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The Evolution of Transgender Student Rights: A Legal and Policy Analysis

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THE EVOLUTION OF TRANSGENDER STUDENT RIGHTS: A LEGAL AND POLICY ANALYSIS

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ABSTRACT

Transgender student protections are at the center of the most recent debate about the scope of Title IX of the Education Amendments of 1972. Although LGBTQ+ rights and protections have greatly expanded under all areas of the law in the last thirty years, transgender student rights have most successfully advanced through the judicial system.

Through a close evaluation of executive, judicial, and legislative responses to this compelling policy issue, the development of transgender student rights is explored. This analysis, which provides a comprehensive overview of the current legal landscape of transgender student protections, ultimately determines that the courts are the best avenue for securing transgender student protections under the law. This research contributes fresh insight into the transgender student rights debate in order to further support and legitimize the argument for extending Title IX's protections, especially through litigation on behalf of LGBTQ+ students.

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And to all transgender students and members of the LGBTQ+ community—you matter, and you are worthy. Let's keep fighting the good fight.

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INTRODUCTION

The recent visibility and acceptance of transgender individuals is both celebrated and highly controversial, generating vehement discussions among all levels of the government, various ideological groups, and citizens across the country. In the last thirty years, the expansion of transgender legal protections has been propelled by two foundational pieces of legislation: Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. Title VII, which established the principles for addressing sex discrimination in the workplace, makes it illegal to discriminate against any employee on the basis of "race, color, religion, sex, or national origin."[1] Similarly in the educational context, Title IX states 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."[2] Although the statute was enacted to combat disparate treatment between the sexes in educational venues, Congress ruled that some sex segregation is permissible in certain circumstances, such as bathrooms, dorms, single-sex schools, fraternities and sororities, boys' and girls' clubs, and athletics.[3] Educational institutions that fail to comply with Title IX guidelines risk losing federal funding, making the statute applicable to nearly every college, university, and primary and secondary school throughout the country.

Though Title IX was originally enacted to create and provide equal educational opportunities for women, over the last fifty years it has been interpreted and expanded to address three primary concerns: equitable interscholastic and intercollegiate athletic opportunities for

[1] "Civil Rights Act of 1964," Pub. L. No. 88–353, § 78 Stat. 241 (1964), https://www.senate.gov/artandhistory/history/resources/pdf/CivilRightsActOf1964.pdf.
[2] "Title IX of the Education Amendments of 1972," Pub. L. No. 92–138, § 86 Stat. 235 (1972), https://www.justice.gov/crt/title-ix-education-amendments-1972.
[3] Elizabeth Kaufer Busch and William E. Thro, *Title IX: The Transformation of Sex Discrimination in Education* (Routledge, 2018), 13.

female students, sexual misconduct claims on college campuses, and most recently, protection from discrimination for LGBTQ+ students.

While the Department of Education's (DOE) Office of Civil Rights (OCR) was initially tasked with overseeing and implementing Title IX, in the last fifty years the statute's protections, much like those under Title VII, have significantly expanded in state legislatures and throughout the lower court system. Title IX's private right of action, recognized by the Supreme Court in its 1979 decision in *Cannon v. University of Chicago,* allows students to file complaints outside of the OCR with the courts to address discriminatory treatment in schools.[4] Through subsequent judicial decisions, courts have significantly weighed in on the meaning and scope of the statute. While state legislatures do not have the power to modify Title IX guidelines, they are responsible for ensuring the statute's policies are implemented in their public universities and schools. State legislators, however, do have broad power to regulate educational institutions within their borders. Therefore, state-level education policies often overlap with many issues that Title IX addresses, especially those involving the highly controversial topic of transgender students.

The divided authority and policymaking oversight for Title IX regulations at all levels of the government allow elected officials, administrators, and the courts to all intervene in the decision-making process. Professor R. Shep Melnick, an expert in the field, calls this "institutional leapfrogging" to underscore how Title IX policies do not move in a linear fashion, but rather in an often-disjointed manner.[5] According to Melnick, this form of policymaking has enabled the statute's scope and power to expand exponentially over time.[6]

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[4] "Cannon v. Univ. of Chi. Case Brief for Law School," Community, accessed April 24, 2022, https://www.lexisnexis.com/community/casebrief/p/casebrief-cannon-v-univ-of-chi.
[5] R. Shep Melnick, *The Transformation of Title IX: Regulating Gender Equality in Education* (The Brookings Institution, 2018), 214–16.
[6] Melnick, *The Transformation of Title IX*, 214–16.

Title VII and Title IX: An Interdependent Relationship

There are several factors that have led to the expansion of Title IX to include protection for transgender students in the school setting. However, considering the similarities between Title VII and Title IX, many scholars note that officials at all levels of the government often turn to Title VII executive guidance and judicial decisions to inform the interpretation of Title IX. Although lawmakers closely modeled Title IX on Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin in programs or activities that receive federal funds, aside from the textual similarities, there are limits to this analogy. Most importantly, Title IX includes many exemptions that are absent Title VI. [7] For example, Title IX allows for girls and boys to be separated in certain instances, and it does not affect schools with single-sex admissions policies or parochial institutions.[8] Considering these exceptions, many agree that Title IX is often more consistent with Title VII in theory and in approach.[9] Though Title VII and Title IX are two distinct statutes that address two distinct contexts, they are similar because both seek to remedy longstanding discrimination. Despite the obvious differences between schools and the workplace, the interconnected relationship between the two statutes is most apparent in court cases.

Since the 1989 Supreme Court decision in *Price Waterhouse v. Hopkins*, countless judicial decisions concerning LGBTQ+ student protections under the law have underscored the textual and conceptual similarities between Title VII and Title IX when adjudicating Title IX cases. Although there is a long history of litigation that relied upon legal rationales found in Title VII decisions to expand Title IX protections, the legal implications of these similarities were heightened in 2020 with the seminal Supreme Court decision *Bostock v. Clayton County.* The Court ruled in favor of

[7] Melnick, *The Transformation of Title IX,* 40; "Title IX Legal Manual," The United States Department of Justice, August 6, 2015, https://www.justice.gov/crt/title-ix; "Title VI of the Civil Rights Act of 1964," 42 U.S.C. § 2000d et seq. § (1964).
[8] "Title IX Legal Manual."
[9] "Title IX Legal Manual."

the plaintiffs, finding that Title VII's prohibition on sex discrimination in the workplace encompasses discrimination on the basis of both sexual orientation and gender identity. In his dissenting opinion, Justice Alito warned that the groundbreaking decision is "virtually certain to have far-reaching consequences."[10] Indeed, the *Bostock* decision has already had profound implications for Title IX law and policy, as many scholars predicted it would.

Outside of the judiciary, Melnick expands his theory of "institutional leapfrogging" to describe the process of "cross-institutional leapfrogging": the way in which courts and agencies have extended the scope of Title IX in a number of small steps by claiming to defer to one another's policy decisions.[11] Beginning in 1975, the courts and the Department of Education's Office of Civil Rights (OCR) have relied upon each other's interpretations of the two statutes to expand the scope of Title IX to include LGBTQ+ students.[12] For instance, the Obama administration's controversial 2016 Dear College Letter (DCL) that supported transgender student rights under Title IX was based upon judicial interpretations of Title IX and Title VII. Melnick highlights how the Obama administration utilized these interpretations even though the sole pre-2016 Title IX court case rested on judicial deference to an OCR letter that "…in turn relied on previous Title VII opinions on quite a different matter."[13] As this complicated example illustrates, the relationship between Title VII and Title IX judicial decisions has resulted in an intertwined web of case law that has worked to extend the breadth of each statute over time.

While Melnick's theory of cross-institutional leapfrogging informs the history of Title IX's expansion and emphasizes the relationship between Title VII and Title IX, his analysis is limited

[10] Bostock v. Clayton County, No. 90 U.S. ___, 140 S. Ct. 1731 (2020).
[11] Melnick, *The Transformation of Title IX,* 251.
[12] Melnick, *The Transformation of Title IX,* 228-230.
[13] Melnick, *The Transformation of Title IX,* 227 and 253.

because it primarily centers on the role of executive action in creating and implementing Title IX regulations. Though Melnick writes how "The most important judicial action has taken place in the lower courts…," his analysis and much of the current literature on transgender student protections does not sufficiently emphasize the importance of the judiciary in securing transgender student rights under the law.[14] Although transgender students have been afforded more protection due to executive regulations or specific state legislative action, transgender students remain vulnerable given today's polarized politics. Nevertheless, greater security for transgender student protections can be found in judicial decisions. In the last thirty years courts across the country have slowly but steadily addressed transgender rights, reaching conclusions in a surprising trend that promotes the expansion of Title IX to include protections for LGBTQ+ students.

To understand the crucial role of the judiciary in expanding and securing transgender student protections, this thesis explores and considers how policies concerning transgender student rights have been developed by all levels of the government. In Chapter I, recent Title IX executive action concerning transgender students is examined to document how frequently changing executive guidelines render transgender student rights under Title IX unstable. Chapter II then turns to the development of Title VII and Title IX transgender case law in order to explain how the application of judicial deference enabled transgender students to put forth claims of discrimination on the basis of sex in the school setting. Chapter III evaluates cases decided after the *Bostock* ruling to emphasize its critical impact on Title IX transgender student-specific cases. By analyzing pivotal cases and their role in propelling transgender student rights, Chapter II and Chapter III seek to provide a comprehensive overview of the expansion of transgender protections through the judicial system to emphasize its powerful, yet often unrecognized, role in expanding

[14] Melnick, *The Transformation of Title IX,* 255.

transgender student rights. Finally, in Chapter IV, the most recent transgender student controversy—the issue of transgender student athlete participation in sports—is evaluated to reveal how state legislation has created new uncertainties about the extent to which transgender students' rights will be protected by Title IX. In underscoring the consistent victories transgender students have found in the judiciary, especially when compared with those in the executive or legislative branches, this thesis ultimately argues that the courts are the most successful avenue for advancing transgender student protections under the law.

CHAPTER I

Title IX Executive Action Regarding Transgender Students

Executive branch involvement in interpretating the scope of Title IX has both expanded and retracted transgender student protections in the last ten years. As with other Title IX regulations, such as those concerning sexual harassment, changing administrations at the federal level play a substantial role in directing the extent of transgender student rights under the statute. Considering the flurry of executive action pertaining to transgender students in recent presidential administrations, this chapter offers a comprehensive timeline of important executive branch issuances, orders, and memoranda that have impacted transgender student protections under Title IX. The controversy surrounding informal policymaking measures in which Title IX regulations are formulated and implemented will also be considered. In examining executive branch Title IX transgender student regulations, it is evident that frequently changing Title IX policy guidance renders transgender student rights unclear and uncertain with each administration.

