because of the medical requirements that still exist in many jurisdictions, updated identification is even less available to transgender youth.<sup>125</sup>

For the reasons already discussed, denying equal access to restroom facilities undermines a student's educational opportunities, whether or not such scenarios were contemplated by the members of Congress who passed Title IX. The interpretation of the law should not follow unprincipled, and now outdated, outlier decisions. Instead, they should follow the prevailing interpretation among states and federal government agencies that have since considered the question.

## VII. THE RULE OF EQUAL ACCESS APPLIES EQUALLY TO ALL TYPES OF SEGREGATED FACILITIES.

It is sometimes proposed that a rule of equal access consistent with gender identity is right for restrooms, but that schools should be given more leeway when it comes to facilities such as locker or changing rooms, where the potential for students to view one another unclothed is greater.<sup>126</sup> For example, Washington State's nondiscrimination guidelines state a clear rule of equal

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123. With regard to birth certificates, for example, some states require physician certification that the person has undergone "appropriate clinical treatment," without requiring any particular medical procedure. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 103425 (West 2013); 18 VT. STAT. ANN. TIT. 18, § 5112 (2012). Other states require proof of some form of surgery. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 36-337 (2009); W. VA. CODE § 64-32-12 (2012). Still others leave amendments to judicial discretion on an individual basis. *See, e.g.*, ALASKA STAT. § 18.50.290 (2012); NEV. ADMIN. CODE § 440.130 (2013). A few jurisdictions refuse to update gender designations in any circumstance. *See, e.g.*, TENN. CODE ANN. § 68-3-203(d) (2013). State policies for updating driver's licenses and state IDs also vary significantly. *See also* Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 377 (2013); Harper Jean Tobin, *Fair and Accurate Identification for Transgender People*, LGBTQ POL. J. (2011).

124. GRANT, ET AL., *supra* note 14, at 140-52.

125. *See* Coleman et al., *supra* note 5, at 176-78 (outlining limiting use of surgical treatments for minors).

126. *See* discussion of misconceptions about locker rooms and transgender students in California assembly speaker John A. Perez's defense of proposed legislation, The School Success and Opportunity Act, AB 1266. *Interview with John A. Perez, News Conference with Conan Nolan* (KNBC television broadcast July 21, 2013), available at <http://youtu.be/gNhXwa9LYsc>.

restroom access based on gender identity, but the locker rooms guidelines state that access for transgender students “should be assessed on a case-by-case basis,” with access consistent with the student’s gender identity provided in “most cases.”<sup>127</sup> Such official “wriggle room” has no support in law, and poses as much a threat to transgender students’ educational, social, and emotional development as the restroom exceptionalism already discussed.<sup>128</sup>

Title IX’s language does not distinguish among types of school facilities, such as prohibiting discrimination in classrooms but permitting it on field trips or during school assemblies.<sup>129</sup> The stigmatization of segregation or exclusion is not diminished because a student is excluded from a locker room rather than a restroom. To make such an exception is to tell a transgender student and their peers that their presence among other girls or boys is too frightening, disturbing, or dangerous to be permitted.

The strong offense felt by some people regarding the prospect of sharing a locker room with a transgender person cannot dictate, of course, what the law is. It does, however, invite a closer examination of the reasons we have separate facilities in the first place. As one decision states: “The desire to shield one’s unclothed figured from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”<sup>130</sup> Title IX’s separate-facilities regulation seems to similarly reflect this cultural taboo.

However, if a transgender student’s lived and identified gender is the same as other students using the locker room, the discomfort (or perceived discomfort) of having to share a locker room cannot be explained by this taboo alone. Instead, it reflects a specific discomfort with transgender people and their bodies, seen or unseen, and the consequent feeling of having one’s own body viewed by a transgender person of the *same* lived and identified gender as being *more* invasive of self-respect and personal dignity than being viewed by a non-transgender person of the *same* lived and identified gender.<sup>131</sup> While these

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127. WASHINGTON SUPERINTENDENT OF SCHS., PROHIBITING DISCRIMINATION IN WASHINGTON PUBLIC SCHOOLS: GUIDELINES FOR SCHOOL DISTRICTS TO IMPLEMENTS CHAPTERS 28A.640 AND 28A.642 RCW AND CHAPTER 392-190 WAC (2012).

128. See *supra* Part II.

129. 34 C.F.R. 106.31(b) (2013) (prohibiting discrimination in “any aid, benefit, or service”); 34 C.F.R. § 106.33 (2013) (permitting “separate toilet, locker room, and shower facilities” without distinguishing between them).

130. *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963).