The Expansion and Retraction of Executive Branch Transgender Student Protections

Title IX regulations have grown increasingly complicated in the past forty years as the executive branch has taken a direct role in dictating how the statute should be interpreted. Trinity College graduate Cara Bradley reports in her senior Public Policy and Law honors thesis that since the establishment of the Department of Education (DOE) in 1980, the subsequent seven presidential administration have each approached Title IX differently, with liberal administrations strengthening protections and conservative administrations "loosening restrictions and regulations."[15] Bradley emphasizes how varying presidential ideologies have enabled significant expansion and retraction of protections since the statute's enactment in 1972. Not only has this practice resulted in confusing guidelines on how to approach claims of discrimination under Title IX, but the frequency of the policy changes has increased as new administrations enter and exit office. This makes it difficult for schools to remain in compliance with updated regulations and creates significant fluctuations of protections afforded by Title IX over short periods of time.

Though the executive branch has taken part in directing Title IX's interpretation since the 1980s, it is only during the last three presidential administrations that transgender student protections have been addressed. The question of transgender student rights was brought to the national spotlight during President Obama's administration-wide effort to extend both Title VII and Title IX protections to transgender employees and students.[16] In April 2014, the Office of Civil Rights (OCR) issued the document "Questions and Answers on Title IX and Sexual Violence" stating that Title IX protects against sexual harassment and violence based on transgender status.[17] A year later in 2015, the OCR's Acting Deputy Assistant for Policy James Ferg-Cadima released

[15] Cara Bradley, "Title IX and Intercollegiate Athletics: An Analysis of The Extent to Which Title IX Has Fulfilled Its Original Promise of Establishing Gender Equity Between Men and Women in Intercollegiate Athletics" (Hartford, CT, Trinity College, 2020), 48, https://digitalrepository.trincoll.edu/theses/855.
[16] Melnick, *The Transformation of Title IX,* 226.
[17] Melnick, *The Transformation of Title IX,* 228-229.

a letter declaring that schools must "treat transgender students consistent with their gender identity" in regard to sex-segregated facilities in schools.[18] The OCR and Department of Justice (DOJ) upheld this position in May 2016 when they issued the controversial Dear Colleague Letter (DCL), which ruled that educational institutions cannot treat transgender students differently than their cisgender peers and that transgender students "must be allowed to participate in such activities and access such facilities consistent with their gender identity."[19] In underscoring that the prohibition "…encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status," the administration continued to support the idea that gender identity is equivalent to biological sex in the Title IX context.[20] The Obama administration continued to explain its position on transgender students with the subsequent publication of "Examples of Policies and Emerging Practices for Supporting Transgender Students." The pamphlet, which explained successful transgender policies from various school districts across the country, was distributed nationwide to educate institutions on how to best support transgender students in the school setting.[21] This additional guidance, along with the initial 2016 DCL, were consistent with the Obama administration's goal to expand the scope of Title IX and to educate the general public on the pertinent issues surrounding transgender students.

Though the Obama administration's issuances provided transgender students with newfound rights, many critics viewed the development as an attempt to "micromanage" educational institutions. They also questioned the legitimacy of the guidelines since the proper

[18] James Ferg-Cadima, "Letter to Emily Prince from James Ferg-Cadima, Acting Deputy Assistant Secretary for Policy" (U.S. Department of Education Office for Civil Rights, January 7, 2015), https://www2.ed.gov/about/offices/list/ocr/letters/20150107-title-ix-prince-letter.pdf.
[19] Catherine Lhamon and Vanita Gupta, "Dear Colleague Letter on Transgender Students" (U.S. Department of Justice Civil Rights Division and U.S. Department of Education Office for Civil Rights, May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
[20] Busch and Thro, *Title IX*, 211.
[21] "Examples of Policies and Emerging Practices for Supporting Transgender Students" (U.S. Department of Education Office of Elementary and Secondary Education, Office of Safe and Healthy Student, May 2016).

notice-and-comment procedure for enacting new Title IX regulations was not adhered to.[22] To satisfy the requirements of the Administrative Procedure Act (APA), the executive office must follow the stipulated notice-and-comment process, which allows institutions to preview proposed guidelines and give feedback when implementing new Title IX regulations.[23] Under this legislation, altering Title IX guidance and regulations should, in theory, be a lengthy and involved process. However, as the Obama administration's implementation of its updated Title IX guidelines demonstrates, this process is not always followed.[24]

Despite the significant advancement of transgender student rights under President Obama, these protections were drastically reduced during the Trump administration. In a 2017 DCL from the Secretary of Education Betsy DeVos, the Department of Education (DOE) rescinded the Obama administration's DCL and the letter from James Ferg-Cadima.[25] Though DeVos' DCL stipulated that the withdrawal of the previous guidance "…does not leave students without protections from discrimination, bullying, or harassment," the lack of clear detail regarding the scope of said "discrimination, bullying, and harassment" made it difficult to ascertain the actual extent of transgender students' legal protections under Title IX.[26]

Over three years later, on May 6, 2020, the Trump administration released its updated Title IX guidelines in a 554-page document. Following a lengthy notice-and-comment period in which

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[22] Melnick, *The Transformation of Title IX,* 226; Jared P. Cole, "Title IX's Application to Transgender Athletes: Recent Developments" (Congressional Research Service, August 12, 2020), https://crsreports.congress.gov/product/details?prodcode=LSB10531.
[23] Busch and Thro, *Title IX*, 78.
[24] Michelle E. Philips, "Court Decisions Could Frustrate Obama Administration Efforts to Protect Transgender Students, Employees," Jackson Lewis, September 21, 2016, https://www.jacksonlewis.com/publication/court-decisions-could-frustrate-obama-administration-efforts-protect-transgender-students-employees. Following the implementation of the Obama administration's Title IX regulations, many court challenges ensued, notably in North Carolina and in Texas, which is discussed in greater detail in Chapter III.
[25] Sandra Battle and T.E. Wheeler II, "Dear Colleague Letter on Transgender Students" (U.S. Department of Justice Civil Rights Divison and U.S. Department of Education Office for Civil Rights, February 22, 2017), http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf.
[26] Battle and Wheeler II, "Dear Colleague Letter on Transgender Students".

the DOE received over 124,000 comments, transgender students were scarcely addressed.[27] Instead, the Trump administration made highly controversial changes to Title IX's sexual harassment policy with little mention of LGBTQ+ students' ability to use sex-segregated facilities or participate in sex-segregated activities. The DOE stated bluntly that it declined "…to address discrimination on the basis of gender identity or other issues raised in the Department's 2015 letter regarding transgender students' access to facilities such as restrooms and the 2016 'Dear Colleague Letter on Transgender Students.'" [28] Although the Trump administration avoided explicitly addressing discrimination on the basis of gender identity, it indicated its position on sex discrimination in schools stating, "Title IX and its implementing regulations include provisions that presuppose sex as a binary classification."[29] Since the DOE did not "propose to revise" the scope of sex discrimination in its regulations, the Department automatically defaulted to a definition of sex as binary, or biological sex at birth.[30] Although the Trump administration's hostile approach to transgender students created some level of ambiguity, its definition of sex as binary indicated that it would not protect transgender students from discrimination on the basis of their gender identity.

Aside from these brief statements, the Trump administration remained silent on the issue of transgender students for much of its term in office. However, just weeks before President Biden was sworn in, the DOE released a document on January 8, 2021, clarifying its stance on transgender students in light of the *Bostock* decision. In a memorandum question and answer

[27] "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 34 CFR 106 § (2020), https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.
[28] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 2276.
[29] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 2265.
[30] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 2265.

document, the DOE declared that *Bostock* does not change the meaning of "sex" as it is used in Title IX.[31] Under this interpretation, the Department explained that bathroom and locker room facilities and athletics should be separated solely on the basis of biological sex in order to comply with Title IX.[32] Though the DOE recognized that *Bostock*'s logic might support allegations of sex discrimination in certain Title IX contexts, it made clear that discrimination on the basis of gender identity and sexual orientation was not an automatic violation of the statute.[33] Throughout the memorandum, the Department reiterated thirteen times in the thirteen-page document that *Bostock* is not applicable to Title IX because the definition of sex in the statute refers to "biological sex" based on its "ordinary meaning."[34] To support this claim, the document explains how the actual text of Title IX and Title VII are different and due to these statutory dissimilarities, "…Title IX and its implementing regulations, unlike Title VII, may require consideration of a person's biological sex, male or female."[35] Although the Trump administration suggested that *Bostock* may be applicable in certain situations, emphasizing that biological sex is often relevant in the Title IX context, the memorandum made clear that the use of *Bostock* to halt discriminatory treatment toward transgender students was unlikely. In an almost desperate last-ditch attempt leave its mark on Title IX, the January 2021 memorandum exemplified the Trump administration's drastic reduction of transgender student protections.

Yet, within hours of President Trump's exit from office, the Biden administration wasted no time overhauling his predecessor's controversial Title IX guidelines. On January 20, 2021,

[31] Reed Rubenstein, "Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020)" (U.S. Department of Education Office for Civil Rights, January 8, 2021), 2, https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf.
[32] Rubenstein, "Memorandum for Kimberly M. Richey," 7-9.
[33] Rubenstein, "Memorandum for Kimberly M. Richey," 4.
[34] Rubenstein, "Memorandum for Kimberly M. Richey," 1.
[35] Rubenstein, "Memorandum for Kimberly M. Richey," 4.

President Biden issued Executive Order 13988 Preventing and Combating Discrimination on the Basis of Gender Identity to extend *Bostock*'s definition of discrimination on the basis of sex to Title IX, the Fair Housing Act, and the Immigration and Nationality Act.[36] He unequivocally addressed the issue of transgender students in the second sentence of the document, stating "Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports."[37] The fact that Biden issued this order on his first day in office indicates that expanding protections for transgender students, especially in the most controversial areas of bathroom access and athletic participation, is of utmost priority for his administration. Moreover, his explicit reference to *Bostock* further underlines the decision's importance as a catalyst for expanded LGBTQ+ rights in all areas of the law.

While Executive Order 13988 marks a significant turning point in the fight for increased transgender student protections, the administration did not stop there. On March 8, 2021, President Biden reiterated his support for transgender students when he issued Executive Order 14021 Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity. The order stated that "…it is the policy of my administration that all students should be guaranteed an education environment free from discrimination on the basis of sex…including discrimination on the basis of sexual orientation or gender identity."[38] He mandated that within one-hundred days, government agencies "…shall review all existing regulations, orders, guidance documents, policies, and any other similar agency

[36] "Executive Order 13988 Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation," 86 FR 7023 § (2021), https://www.federalregister.gov/documents/2021/01/25/2021-01761/preventing-and-combating-discrimination-on-the-basis-of-gender-identity-or-sexual-orientation.
[37] Exec. Order 13988.
[38] "Executive Order 14021 Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity," 86 FR 13803 § (2021), https://www.federalregister.gov/documents/2021/03/11/2021-05200/guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including.

actions…that are or may be inconsistent with the policy set forth…[in] this order."[39] Not only did this statement firmly reinforce his January 2021 Executive Order, it also called upon other executive agencies to meet the same standards, emphasizing that extending transgender student protections must be an administrative-wide effort.

Following Biden's March 2021 Executive Order, a series of agencies issued new guidelines. Three weeks later on March 26, 2021, the Civil Rights Division of the Department of Justice issued a document titled "Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972." The memorandum, directed to all federal agency civil rights directors and general counsels, instructed that given Executive Order 13988, sex discrimination prohibited by Title IX includes discrimination on the basis of gender identity and sexual orientation.[40] In addition to citing textual similarities between Title VII and Title IX, the DOJ also considered recent court cases that have reached the same conclusion.[41] Unlike the Trump administration, the Department deviated from the "ordinary meaning" argument to ultimately conclude that "…nothing persuasive in the statutory text, legislative history, or caselaw to justify a departure from Bostock's textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly."[42]

On June 22, 2021, Suzanne Goldberg, the Acting Assistant Secretary for Civil Rights for the OCR, issued the DOE's response to Executive Order 14021. In a Notice of Interpretation, she stated that the Department will interpret Title IX's protections consistent with the Supreme Court's ruling in *Bostock.* Citing textual similarities and the lower courts' reliance on *Bostock* to justify

[39] Exec. Order 14021.
[40] Pamela S. Karlan, "Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972" (U.S. Department of Education Office for Civil Rights, March 26, 2021), 1, https://www.justice.gov/crt/page/file/1383026/download.
[41] Title VII and Title IX transgender court cases are discussed in greater detail in Chapter III.
[42] Karlan, "Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972," 3.

the extension of Title IX's protection to cover gender identity and sexual orientation, Goldberg concluded "…to the extent other interpretations may exist, this is the best interpretation of the statute." This means that moving forward, the OCR will investigate complaints of sex discrimination based on this definition, thus supporting President Biden's vigorous effort to extend transgender student legal protections by applying Title IX guidelines.[43] Although the Department had previously issued a Notice of Language Assistance on April 6, 2021 stating that Trump's regulations remained in effect until a proper public hearing and question and answer period could be held, this document effectively overturned the DOE's previous statement and firmly placed it in line with the Biden administration's position on the matter.[44]

Only a day later on June 23, 2021, the OCR issued another document affirming the administration's support of transgender students. In a "Letter to Educators on Title IX's 49th Anniversary," Goldberg offered an updated Notice of Language Assistance to further reinforce that the *Bostock* decision applies "…regardless of whether the individual is an adult in a workplace or a student in school."[45] She added that the "…OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance"[46] In addition to the letter, the DOJ Civil Rights Division affirmed the DOE's decree by publishing an updated fact sheet with hypothetical situations that would require investigation by the OCR under Title IX's expanded definition of discrimination on

[43] Suzanne B. Goldberg, "Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County," 34 CFR chapter under § (2021), https://www.federalregister.gov/documents/2021/06/22/2021-13058/enforcement-of-title-ix-of-the-education-amendments-of-1972-with-respect-to-discrimination-based-on.
[44] Suzanne B. Goldberg, "Letter to Students, Educators, and Other Stakeholders Re Executive Order 14021" (U.S. Department of Education Office for Civil Rights, April 6, 2021), 2, https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf.
[45] Suzanne B. Goldberg, "Letter to Educators on Title IX's 49th Anniversary Notice of Language Assistance" (U.S. Department of Education Office for Civil Rights, June 23, 2021), 1, https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf.
[46] Goldberg, "Letter to Educators on Title IX's 49th Anniversary Notice of Language Assistance," 2.

the basis of sex.[47] As the recent rollout of administrative orders demonstrates, there is ardent support for transgender student protections among the leading agencies that work to ensure equality in education and in all contexts of an individual's life. This support from executive agencies across the board has enabled the Biden administration to advance the most progressive executive branch transgender student protections yet.

Despite this victory for LGBTQ+ students, the Biden administration's Title IX regulations have been met with much resistance. On July 7, 2021, twenty-one conservative state Attorneys General published a response to the DOE's June 2021 Notice of Interpretation.[48] In the document, the legal officers openly expressed their opposition to the notice, pointing to three central reasons: the DOE did not adhere to the public comment process, the interpretation of Title IX set forth does not take into account privacy issues students may face, and the interpretation encroaches upon religious liberty. They claimed that as a statutory decision, *Bostock* cannot override First Amendment protections.[49] The response also notes that in the majority opinion, Justice Gorsuch explicitly states that *Bostock* does not automatically apply in the context of Title IX.[50] Though the Biden administration's application of *Bostock* to Title IX is commendable, the Attorneys General raise important policy questions, especially those regarding the complex and often nuanced stipulations of the participation of transgender student athletes, that have yet to be addressed.

[47] "Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families" (U.S. Department of Justice Civil Rights Division and U.S. Department of Education Office for Civil Rights, June 2021), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf.
[48] Herbert H. Slatery III, "Administrative Action Related to Bostock v. Clayton County" (State of Tennessee Office of the Attorney General, July 7, 2021), 1, https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2021/pr21-23-letter.pdf.
[49] Slatery III, "Administrative Action Related to Bostock v. Clayton County," 2.
[50] Slatery III, "Administrative Action Related to Bostock v. Clayton County," 3.

Executive Action Resistance: *State of Tennessee v. United States Dept. of Education*

The controversy was further heightened when the State of Tennessee and the nineteen other states filed a complaint against the Department of Education on August 30, 2021, claiming that the application of *Bostock* to Title IX, and Title VII's interpretation of "sex" in general, is an attempt to "…rewrite federal law."[51] Turning to the fact that education falls under state authority, the lawsuit alleges that the "…agencies have no authority to resolve…sensitive questions," such as those involving transgender student bathroom access and transgender student athlete participation in sports, "…let alone to do so by executive fiat without providing any opportunity for public participation."[52]As with complaints concerning Obama's Title IX regulations, the lawsuit questions the legality of the Biden administration's implementation of new Title IX regulations without adherence to the proper notice and comment process.[53]

The Attorneys General further maintain that the application of *Bostock* to Title IX is unlawful since Justice Gorsuch specifically stated in the opinion that other federal and state antidiscrimination laws, like Title IX, were not "before" the Court. For this reason, the justices expressly refused to "'prejudge'" whether the decision would extend beyond Title VII to other areas of the law.[54] Despite the Department of Education's thorough explanation of the judicial connection between Title IX and Title VII in the June 2021 Notice of Interpretation, the lawsuit emphasized that the two statutes are "materially different."[55] Though the states turn to two Sixth Circuit Court decisions, *Meriwether v. Hartop* and *Pelcha v. MW Bancorp, Inc,* to substantiate

[51] *The State of Tennessee v. United States Department of Education* at 2.
[52] *Id.* at 3.
[53] *Id.* at 22.
[54] *Id.* at 7.
[55] *Id.* at 11.

their claim that the statutes' are dissimilar, the two decisions are taken out of context and do not directly concern protections for transgender individuals, let alone students, under the law.[56]

Nonetheless, the Attorneys General persist in explaining that the application of *Bostock's* definition of sex-based discrimination is unlawful because it interferes with established state laws, such as those that determine athletic participation using birth sex or those that provide students a right to "'express religious viewpoints in a public school.'"[57] In addition to state laws, the Attorneys General also claim that the Biden administration's guidelines violate Title IX itself by undermining the sanctioned sex-segregated facilities, primarily those involving bathrooms and athletics.[58] For these reasons, the states requested declaratory judgment against all documents issued by Biden administration regarding Title IX, as well as a preliminary and permanent injunction prohibiting the government from enforcing its updated Title IX regulations.[59]

Two months later, on October 4, 2021, the Alliance Defending Freedom (ADF) filed a motion to intervene on behalf three high school cisgender female student athletes from Arkansas. The ADF argued that the updated guidelines threaten to "erase women's sports and eliminate the opportunities for women that Title IX was intended to protect."[60] If granted, the original complaint would be significantly strengthened as the motion to intervene offers a considerable amount of evidence that supports the claim that transgender student athlete participation reduces cisgender female athletes' opportunities. Yet, as of May 2022, no further litigation has ensued.

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[56] *Id.* at 12; Meriwether v. Hartop, et al., No. 992 F.3d 492 (6th Cir. 2021); Pelcha v. MW Bancorp, Inc., No. 20-3511 (6th Cir. 2021). The 2021 *Meriwether v. Hartop* case involved a professor's First Amendment rights when he refused to call a transgender student by their preferred pronouns. The Sixth Circuit Court of Appeals ruled that the university's disciplinary measures for failing to use the student's preferred pronouns violated his right to free speech and right to free exercise of religion as a public employee. In *Pelcha v. MW Bancorp, Inc.,* the Sixth Circuit found that *Bostock* does not extend to the Age Discrimination in Employment Act.
[57] *The State of Tennessee v. United States Department of Education* at 19.
[58] *Id.* at 32.
[59] *Id.* at 33-34.
[60] "Tennessee v. Department of Education," *Freedom for All Americans* (blog), accessed February 23, 2022, https://freedomforallamericans.org/litigation/tennessee-v-department-of-education/.

As this complaint demonstrates, there has been much controversy surrounding the Biden administration's application of *Bostock* to Title IX executive regulations. Though the Attorneys General offer legitimate concerns regarding the notice-and-comment process and the larger issue of federal and state convergence on educational matters, they fail to acknowledge that many of the expressed concerns have already been addressed by the courts. Such concerns, like those involving sex-segregation sanctioned by Title IX, First Amendment protections of free exercise of religion, and questions of student privacy, have been thoroughly evaluated and considered in recent lower court decisions across the country.[61] Furthermore, the assertion that the texts and purposes of Title IX and Title VII are dissimilar is an unpopular and largely unsupported view. As discussed in the Introduction of this paper, courts, scholars, and various executive agencies have long recognized the relationship between the two statutes despite the fact that there are important differences between the rules that apply to schools and workplaces.