131. Cf., e.g., Case Comment, *Employment Law – Title VII – EEOC Affirms Protections for Transgender Employees – May v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012)*, 126 HARV. L. REV. 1731,1735 (2013) (“As some commentators have argued, revulsion to transgender bodies seems to lie at the root of most transgender discrimination”) (quoting Carolyn E. Coffey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures*, 7 N.Y. CITY L. REV. 161, 167 (2004)); Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 152 (2005) (cataloguing examples of the depiction of transgender bodies as abject or monstrous); *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011) (citing defendant’s

feelings may be strongly held by some, they reflect biased attitudes toward transgender individuals, and should not be a basis for altering a school's responsibility for equal treatment under Title IX.<sup>132</sup>

Just as students with other physical differences, such as different stages of sexual development, visible disabilities or medical devices, or unusual scars or skin conditions, must be treated equally, so must transgender students. Indeed, the very purpose of non-discrimination laws, such as Title IX, is to press against and shift norms and stereotypes, often outdated, which have the effect of interfering with a marginalized group's ability to function or participate in society, and in the case of Title IX, for students reliant on public education.<sup>133</sup> Adopting and institutionalizing social discomfort with a specific group has the opposite effect of reifying the underlying social norms that give rise to the discriminatory attitudes in the first place.<sup>134</sup>

A transgender girl has as much right to change clothes or shower in the girls' locker room as any other girl. Yet a school may punish her for her physical differences and deny her access because others may not wish to change in front of her because she is transgender. In fact, many students, not just transgender students, do not feel comfortable changing in front of others, sometimes particular others, based on (for example) the other person's race, ethnicity, sexual orientation, or disability.<sup>135</sup>

statement that "it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing," and that such a person is "unnatural").

132. See *supra* Part V.

133. See, e.g., U.S. DEPT. OF EDUC., *Title IX: 25 Years of Progress*, <http://www2.ed.gov/pubs/TitleIX/index.html> (last updated June 1997) ("Since its passage in 1972, Title IX has had a profound impact on helping to change attitudes, assumptions and behavior and consequently, our understanding about how sexual stereotypes can limit educational opportunities.").

134. Cf. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) ("[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether [a form of] sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the [Civil Rights] Act was meant to overcome.").

135. See, e.g., Kristine Edgington, & Jillian Roberts, *Serving Youth with Physical Deformity in Canadian Schools: Ethical Guidelines for Non-Discriminatory Practice*. FORUM QUALITATIVE SOZIALFORSCHUNG / FORUM: QUALITATIVE SOCIAL RESEARCH (May 2005), <http://www.qualitative-research.net/index.php/fqs/article/view/472> (discussing stigma faced by students whose disabilities may be exposed in school locker rooms); Elizabeth Simpson, *Device is an Easier Option to Correct Chest Deformity*, VIRGINIAN-PILOT, Nov. 23, 2012, <http://hamptonroads.com/2012/11/device-easier-option-correct-chest-deformity> (discussing locker room teasing experienced by student with concave chest); Judith Lewis, *Lesbian in the Locker Room*, LA WEEKLY, Jan. 9, 2003, <http://www.laweekly.com/2003-01-16/news/lesbian-in-the-locker-room/> (reporting lawsuit by student who was sent out of gym class for making other students "uncomfortable" in the locker room by disclosing she was a lesbian); cf. also Jarrett Bell, *There's Room for Gay Players in NFL Locker Rooms but not Bias*, USA TODAY, Feb. 1, 2013, <http://www.usatoday.com/story/sports/nfl/2013/01/31/jarrett-bell-chris-culliver-gay-locker-room/1881909/> (discussing objections to openly gay players in professional sports).

The solution is not to segregate or exclude the person who the student in the majoritarian position finds offensive, but where possible, to increase privacy options for everyone. When locker rooms have separate stalls for showering and changing, as most already do, or can be made to with inexpensive modifications such as hanging curtains,<sup>136</sup> each student is given more control over the extent to which they will see or be seen by others. In some cases, an individual student, whether transgender or not, may be very uncomfortable using the shared facility at all and request another accommodation. Schools can and should take steps to increase privacy for all students and be flexible in accommodating individual needs, but they must do so from a baseline of equal access for all.

#### VIII. WHO DECIDES A STUDENT'S GENDER IDENTITY?

Articulating a standard of equal access that turns on gender identity naturally raises the question of whether a school may ever question a student's gender identity, and if so, what types of inquiries are permissible. An often raised concern is that a non-transgender student may falsely assert a different gender identity in order to enter, or to avoid discipline for entering, a restroom for an inappropriate purpose, such as harassment or voyeurism.<sup>137</sup> The Maine Human Rights Commission encountered one such case.<sup>138</sup> There, a male student, apparently at the instigation of a family member, was upset that a transgender female student was being allowed to attend school as a girl.<sup>139</sup> He followed the transgender girl into the restroom and harassed her.<sup>140</sup> He later brought a non-discrimination complaint against the school for disciplining him.<sup>141</sup> The Commission rejected the male student's complaint, reasoning that because the student never seriously asserted a female gender identity he was treated in the same manner as other male students.<sup>142</sup>