While the challenges made by the state Attorneys General are dismissive of transgender student rights, the concerns they raise, especially those regarding procedural processes, echo those expressed during the Obama administration's term following its implementation of its Title IX guidelines without input from the public. Although this method of informal policymaking, primarily through DCL's, letters, and notices, has exponentially expanded the statute's scope over time to encompass an array of discriminatory treatment in educational settings, this process has resulted in significant changes with little notice or agreement from institutions and other important actors. Under the APA, altering Title IX guidance and regulations should theoretically be an engaged process. Yet, as with both the Obama and Biden Title IX regulations, administrations often fail to follow to this process. The lack of consistent adherence to APA procedures during the

[61] Such cases include *Adams v. School Board of St. John's County, Florida, Doe v. Boyertown Area School District,* and *Whitaker v. Kenosha Unified School District.* These cases are discussed in further detail in Chapters II and III.

Obama, Trump, and Biden presidential administrations reveals the irreconcilables differences between liberal and conservative policymakers who do not agree upon a single definition of gender or hold a shared interpretation of Title IX. The Trump administration's guidelines reflected its antipathy to the very *idea* of gender identity itself; a person cannot be transgender because sex exists as a binary of either male or female. On the other hand, the Biden administration's policies emanate from a nuanced understanding of gender as fluid and extending beyond the strict classification of male or female. The two administrations' approaches to gender and the law are mutually exclusive: Trump's narrow concept of sex cannot coexist with Biden's broad one, and vice versa. These fundamental ideological differences concerning gender identify help explain why changes to Title IX transgender policies have been abrupt, thereby circumventing the rulemaking process in the last decade. Although many criticize the executive branch's frequent failure to adhere to the proper rulemaking process, both the Obama and the Biden administrations executed new Title IX guidelines swiftly to address to compelling policy needs and the undeniable danger to transgender students if it failed to act. It is important to emphasize that Biden administration acted so quickly precisely because the Trump DOE had issued new guidelines, without a proper review, during the very last days his presidency.

Despite the conflict between proper rulemaking procedures and the Biden administration's already-clear stance on transgender student rights, its official updated Title IX guidelines are not slated to be released until 2022 after the OCR has completed the notice-and-comment period.[62] While following the proper policymaking process is important to maintain the legitimacy of Title IX regulations, the absence of official guidelines from the DOE leaves any litigation many situations regarding LGBTQ+ student protections up to the lower court's discretion until that time.

Conclusion

In a span of only eight years, the interpretation of Title IX at the executive branch level has undergone drastic changes. As Table 1.1 demonstrates, transgender student rights have undergone rapid periods of expansion and retraction during each recent administration, rendering their legal protections ambiguous, inconsistent, and highly contested. The lack of a single authoritative interpretation of the statute's scope, coupled with unconventional policymaking measures, has only heightened this effect. Although the Biden administration has propounded the most progressive agenda for transgender student rights thus far, there is no guarantee that this level of legal security will continue in the next administration. As the stark rollback of transgender student protections by the Trump administration illustrates, if a conservative administration comes into office, it is likely the current expansive interpretation of Title IX would be reduced once again. Considering the uncertainty surrounding executive branch Title IX regulations, it is important to consider another critical avenue in which LGBTQ+ rights, and more recently transgender student protections, have expanded under the law: the courts.

Table 1.1 Title IX Executive Action Pertaining to Transgender Students

Date Issued	Document	Office	Effect	Administration
4/29/14	Questions and Answers on Title IX and Sexual Violence	OCR	Title IX protects against sexual harassment and violence based on transgender status	Obama
1/7/15	Letter to Emily Price from James Ferg-Cadima, Acting Deputy Assistant Secretary for Policy	OCR	Transgender students must be treated consistent with their gender identity in sex-segregated school facilities	Obama
5/13/16	Dear Colleague Letter on Transgender Students Notice of Language Assistance	DOJ and OCR	Transgender students must be allowed to participate in activities and use facilities consistent with their gender identity	Obama
5/13/16	Examples of Policies and Emerging Practices for Supporting Transgender Students	DOE	Model examples of transgender student polices	Obama
2/22/17	Dear Colleague Letter on Transgender Students	OCR	Obama regulations rescinded	Trump
5/6/20	Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance	OCR	Sex-segregated facilities/activities separated based on sex at birth	Trump
1/8/21	Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office of Civil Rights Re: *Bostock v. Clayton County 140 S. Ct. 1731 (2020)*	DOE	*Bostock* does not change the definition of discrimination on the basis of sex under Title IX	Trump
1/20/21	Executive Order 13988 Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation	President	*Bostock*'s definition of discrimination of the basis of sex extends to Title IX	Biden
3/8/21	Executive Order 14021 Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity	President	Sex discrimination prohibited by Title IX includes discrimination on the basis of gender identity and sexual orientation	Biden
3/26/21	Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972	DOJ	Sex discrimination prohibited by Title IX includes discrimination on the basis of gender identity and sexual orientation	Biden
4/6/21	Letter to Students, Educators, and other Stakeholders re Executive Order 14021 Notice of Language Assistance	OCR	Trump administration guidelines remain in effect until notice-and-comment process carried out	Biden
6/22/21	Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*	OCR	DOE will interpret and implement Title IX consistent with *Bostock* decision	Biden
6/23/21	Letter to Educators on Title IX's 49th Anniversary Notice of Language Assistance	DOJ and OCR	OCR will enforce Title IX to prohibit discrimination on the basis of gender identity and sexual orientation in all education programs/activities	Biden
6/23/21	Confronting Anti-LGBTQ+ Harassment in Schools: A Resource for Students and Families	DOJ and OCR	Hypothetical discriminatory policies/scenarios that merit OCR investigation	Biden

OCR = Department of Education Office of Civil Rights
DOE = other office in Department of Education
DOJ = Department of Justice Civil Rights Division

CHAPTER II

The Evolution of Transgender Student Rights through the Courts: Part 1

The highly public and controversial nature of Title IX administrative guidance often touts the executive branch as the principal actor in directing the trajectory of LGBTQ+ student protections. However, though their role has been less recognized, the courts have also played a crucial part in advancing transgender student protections under the law. To shed light on the judiciary's important role in the expansion of transgender student protections, this chapter aims to explain how statutory and constitutional rights have expanded through judicial decisions to include transgender students over the last thirty years. In order to best understand the legal rationales that support transgender student-specific cases, it is important to consider the decisions they are based upon, which are primarily Title VII cases. Though many of these cases are well-known, their specific contributions to the development of transgender student case law have not been thoroughly explained in scholarly literature. Thus, in evaluating how courts built upon previous decisions to gradually bring transgender rights to the legal stage, the unique role each case played in the expansion of transgender student rights is articulated.

After establishing the legal basis that enabled transgender students to put forth claims of discrimination, the earliest transgender student-specific cases are considered to provide important examples of how courts across the country incorporated and extended Title VII decisions to reach conclusions within the Title IX context. Starting with the seminal 1989 Title VII case *Price Waterhouse v. Hopkins* to pioneering transgender student litigation involving the question of bathroom access in the late 2010s, this chapter will provide a comprehensive outline of cases that propelled transgender rights to their current legal status.

Transgender Litigation: The Early Years

Price Waterhouse v. Hopkins

Before the highly controversial transgender "bathroom issue" gained public attention, many Title VII cases involving discrimination on the basis of sex made their way through the courts during the 1980s and 1990s. Though unintentionally, the seminal 1989 case *Price Waterhouse v. Hopkins* is primarily responsible for laying the legal foundation for later claims of discrimination made by transgender individuals. When Ann Hopkins, a successful senior manager at a Price Waterhouse accounting office, was denied partnership at her firm for two years in a row, she sued the company claiming it discriminated against her on the basis of sex in violation of Title VII.[63] The District Court for the District of Columbia agreed with Hopkins and held that she was discriminated against on the basis of sex because the board took into account comments that were influenced by sex stereotypes when making its partnership decision.[64] The U.S. Court of Appeals for the District of Columbia affirmed this decision, however they diverged on the issue of liability, finding that an employer cannot be held liable if it can prove, by clear and convincing evidence, that it would have made the same decision in the absence of discrimination.[65] On appeal, the Supreme Court reviewed whether the appellate court had erred in finding that an employer must show clear and convincing evidence to prove that an employment decision was not motivated by discriminatory intent.

In the plurality opinion issued by Justice Brennan, the Supreme Court reversed the Court of Appeals' decision, ruling instead that the right test was used and the burden of proof should have been placed at "preponderance of the evidence" not the "clear and convincing" standard.[66] While

[63] Price Waterhouse v. Hopkins, No. 490 U.S. 228, (Supreme Court 1989) at 3.
[64] *Id.* at 5.
[65] *Ibid.*
[66] *Id.* at 12.

establishing an employer's liability for discriminatory intent is less relevant to Title IX due to its statutory differences from Title VII, in declaring that discrimination on the basis of sex encompasses gender stereotypes, Justice Brennan articulated a new approach for adjudicating claims of sex discrimination in the workplace. When explaining the role gender plays in making employment decisions, Brennan writes that if an employer "…considers both gender and legitimate factors at the time of making a decision, that decision was 'because of sex.'"[67] Therefore, since Hopkins was penalized for her "masculine" behaviors, which ultimately arose because of her perceived deviance from expectations about how women should act, she was discriminated against on the basis of sex. Under this rationale, an employer's consideration of other criteria is irrelevant if it otherwise took into account gender stereotypes when making an employee-related decision since these stereotypes and biases are derived from one's perceived sex. The Supreme Court's declaration that women (and in later cases, men) cannot be punished for their failure to conform to society's notions of how they should behave in the workplace established the "sex-stereotyping" theory of sex discrimination.

Although the *Price Waterhouse* case did not involve a transgender person, nor does the decision even mention the LGBTQ+ community, the recognition that employers cannot treat employees differently because of their gender non-conformity offered a new avenue for those seeking a legal remedy for gender-based discrimination. While previous definitions of "sex" in Title VII solely encompassed sex discrimination on the basis of biological sex, incorporating the broader and less rigid idea of gender stereotypes into the statute's parameters substantially expanded its scope. Employees who faced invidious treatment due to their failure to adhere to societal gender norms could now ground claims of sex discrimination in previously acceptable

[67] *Id.* at 6.

treatment, such as being tasked with carrying out duties traditionally associated with one sex over the other, gendered remarks, different dress policies for men and women, and other work-related policies or practices. This newfound protection from adverse gender stereotypes set the strong precedent that as for the "…legal relevance of sex stereotyping, we are beyond the day when an employer [can] evaluate employees by assuming or insisting that they [match] the stereotype associated with their group."[68] The Court's incorporation of sex stereotyping into its analysis served as an essential launching point for those facing discriminatory treatment based on factors other than biological sex to seek legal remedy for disparate treatment in the workplace.

Montgomery v. Independent School District

The application of *Price Waterhouse's* theory of sex-stereotyping to a Title IX case quickly followed. Although *Price Waterhouse* is a Title VII case, it is important to reiterate that courts often look to Title VII jurisprudence when addressing Title IX claims due the statutes' similarities and the ultimate goal of both pieces of legislation to address discrimination. Following the Seventh Circuit Court of Appeals' decision in the 1996 case *Nabozny v. Podlesny*, which established that a school can be held liable under the Equal Protection Clause of the Fourteenth Amendment for failing to protect homosexual students from harassment, a spate of LGBTQ+ legislation ensued.[69]

In the 2000 case *Montgomery v. Independent School District,* the Minnesota District Court relied directly upon *Price Waterhouse* to find that a male student's harassment due to his "feminine" personality traits was impermissible discrimination under Title IX.[70] Jesse Montgomery was verbally and physically harassed by his classmates based on his perceived sexual

[68] *Id.* at 9.
[69]"Nabozny v. Podlesny," Lambda Legal, accessed December 15, 2021, https://www.lambdalegal.org/in-court/cases/nabozny-v-podlesny.
[70] Montgomery v. Independent School District, No. 109 F. Supp. 2d 1081, (D. Minn. 2000) at 11.

orientation for approximately eleven years of his education.[71] The harassment was so severe and pervasive that it led to Montgomery's removal from many of his favorite classes and caused him to skip many days of school to avoid his harassers. Despite some disciplinary action taken against the perpetrators, the harassment continued unabated. [72] Montgomery filed suit against the school district, claiming that its failure to stop the harassment violated his Fourteenth Amendment Equal Protection and Due Process rights, as well as Title IX.

In a memorandum opinion, the District Court of Minnesota found Montgomery's Due Process rights were not violated because he was still able to take action outside of the school's sexual harassment reporting mechanisms through law enforcement or other legal avenues.[73] Since it was evident that the school did not respond to Montgomery's complaints in the same manner as they had responded to other claims of harassment, the judge held that Montgomery had stated a cognizable Equal Protection claim. However, he ultimately found he could not determine if Montgomery was similarly situated to other students who filed complaints due to the same-sex nature of his harassment and thus denied the Equal Protection claim.[74]

Although the Fourteenth Amendment argument proved unsuccessful, some relief was offered through Title IX. The judge agreed with the school district that Title IX was not applicable to Montgomery's claim of sex discrimination because his treatment was not based on sex, but rather his perceived sexual orientation.[75] However given the sexual nature of the verbal and physical assaults, he held that Montgomery had stated a viable Title IX claim of sex-based harassment. Relying on the rationale articulated in *Price Waterhouse* and *Onacle v. Sundowner*

[71] *Montgomery v. Independent School Dist* at 1.
[72] *Id.* at 3-4.
[73] *Id.* at 16.
[74] *Id.* at 19-20.
[75] *Id.* at 8.

Offshore Services, Inc., the Supreme Court decision that ruled that Title VII protects against same-sex sexual harassment, the judge found that Montgomery suffered sex-based harassment due to his failure to conform to masculine gender stereotypes.[76] Though this reasoning was later utilized to substantiate claims of sex discrimination under Title IX rather than claims of harassment, it is important to note that this was one of the first cases to address this type of anti-gay bullying in a school setting. Therefore, with little case law to guide the court, it is understandable that portions of the opinion are slightly misaligned with more recent decisions addressing similar issues.

Nonetheless, by incorporating *Price Waterhouse* into its discussion, *Montgomery* played an important role in bridging the gap between Title VII and Title IX LGBTQ+ litigation. When an individual is penalized for their transgender status, the animus behind the adverse treatment is their perceived transgression of traditionally accepted gender norms through their appearance, interests, or self-identification. Thus, when gender-based harassment or discrimination occurs, it is a reaction to the incongruence between the individual's perceived sex and their own self-identity.[77] Though *Montgomery* did not specifically address transgender students, the judge's declaration that Title IX—at least in some form—protects against harassment based on gender non-conformity provided previously unrepresented students the opportunity to make legal claims of discrimination for the first time.

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[76] *Id.* at 11. Though the opinion does not specifically cite *Price Waterhouse*, it does reference the Title VII case *Higgins v. New Balance Athletic Shoe, Inc.,* which relied heavily on *Price Waterhouse* to find that the sex-stereotyping theory applies to male employees in the same way it applies to female employees. Moreover, the language utilized to explain why Montgomery's harassment was impermissible under Title IX is undeniably similar to the language used to explain the discriminatory treatment in *Price Waterhouse.* In *Montgomery,* the judge explains how the harassment Montgomery faced was "based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy." This is akin to the reasoning put forth in *Price Waterhouse* that Hopkins was not promoted because of her "masculine" behavior. These similarities further emphasize the significance of *Price Waterhouse* in shifting the rhetoric surrounding LGBTQ+ protections in many areas of the law.

[77] Tina Sohaili, "Securing Safe Schools: Using Title IX Liability to Address Peer Harassment of Transgender Students," *Tulane Journal of Law and Sexuality* 20 (2011): 79–95.

Smith v. City of Salem

Price Waterhouse's theory of sex-stereotyping was further developed when the Sixth Circuit Court of Appeals became the first federal appellate court to extend legal protections to a transgender employee in the 2004 Title VII case *Smith v. City of Salem*. Lieutenant Jimmie Smith was terminated from a local fire station due to his "non-masculine" appearance and desire to undergo a gender transition and present as female.[78] Relying on the sex-stereotyping framework, the Sixth Circuit Court of Appeals held in a majority decision that Smith's termination constituted sex discrimination under Title VII because it was motivated by his failure to adhere to his employer's ideas of proper masculine behavior.[79] The opinion found that there was no "…reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual."[80] This forthright declaration relied directly upon *Price Waterhouse* to reiterate that transgender status does not preclude an individual from Title VII's reach if the discriminatory treatment is based on the individual's sex. Since the fire department considered Smith's effeminate behavior when making the decision to fire him, it had discriminated against Smith in part on his sex, which is forbidden under Title VII.

Though the defendant's attempted to utilize Title VII transgender cases from the 1970s and 1980s, such as *Holloway v. Arthur Andersen & Co*. and *Ulane v. Eastern Airlines, Inc.,* to emphasize that the statute's protections do not extend to transgender employees, the court maintained that "Such analyses cannot be reconciled with *Price Waterhouse.*"[81] This analysis not only reaffirmed *Price Waterhouse* as the new standard for claims of sex discrimination under Title

[78] Smith v. City of Salem, No. 378 F.3d 566 (6th Cir. 2004) at 2.
[79] Smith is referred to as "he" as this is how he is referred to in the decision. These gender pronouns may no longer be accurate.
[80] *Smith v. City of Salem at* 6 and 9.
[81] *Id.* at 9.

VII, but it also reiterated that discrimination based on "transsexual" status does not differ from discrimination on the basis of sex.

Glenn v. Brumby

Legal protections for transgender employees were further expanded in the 2011 case *Glenn v. Brumby.* When Vandiver Elizabeth Glenn was diagnosed with Gender Dysmorphia in 2005, she began taking steps to transition from male to female.[82] After Glenn's senior supervisor Sewell Brumby learned of her plans to present as a woman, he terminated Glenn claiming that the gender transition was inappropriate, disruptive, and some employees may find it uncomfortable. Glenn sued alleging that her dismissal constituted discrimination under the Fourteenth Amendment based on both her sex and her medical condition, Gender Dysmorphia.[83] In 2010, the Northern District Court of Georgia granted summary judgment to Glenn regarding her sex discrimination claim and granted summary judgment to Brumby regarding Glenn's medical discrimination claim.[84] Both parties appealed. A three-panel judge majority decision from the Eleventh Circuit Court of Appeals found that discrimination against transgender individuals based on their failure to conform to sex-stereotypes constitutes sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.[85]

Although the facts are similar to *Smith,* the decision in *Glenn* is distinct as the court relies upon the Equal Protection Clause rather than Title VII to reach its decision. The opinion recognized that had Glenn pursued a claim under Title VII, the evidence provided would have been sufficient

[82] Glenn v. Brumby, No. 663 F.3d 1312 (11th Cir. 2011) at 2-3. In earlier cases, Gender Dysmorphia is referred to as "Gender Identity Disorder." This name was formally changed to "Gender Dysmorphia" in 2013 by the American Psychiatric Association.
[83] *Glenn v. Brumby* at 4.
[84] *Id.* at 5.
[85] *Id.* at 9.

to prove discriminatory intent.[86] However, since she pursed an Equal Protection claim, the court was obligated to apply a more rigorous legal test to determine if her dismissal constituted sex discrimination under the Fourteenth Amendment.[87] Utilizing *Price Waterhouse*'s theory of sex-stereotyping in tandem with previous case law, the Eleventh Circuit agreed with the District Court that heightened scrutiny applied since gender-based classifications are inherently suspect.[88] The panel affirmed the lower court's decision that Glenn's termination was motivated by discriminatory intent, and that Brumby's concerns were speculative and thus could not stand under a heightened standard of review. Much like recent Title IX cases involving transgender students, Brumby's primary issue with Glenn's transgender status was his belief that female coworkers would feel uncomfortable using the same restroom. However, this concern proved to be invalid as no such complaints had been documented and, most significantly, all the bathrooms in the office were single stall.[89]

Building upon the *Smith* decision, the Eleventh Circuit added that transgender status does not exclude an individual from the protections afforded by the Equal Protection Clause. Turning to precedent set by *Price Waterhouse, Smith,* and a host of other Title VII cases, the court reiterated the relationship between gender-based discrimination and sex-based discrimination to determine that "The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis [gender] is a form of sex-based discrimination that is subject to heightened scrutiny…"[90] Based on this analysis, the court reached a conclusion consistent with

[86] *Id.* at 17.
[87] *Id.* at 6-7.
[88] *Id.* at 6 and 14.
[89] *Id.* at 18.
[90] *Id.* at 13.

prior rulings: discriminatory treatment cannot prevail when based upon gender- or sex-based stereotypes.[91]

The court's application of the Equal Protection Clause is also significant as this decision afforded transgender employees, and potentially those outside the legal realm of Title VII, another approach for seeking relief for disparate treatment. By addressing Glenn's sex discrimination claim under the Equal Protection Clause instead of Title VII, the Eleventh Circuit made a powerful statement: ensuring work environments free from discrimination on the basis of gender non-conformity is so important that it merits constitutional protection. This "coupling" of Title VII with the Fourteenth Amendment substantially advanced the legal basis for claims of sex discrimination by providing both a statutory and constitutional avenue for relief. Not only did this development strengthen the legal foundation of Title VII case law, but it also proved to be crucial to the expansion of transgender student protections in education.