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136. A number of states require or recommend that schools provide private stalls or partitions. See, e.g., S.C. DEPT. OF EDUC., 2012 S.C. SCH. FACILITIES PLANNING & CONTSTR. GUIDE, at 304.13.5.6 (2012) (requiring individual enclosures with curtains or doors for all showers); VA. DEPT. OF EDUC., GUIDELINES FOR SCH. FACILITIES IN VA. PUBLIC SCHS. at 18 (2010) (requiring private shower stalls with enclosed dressing rooms). However, some states currently only require private stalls or partitions in female locker rooms. See, e.g., W. VA. BD. OF EDUC., HANDBOOK ON PLANNING SCH. FACILITIES, at 511.053 (2008).

137. See, e.g., *Calif. Bill Clarifies Rights of Transgender Students*, UPI, Aug. 13, 2013, [http://www.upi.com/Top\\_News/US/2013/08/13/Calif-bill-clarifies-rights-of-transgender-students/UPI-45261376406254](http://www.upi.com/Top_News/US/2013/08/13/Calif-bill-clarifies-rights-of-transgender-students/UPI-45261376406254) (citing arguments that legislation to guarantee equal access would "give prankster students a titillating peak inside locker rooms and bathrooms of the opposite sex.").

138. ME. HUMAN RIGHTS COMM'N, INVESTIGATOR'S REPORT PAED/08-0239-A: PARENTS OF MINOR STUDENT V. REGIONAL SCHOOL UNIT #26, at 3 (Aug. 24, 2010). This is the same incident involved in *Doe v. Clenchy*, discussed supra.

139. *Id.*

140. *Id.*

141. *Id.* at 12.

142. *Id.* at 4-5.

As the Massachusetts state guidance explains, “The responsibility for determining a student’s gender identity rests with the student, or, in the case of young students not yet able to advocate for themselves, with the parent or guardian.”<sup>143</sup> A student who says she is a girl, wishes to be regarded as such throughout the school day and throughout nearly every area of her life, should be respected and treated like a girl. The same is true for a male student, where he should be respected and treated as a boy.

As already discussed, gender identity is an innate, largely inflexible human characteristic,<sup>144</sup> and it would be inappropriate for school officials to sit in judgment of any student’s gender identity. While there may be circumstances in which questioning a student’s asserted identity or facility use may be appropriate because there is some credible, objective evidence that it is being falsely asserted, transgender students may not be singled out for intrusive, demeaning, or burdensome inquiries.<sup>145</sup> Two recently passed state laws expressly contemplate such a situation and include in the definition of gender identity a provision that excludes protections for persons who assert a gender identity for an improper purpose.<sup>146</sup> Non-transgender students are never or rarely asked for any proof regarding their gender before they are permitted to use sex-segregated facilities, and neither should students be uniquely subjected to such demands simply because they are transgender. To do so would constitute disparate treatment based on the student’s transgender status.

Nevertheless, Title IX would not prohibit reasonable inquiries related to a student’s gender identity in those unusual cases where there is some legitimate, non-discriminatory reason to believe that the person is seeking access to a

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143. MASS. DEP’T OF ELEMENTARY & SECONDARY EDUC., *supra* note 60, at 4. .

144. *See supra* Part I.

145. *See* 34 C.F.R. § 106.31(b) (2013) (prohibiting educational institutions from applying separate or different rules of behavior, sanctions, or other treatment on the basis of sex, or treating persons differently on the basis of sex determining whether they satisfy any requirement or condition for any aid, benefit, or service).

146. MASS. GEN. LAWS ch. 4, § 7 (LexisNexis 2013) (Defining gender identity as “shall mean a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person’s core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.”); CONN. GEN. STAT. § 46a-51(21) (2013) (defining gender identity as “a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, part of a person’s core identity or not being asserted for an improper purpose”).

gender-specific facility for an improper purpose. As the Washington State guidelines state:

If a school district has an objective basis that would justify questioning whether a student's asserted gender identity is genuine, it may ask for information to show that the student's gender identity or expression is sincerely held. No particular type of information (such as medical history information) should be specifically required.<sup>147</sup>

A partial analogy is appropriate here to questions of religious belief. Under Title VII, an employer is generally expected to accept an employee's assertion of a sincere religious belief at face value, unless there is some objective reason to doubt it, such as behavior obviously inconsistent with that belief, or circumstances suggesting an ulterior motive.<sup>148</sup> Absent such a reason, there is no justification for a school to question a student's gender identity.