The Shift to School-Specific Transgender Litigation

During the early years of LGBTQ+ litigation, the expansion of transgender rights primarily occurred in the Title VII realm. Though these cases did not specifically apply to the school setting, the case law developed throughout the 2000s and the early 2010s provided transgender students with a strong legal foundation to base claims of sex discrimination.

Whitaker v. Kenosha Unified School District

In the 2017 case *Whitaker v. Kenosha Unified School District,* the Seventh Circuit Court of Appeals became the first appellate federal court to decisively find that the Title IX prohibition

[91] *Ibid*.

of discrimination on the basis of sex extends to transgender students.[92] Ash Whitaker, a transgender male student from Wisconsin, was prohibited from using the boys' restroom per his school's policy that students must use the bathroom that corresponds with their biological sex or an alternative single-stall gender-neutral option.[93] Despite the fact that Ash was diagnosed with Gender Dysmorphia and identified as male when he began high school in 2013, the school continued to forbid him from using the boys' facilities. Fearing that using the gender-neutral restroom alternative would further single him out and that using the girls' restroom undermined his transition, Ash practiced bathroom avoidance or used the boys' restroom, which resulted in disciplinary action and threats of surveillance of his bathroom usage.[94] Following these disciplinary measures, Ash filed a complaint in 2016 with the Office of Civil Rights (OCR) alleging that the school's policy violated Title IX and the Equal Protection Clause of the Fourteenth Amendment. He also filed a motion for a preliminary injunction seeking to enjoin the enforcement of the school district's policy. The school district filed a motion to dismiss, asserting that Ash had no legitimate claim under Title IX or the Equal Protection Clause. The Eastern District Court of Wisconsin denied the school's motion and enjoined the school district from enforcing its policy, thus allowing Ash to use the boys' restroom.[95]

On appeal, the Seventh Circuit Court ruled in a three-panel judge majority decision that the District Court did not err in granting a preliminary injunction since Ash's Title IX and Fourteenth Amendment claims were likely to succeed on the merits. Looking to *Price Waterhouse, Smith,* and *Glenn*, the Circuit Court interpreted the meaning of "sex discrimination" under Title

[92] "Kenosha Unified School District v. Whitaker," *Freedom for All Americans*, January 10, 2018, https://freedomforallamericans.org/kenosha-unified-school-district-v-whitaker/.
[93] Whitaker v. Kenosha Unified School District, No. 858 F.3d 1034 (7th Cir. 2017) at 2 and 8.
[94] *Whitaker v. Kenosha* at 6.
[95] *Id.* at 9.

IX consistent with previous Title VII decisions.[96] Using *Price Waterhouse's* theory of sex-stereotyping, the court maintained that Ash had been discriminated against on the basis of sex because the school's policy punished him for failing to conform to the accepted gender norms associated with women. Due to the dissonance between his biological sex and his gender identity, Ash was subjected to different treatment and sanctions that non-transgender students did not face, primarily the stipulation that he use single-stall restrooms.[97] Therefore, since the policy was motivated by gender stereotypes that resulted in disparate treatment, it was discriminatory on the basis of sex, which Title IX prohibits.

In addition to considerably expanding transgender protections within the statutory realm of Title IX, the Seventh Circuit also addressed the extent of transgender student protections under the Equal Protection Clause. The school district argued that the policy was necessary to ensure the protection of students' privacy. It further maintained that since transgender status is not a protected class under the Equal Protection Clause, the policy was subject to the rational basis standard of review.[98] Applying this standard, the policy could be found to be rationally related to the goal of protecting student's privacy.[99] However, as with previous decisions, the Seventh Circuit refuted this argument, stating that regardless of transgender status, the bathroom policy inherently created a sex-based classification, which warrants a heightened standard of review.[100]

Under heightened review, the policy did not stand because it was applied arbitrarily. When Ash registered for high school in 2013, his birth certificate indicated his sex as female.[101] However, school policy allowed transfer students to enroll using a birth certificate *or* a passport, which in

[96] *Id.* at 19-22.
[97] *Id.* at 24.
[98] *Id.* at 3.
[99] *Id.* at 26.
[100] *Id.* at 27.
[101] *Id.* at 4.

the case of a transgender student, may have been updated to reflect a different sex than at birth.[102] For this reason, the policy was not substantially related to the important government interest of protecting a student's bodily privacy because it allowed room for error. To further support this point, the school was unable to provide any documentation of such privacy complaints from students, prompting the court to find that the purported privacy concerns were merely speculative.[103] The lack of evidence presented by the school district in contrast with the well-documented harms that Ash faced as a consequence of the policy ultimately led the panel to resolve that the "mere presence" of a transgender student in the bathroom does not infringe upon the privacy rights of other students.[104] This oftly-cited quote effectively rebuts the conventional argument that simply being exposed to the opposite sex in a bathroom or locker room constitutes sexual harassment under Title IX. Though this argument was not considered specifically in *Whitaker,* the court's definitive finding proved to be extremely beneficial in subsequent transgender student-specific cases. [105]

As with its Title IX claim, *Whitaker* marks the first time a federal court of appeals applied the Equal Protection Clause to an education case involving a transgender student. Much like *Glenn,* the court's pivotal implementation of the Equal Protection Clause—its "coupling" with Title IX—

[102] *Id.* at 32.
[103] *Id.* at 29.
[104] *Id.* at 28.
[105] Another important component of *Whitaker* is that at the time of the hearing, Ash had not undergone any surgical procedures to alter his physical appearance. In stating that "…not all transgender persons opt to complete a surgical transition, preferring to forgo the significant risks and costs that accompany such procedures," the Seventh Circuit underscored the fact that transgender students may exhibit different physical characteristics than their gender identity. Although Ash followed hormone replacement treatment, the court's point addresses the potential counterargument that transgender students who do not exhibit physical similarities as their gender identity may raise greater issues of privacy in sex-segregated facilities than transgender individuals whose physical appearance is more consistent with their gender identity. This is important because other transgender court cases involve situations where the individual had undergone or planned to undergo surgery to physically change their appearance (see *Smith v. City of Salem, Glenn v. Brumby, Adams v. School Board of St Johns County,* and *Grimm v. Gloucester).* While this portion of the opinion is not often recognized for its significance, the court's decision to structure its rationale devoid of the "physiological argument" strengthens transgender student case law and makes the opinion more applicable to a wide range of transgender students in varying stages of transition.

provides transgender students with another legal approach for relief from sex-based discrimination. Although scholars tend to acknowledge that Title IX and the Equal Protection Clause offer the most effective approach to relief for transgender students, the interconnected relationship between the two have not been sufficiently emphasized.[106] As with Title VII case law, the "coupling" phenomenon strengthens the legal foundation for transgender students' claims of discrimination by offering both statutory and constitutional avenues for relief. This development is extremely important in Title IX litigation because frequently changing executive guidelines often dictate the statute's scope. However, by grounding claims of sex discrimination in the Equal Protection Clause, litigation is insulated from changing administrative guidelines. This constitutional guarantee of protection significantly strengthens legal protections for transgender students as they are no longer bound by the uncertainty of Title IX regulations from the executive branch.

Doe v. Boyertown Area School District

As Title IX cases striking down discriminatory policies made their way through the courts in the 2010s, a concurrent set of cases involving inclusive transgender student policies were also evaluated. Until 2017, the majority of cases regarding transgender rights came from transgender students themselves. However, the most recent wave of complaints has been brought by cisgender students. These cases are important to consider as they address common arguments put forth by cisgender students who maintain that bathroom facilities separated by biological sex do not violate Title IX or the Fourteenth Amendment.

[106] Vittoria L. Buzzelli, "Transforming Transgender Rights in Schools: Protection from Discrimination under Title IX and the Equal Protection Clause Comments," *Penn State Law Review* 121, no. 1 (2017 2016): 187; Suzanne Eckes, "Sex Discrimination in Schools: The Law and Its Impact on School Policies," *Laws* 10 (May 11, 2021): 7, https://doi.org/10.3390/laws10020034.

In the 2018 case *Doe v. Boyertown,* cisgender students complained that the Boyertown Area School District's policy allowing students to use the restroom and locker rooms facilities consistent with their gender identity, regardless of their birth sex, violated their constitutional right to bodily privacy, Title IX, and Pennsylvania tort law.[107] Although the school enacted a careful screening process to grant access to the facilities consistent with a student's gender identity and provided all students who wished for more privacy with single-stall alternatives, four cisgender students and their families sought preliminary injunction to enjoin the policy based on encounters with transgender students in the restroom and locker rooms.[108] The Eastern District Court of Pennsylvania denied the injunction on the grounds that the plaintiffs did not face irreparable harm and that their claims had no likelihood of success on the merits.[109] On appeal, the Third Circuit Court held in a three-panel judge majority opinion that the District Court did not err in their finding, thus allowing the school district's policy to stand.

Reviewing the policy under strict scrutiny, the court found that it did not violate the school's Fourteenth Amendment privacy interest in protecting an individual's partially clothed body. Though a cisgender student's body may be partially exposed to the opposite sex in the restroom or locker room, the court held that this does not give rise to a constitutional violation because the policy was narrowly tailored and served a compelling state interest.[110] The court resolutely declared "…we do not view the level of stress that cisgender students may experience because of appellees' bathroom and locker room policy as comparable to the plight transgender students who are not allowed to use facilities consistent with their gender identity."[111] Therefore,

[107] Doe v. Boyertown Area School District, No. 897 F.3d 518 (3rd Cir. 2018) at 10.
[108] *Doe v. Boyertown* at 9.
[109] *Id.* at 11.
[110] *Id.* at 14.
[111] *Id.* at 7.

while the judges acknowledged that the policy may cause cisgender students to feel distressed, this discomfort does not outweigh the countless impacts imposed upon transgender students when they are prohibited from using their preferred facilities.[112]

Although the appellants attempted to rely upon prior judicial opinions to substantiate their privacy claim, the court asserted that the decisions in these cases did not recognize a constitutional mandate for sex-segregated restrooms and locker rooms. Instead, the opinion finds that though the Constitution "*tolerates* single-sex accommodations," it does not "*demand* it."[113] Without sufficient legal support, the court disregarded the Fourteenth Amendment privacy claim given that no court has recognized such an "expansive constitutional right to privacy."[114]

The Title IX claim of sexual harassment was also denied since the cisgender students and their families failed to demonstrate that transgender students in the bathroom or locker room rose to the level of sexual harassment.[115] Relying upon the precedent set in *Whitaker,* the court ruled that unless a transgender student is engaging in inappropriate conduct, their mere presence alone does not constitute sexual harassment under Title IX.[116] By building upon *Whitaker,* the Third Circuit's opinion adds to growing case law which maintains that cisgender privacy concerns do not supersede discriminatory treatment toward transgender students.[117]

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[112] *Id.* at 7 and 17.
[113] *Id.* at 22. Citing *Faulkner v. Jones* and *Chaney v. Plainfield Healthcare Center.*
[114] *Id.* at 20.
[115] *Id.* at 26.
[116] *Id.* at 28.
[117] Finally, in the shortest portion of its opinion, the Third Circuit Court addressed the appellant's Pennsylvania-tort law claim. It agreed with the District Court that presence of transgender students in the locker room would not be considered "highly offensive to a reasonable person" and that the appellants failed to show that the denial of their injunction would result in irreparable harm. Although this rationale is less thoroughly developed than the other sections of the opinion, state-specific statutory claims have proven to be successful when argued from either side of the bathroom debate. Even in early LGBTQ+ litigation, such as in *Montgomery* and *Smith,* the courts denied to consider how transgender individuals facing sex discrimination coincides with state and tort law. This may suggest that tort law and other state-level statutory measures are not an effective means to achieving expanded transgender or non-transgender protections in regard to the issue of bathroom access.

Parents for Privacy v. Barr

Two years later the Ninth Circuit Court of Appeals reached a similar conclusion in the 2020 case *Parents for Privacy v. Barr.* In addition to finding that a school's inclusive restroom and locker room policies do not violate Title IX or cisgender student's Fourteenth Amendment rights, the court found these policies also do not infringe upon the First Amendment right to the free exercise of religion.

In 2015, a transgender student from Oregon asked school officials to use the restroom consistent with his gender identity. The school district obliged, implementing a "Student Safety Plan" that allowed any student to use the restroom and locker room consistent with their gender identity regardless of their biological sex.[118] Following the implementation of the policy, some cisgender boys began to feel "'embarrassment, humiliation, anxiety, intimidation, fear, apprehension, and stress'" when they had to change their clothes for gym class in the presence of the opposite biological sex.[119] Cisgender girls expressed similar concerns as they feared a transgender girl would be allowed to use the women's facilities.[120] Despite objections from many students and parents, the school continued to enforce the policy. In November 2017, a group of parents and several other individuals sued the school district and various other state and federal agencies, claiming that the school's policy violated their Fourteenth Amendment right to privacy, the Fourteenth Amendment parental right to direct the education of their children, Title IX, and the First Amendment Free Exercise Clause.[121] When the District Court of Oregon dismissed the

[118] Parents for Privacy v. Barr, No. 949 F.3d 1210 (9th Cir. 2020) at 2-3.
[119] *Parents for Privacy v. Barr* at 11.
[120] *Id.* at 12.
[121] *Id.* at 17-18.

case, finding that the cisgender students had failed to state claims upon which relief could be granted, the plaintiffs swiftly appealed.[122]

On appeal, the Ninth Circuit held in a three-panel judge majority decision that the District Court did not err in dismissing the case since the claims were unlikely to succeed on the merits. Though the facts of the case are similar to *Doe v. Boyertown,* the legal arguments put forth by the cisgender students are slightly different and more constitutionally expansive.

The appellants argued that protections under the Due Process Clause of the Fourteenth Amendment encompass a "'…fundamental right to bodily privacy' that includes 'a right to privacy of one's fully or partially unclothed body…'" However, the court agreed with the Third Circuit that the Fourteenth Amendment does not provide this explicit protection and that there is no "…constitutional privacy right to not share restrooms or locker rooms with transgender students who were assigned a different sex than theirs at birth."[123] As in *Doe,* the judges also noted that the cases utilized to support this assertion were not analogous to the situation because they primarily involved "'egregious state-compelled intrusions into one's personal privacy'" between prisoners and prison guards.[124]

The court built upon previous decisions to find that the policy also did not violate the Fourteenth Amendment parental right to direct the care, education, and upbringing of their children.[125] Though the panel recognized parents have the ability to decide to enroll or remove their children from school, this right does not "'…extend beyond the threshold of the school door.'"[126] Similar to the Due Process argument, the appellants relied upon unrelated First

[122] *Id.* at 16.
[123] *Id.* at 19.
[124] *Id.* at 20.
[125] *Id.* at 33.
[126] *Id.* at 62.

Amendment education cases, such as *West Virginia v. Barnette* and *Wisconsin v. Yoder*, which do not support the supposed Fourteenth Amendment parental right "to direct their children's upbringing" by dictating school policies[127]

The appellants further alleged that the school district's policy violated the First Amendment Free Exercise Clause by exposing students to an environment that prevented them from fully adhering to the ideas of modesty their faith prescribes.[128] The court found that the policy did not subvert an individual's right to freely exercise their religion because it was rationally related to the legitimate state purpose of providing a safe and welcoming environment for transgender students. Moreover, since the policy was neutral and did not generally target religious conduct, it only burdened the exercise of religion incidentally.[129]

As in *Doe*, the appellants argued that the policy violated Title IX by turning the restroom and locker room facilities into sexual harassment inducing environments. Since the only solution offered to avoid these "hostile environments" was to use single-stall alternatives, the cisgender students argued the policy was therefore discriminatory on the basis of sex.[130] The court rejected this rationale, explaining that the policy was not discriminatory on the basis of sex because it applied to all students equally regardless of their sex. To address the sexual harassment claim, the court reiterated a question that was resolved in previous decisions: the presence of transgender students alone in locker rooms does not create a hostile environment simply because cisgender students may be exposed to the opposite biological sex.[131]

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[127] *Id.* at 39.
[128] *Id.* at 43.
[129] *Id.* at 44.
[130] *Id.* at 27.
[131] *Id.* at 27-28.

As the decisions in *Doe v. Boyertown* and *Parents for Privacy v. Barr* demonstrate, student privacy interests do not outweigh the gravity of ensuring transgender students can use facilities consistent with their gender identity. This growing consensus indicates that the attempt to expand Fourteenth Amendment protections to encompass a far-reaching bodily privacy right and the parental right to direct their child's education is not a successful course of action when addressing cisgender concerns with inclusive restroom and locker room policies. This assertion is further supported by the fact that the Supreme Court denied to review both *Doe* and *Parents for Privacy* in 2019 and 2020, respectively, allowing the precedent to remain binding in both the Third and Ninth Circuit jurisdictions.[132] Although it is likely that cases involving student privacy protections will continue to arise, the concurrence of both the Third and Ninth Court of Appeals, along with the Supreme Court's denial to offer their opinion on the matter, suggests that privacy claims and the role of parents in directing their child's education are not likely to succeed under the current set of constitutional or statutory arguments.

Conclusion

Judicial decisions in the past thirty years established a strong set of legal precedents that enabled transgender students to seek legal remedy for discriminatory treatment in schools. Though the controversy surrounding transgender students may appear to be a recent policy development directed by executive action, as this discussion exemplifies, the courts have played an enduring role in supporting the expansion of transgender student protections. Using the *Price Waterhouse* theory of sex-stereotyping, the first court decisions concerning transgender student issues are

[132] "Joel Doe v. Boyertown Area School District," *Freedom for All Americans*, September 24, 2019, https://freedomforallamericans.org/joel-doe-v-boyertown-area-school-district/; "Supreme Court Again Rejects Challenge to Trans-Affirming School Policies," American Civil Liberties Union, accessed December 27, 2021, https://www.aclu.org/press-releases/supreme-court-again-rejects-challenge-trans-affirming-school-policies.

consistent with those of Title VII: denying transgender students access to bathroom facilities consistent with their gender identity violates Title IX and the Equal Protection Clause. Moreover, courts seem to be in agreeance that cisgender privacy concerns do not take precedence over transgender students' interest in utilizing their preferred restroom facilities. The coupling "phenomenon" apparent in both Title VII and Title IX litigation further supports the expansion of legal protections in each area as transgender individuals can seek relief through statutory and constitutional avenues. This development is especially important for Title IX cases as changing executive Title IX guidelines often render transgender student protections uncertain. The subsequent chapter will continue to consider the expansion of transgender student rights in the context of transgender-student specific litigation, which primarily centers around the contentious "bathroom debate."

CHAPTER III

The Evolution of Transgender Student Rights through the Courts: Part 2

The strong legal foundation established from 1989 to 2020 has enabled transgender students to ground claims of discrimination in both Title IX and the Equal Protection Clause of the Fourteenth Amendment. This chapter continues to explore transgender student-specific litigation to demonstrate how recent decisions have vigorously affirmed and continued to expand transgender student protections under the law. Given the contentious nature of the "bathroom debate," at present, the majority of cases involving transgender students address the question of whether transgender students are legally permitted to use bathroom and locker room facilities consistent with their gender identity. In evaluating important transgender student-specific cases, this chapter illustrates how transgender student protections have continued their upward trajectory of expansion through the judiciary. This sustained development can largely be attributed to the 2020 Supreme Court decision in *Bostock v. Clayton County,* which significantly strengthened the legal basis for extending transgender rights by proclaiming that sex discrimination under Title VII encompasses both discrimination on the basis of gender identity and sexual orientation. Therefore, *Bostock's* implications on Title IX litigation will also be examined. In underscoring the victories transgender students continue to find in the judiciary, this chapter ultimately argues that the courts may be the most successful avenue for advancing transgender student protections.