Some states take a slightly different approach, permitting very limited inquiries even absent a specific justification. Massachusetts's gender identity law states that an entity may require "evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity *or any other evidence that the gender-related identity is sincerely held as part of a person's core identity.*"<sup>149</sup> The guidance further provides that this "other evidence" could include a note from a family member, therapist, minister, or family friend confirming the student's gender identity.<sup>150</sup>

In practice, however, the need for such inquiries is very rare. Students are generally known entities to school administrators with whom they interact in the school environment on a daily basis. The gender with which a student identifies and lives will typically be apparent for transgender students just as it is for others. In many cases, students or families choose to affirmatively approach school administrators upon the student's enrollment or transition to discuss the student's needs and ensure that they will be treated with respect and dignity and their privacy protected.<sup>151</sup> In other cases, a student will enroll in their affirmed gender, and the student and family will choose to keep a student's transgender status completely private; even if the student's

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147. WASHINGTON SUPERINTENDENT OF SCHOOLS, *supra* note 127, at 30.

148. See EEOC, EEOC COMPLIANCE MANUAL, RELIGIOUS DISCRIMINATION, at § 12-I (2008).

149. MASS. GEN. LAWS. ch. 4, § 7 (2012) (emphasis added).

150. Mass. Dept. of Elementary & Secondary Educ., *supra* note 60, at 5.

151. Josh Levs, Ed Payne, and Ashley Fantz, *School's transgender ruling: fairness or discrimination?*, CNN March 1, 2013, <http://www.cnn.com/2013/02/28/us/colorado-transgender-girl-school> (describing the Mathis family's decision to proactively seek legal assistance and confront their school district); Arcadia Resolution Letter, *supra* note 80, at 3 (discussing how the family of a transgender boy affirmatively approached their California school district requesting to allow him to use male-designated restrooms at school).

transgender status later comes to the school's attention, there is simply no need to question the student's gender identity.<sup>152</sup>

#### CONCLUSION.

In July 2013, the U.S. Department of Justice and the Department of Education's Office for Civil Rights announced, for the first time, a settlement agreement with a school to resolve allegations of discrimination by a transgender student.<sup>153</sup> The student, who transitioned from female to male during his fifth grade year, alleged that he had been barred by California's Arcadia school district from using the boys' restrooms and locker rooms during sixth and seventh grade.<sup>154</sup> He further alleged that he was also prohibited from staying in a cabin with his male peers during an overnight school trip, and was instead required to stay in a cabin separate from all his classmates with a separate adult chaperone.<sup>155</sup> The resolution agreement provided that the school district "treat the Student the same as other male students in all respects in the education programs and activities offered by the District," including with respect to sex-segregated facilities.<sup>156</sup> As the negotiated position of the Departments of Education and Justice, the announcement and the terms of the agreement are a significant indicator of the direction in which the Title IX law is headed. The case has been widely covered in the press,<sup>157</sup> with many students, parents, and advocates using it as a model to educate and persuade their own school districts to comply with Title IX.

Transgender students should be treated like any other student in school. They should be able to attend and fully participate in school and school activities without their gender being questioned, rejected, or made a cause for punishment or loss of opportunities. This simple conclusion is too often obscured by bias and fear of difference. Helping schools, policymakers, and

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152. See, e.g., Martha Irvine, 'Boy or Girl?' Gender a new challenge for schools, ASSOCIATED PRESS, May 27, 2013, available at <http://bigstory.ap.org/article/boy-or-girl-gender-new-challenge-schools>.

153. *United States Reaches Agreement with Arcadia, California School District to Resolve Sex Discrimination Allegations*, U.S. DEPT. OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, (July 24, 2013), <http://www.justice.gov/opa/pr/2013/July/13-crt-838.html>.

154. Arcadia Resolution Letter, *supra* note 80, at 2-4.

155. *Id.* at 5.

156. Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division at 1-3, (OCR No. 09-12-1020) (DOJ No. 169-12C-70) (July 24, 2013), available at [http://www.nclrights.org/site/DocServer/Arcadia\\_Resolution\\_agreement\\_07.24.2013.pdf](http://www.nclrights.org/site/DocServer/Arcadia_Resolution_agreement_07.24.2013.pdf).

157. See, e.g., Stephan Ceasar, *Arcadia School District Settle Transgender Discrimination Case*, L.A. TIMES, July 24, 2013, <http://articles.latimes.com/2013/jul/24/local/la-me-ln-arcadia-transgender-discrimination-20130724>; Greg Risling, *Transgender Case Resolved with CA School District*, ASSOCIATED PRESS, July 24, 2013, available at <http://www.sfgate.com/education/article/Transgender-bias-claim-against-schools-resolved-4687626.php>.

courts understand the lived experiences of transgender youth and the harmful psychological, social, and educational impact of discrimination in facility access is essential to securing the rights that Title IX guarantees.