***Bostock v. Clayton County*: Defining the New Standard for Discrimination on the Basis of Sex**

Gerald Bostock, a child welfare advocate in Clayton County, Georgia, was fired shortly after he began participating in a gay softball league.[133] Despite his outstanding professional record, he faced criticism after joining the league and was ultimately terminated because of his "unbecoming" conduct as a county employee.[134] Soon after this occurred, Bostock filed suit, claiming he had been wrongfully dismissed on the basis of his sexual orientation in violation of Title VII. Two other similar cases, one relating to termination of employment based on gender identity and the other relating to termination of employment based on sexual orientation, were also tried in the lower courts, resulting in conflicting rulings. Due to the inconsistent interpretation of Title VII protections, the Supreme Court granted certiorari and consolidated the three cases to address whether Title VII protects LGBTQ+ individuals from employment discrimination.[135] The groundbreaking 6-3 majority opinion delivered by Justice Gorsuch in June 2020 ruled in favor of the petitioners, finding that Title VII's prohibition on sex discrimination in the workplace encompasses discrimination on the basis of both sexual orientation and gender identity.

According to the decision, in prohibiting discrimination "because of" sex, Title VII calls for a clear but-for causation standard, which essentially poses the question "but for the existence of X, would Y have occurred?"[136] This means that if one factor or characteristic is changed at a time and the outcome changes, there is a but-for cause. Though this standard can be sweeping, Gorsuch assured that the "but-for" cause does not equate to the sole cause and that events can have multiple "but-for" reasons. Moreover, a protected trait does not need to be the primary factor in an

[133] Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1733 (Supreme Court of the United States 2020).
[134] *Bostock v. Clayton County* at 1734.
[135] *Id.* at 1734-35.
[136] *Id.* at 736.

employment decision or event to constitute the "but-for" cause.[137] Despite these potential limitations, *Bostock* make clear that it is impossible to discriminate against a person for being homosexual or transgender without discriminating against them on the basis of sex because these factors influenced the disparate treatment, and therefore are the but-for cause.[138]

Using a simple analogy, Gorsuch explained that if two employees are the same in every respect except sex and the employer fires the male employee for being attracted to men, it is discrimination on the basis of sex because it tolerates this characteristic—being attracted to men—in the female employee.[139] Therefore, even if an employer's goal is to dismiss an employee because of their gender identity or sexual orientation, it ultimately discriminates on the basis of sex because "…to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex."[140] Because Bostock and the other plaintiffs were penalized for being attracted to the same sex and exhibiting behaviors typically associated with the other gender, Gorsuch held that the employees' terminations constitute discrimination on the basis of sex in violation of Title VII.

In response to the argument that at the time of Title VII's passage in 1964 Congress did not intend its protections to extend to homosexual and transgender individuals, Gorsuch reiterated that legislative history holds little merit because "…when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." He thus applied the "broad rule" by adopting an expansive definition of "sex" under Title VII.[141] Despite other arguments put forth by the defendants, no matter which way the situation is approached, an employer necessarily

[137] Sandra Sperino, "Comcast and Bostock Offer Clarity on Causation Standard," accessed April 3, 2022, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/comcast-and-bostock-offer-clarity-on-causation-standard/.
[138] *Bostock v. Clayton County* at 1740.
[139] *Id.* at 1740-41.
[140] *Id.* at 1742.
[141] *Id.* at 1750.

discriminates based on sex when it considers homosexuality or transgender status in making employee-related decisions because "…the first cannot happen without the second."[142]

In his dissenting opinion, Justice Alito, joined by Justice Thomas, expressed his disdain for the majority decision, calling it an attempt to "'…update' old statutes so that they better reflect the current values of society."[143] Contrary to Justice Gorsuch, he contended that Congress' failure to amend Title VII or enact new legislation that specifically protects individuals against discrimination based on sexual orientation or gender sufficiently underlines that Title VII's scope should not be expanded.[144] He further added that since sex, as likely understood by those in 1964 and in conversation today, means biological differences, the majority opinion is invalid.[145] Not only has the Supreme Court denounced the reliance on dictionary definitions when interpreting statues, Alito's reasoning fails to grapple with the central point of the majority opinion. Gorsuch does not attempt to redefine the meaning of sex by stating sexual orientation and gender identity are impermissible grounds of discrimination under Title VII. Instead, he asserts that because sex plays a role in defining sexual orientation and gender identity, discrimination on the basis of sexual orientation and gender identity is inherently discrimination based on sex.

Despite Alito's misguided reliance on the historical and present-day understanding of sex, he warns that the decision is "…virtually certain to have far-reaching consequences."[146] In describing these potential impacts, Alito points to two unique issues in education: "Bathrooms, locker rooms, [and other things] of [that] kind…" and "Women's sports."[147] Evidentially, Alito was aware of the sweeping consequences *Bostock* would have on legal proceedings in the school

[142] *Id.* at 1750.
[143] *Id.* at 1768.
[144] *Id.* at 1767 and 1769.
[145] *Id.* at 1770.
[146] *Id.* at 1775.
[147] *Id.* at 1776 and 1778.

context. Nonetheless, the concerns expressed by Alito underscore the significance of Gorsuch's opinion: it not only expands upon *Price* to definitively prohibit discrimination based on sexual orientation and gender identity in the workplace, but it also provides LGBTQ+ students with an even stronger legal basis to ground claims of sex discrimination.

Post-*Bostock* Transgender Student Litigation

Adams v. School Board of St. Johns County, Florida

The 2020 case *Adams v. School Board of St. Johns County, Florida,* presented the first post-*Bostock* opportunity to interpret the definition of sex under Title IX. Drew Adams, a transgender male high school student, was barred from using the restroom consistent with his gender identity under the St. John's County School Board's policy which stated that transgender students must use gender-neutral restrooms or the restroom corresponding to their biological sex at school.[148] Adams brought suit against the school board, claiming that the policy violated his rights under Title IX and the Fourteenth Amendment.[149] Despite the fact that Adams was clinically diagnosed with Gender Dysphoria and had socially, medically, and legally transitioned, he was still prohibited from using the boys' restroom at school. After the District Court for the Middle District Court of Florida ruled in favor of Adams, the case was sent to the Eleventh Circuit Court of Appeals de novo to review whether the school's policy violated Title IX and the Equal Protection Clause of Fourteenth Amendment.

In a 2-1 decision, the Eleventh Circuit affirmed the District Court's finding that the school's policy violated both Title IX and the Fourteenth Amendment of the Constitution.[150] Since the policy involved a sex-based classification, the court utilized a heightened standard of review to

[148] Adams v. School Board of St. Johns County, Florida, No. 18-13592, (11th Cir. 2020) at 8.
[149] *Adams v. School Board of St. Johns County* at 10.
[150] *Id.* at 14.

evaluate Adam's Equal Protection claim.[151] It found that the policy failed to support a substantially important governmental interest because it was administered arbitrarily.[152] Similar to *Whitaker v. Kenosha,* the school district used documents submitted when students first enrolled in the school system to determine their sex. However, it is possible that a transgender student may have enrolled in school after already having transitioned. Therefore, had Adams enrolled in school using his updated legal documents, the school board would have no claim against him.[153] For this reason, the court maintained that the school board cannot contend it was truly interested in protecting students' privacy because the policy did not effectively bar *all* transgender students from using their preferred restroom.[154]

This argument was further supported by the fact that the school provided no evidence of such student privacy concerns. Under the heightened standard of judicial review, a "genuine" and "not hypothesized" justification must be supported with concrete evidence to prove the necessity of a discriminatory policy or law. Though the school board alleged that cisgender males felt uncomfortable with Adams in the boys' restroom, it failed to present any documentation supporting this claim. Therefore, without specific evidence, the court found that the school board did not meet its burden to show a genuine justification for excluding Adams from the boys' restroom. [155] For these reasons, the policy violated Adams' Fourteenth Amendment guarantee of Equal Protection under the law.[156]

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[151] *Id.* at 11.
[152] *Id.* at 15.
[153] *Id.* at 24.
[154] *Id.* at 17.
[155] *Id.* at 19-21.
[156] In fact, had the school board truly intended to protect student's privacy based on anatomical differences, it should have theoretically separated pre-pubescent and pubescent students from utilizing the same facilities. Since Adams had undergone sex reassignment surgery, he outwardly resembled his cisgender male peers. The judges note that Adams' presence in girls' bathroom would likely present many of the same privacy concerns as with the boys' restroom. This is further substantiated by the court's Fourteenth Amendment rationale.

The panel also ruled the policy was discriminatory on the basis of sex in violation of Title IX.[157] Relying heavily on *Bostock*, the court concluded that "sex" in Title IX encompasses gender identity in the same manner as it does in Title VII.[158] In applying the "but-for" causation standard, the court found that if Adams' birth sex was male, he would have been allowed to use the boys' restroom.[159] Changing his birth sex to female changed the outcome of the situation, thus sex was the "but-for" cause. Turning to *Glenn,* the court further explained that the policy subjected Adams to discriminatory treatment because it "punished" him, by requiring he use single-stall facilities, for defying social and gender stereotypes of how a biological female should act.[160]

In addressing an argument similar to that made by the defense in *Bostock,* the court refuted the idea that Congress in 1972 did not intend for Title IX protections to encompass transgender students, writing, "*Bostock* teaches that, even if Congress never contemplated that Title VII could forbid discrimination against transgender people, the 'starkly broad terms' of the statute require nothing less."[161] Like Title VII, there is no implicit evidence in Title IX's plain language that "sex" refers to biological sex. Moreover, there is no indication in the statute's regulations that "…declare which sex should determine a transgender student's restroom use," thus leaving much room for interpretation.[162] The Eleventh Circuit's Title IX conclusion serves as an important turning point in transgender student litigation because it marks the first appellate court to declare that exclusionary transgender bathroom policies cannot prevail under *Bostock*'s expanded definition of discrimination on the basis of sex.

[157] *Id.* at 31.
[158] *Id.* at 42.
[159] *Id.* at 36.
[160] *Id.* at 12.
[161] *Id.* at 33.
[162] *Id.* at 41.

In his dissenting opinion, the-now Chief Judge Pryor argued that the policy does not discriminate on the basis of sex because it relies upon sex-segregated facilities, which are permissible under Title IX.[163] In his view, the opinion calls into question the constitutionality of sex-segregated facilities themselves to reach "…the remarkable conclusion that schoolchildren have no sex-specific privacy interests when using the bathroom."[164] Considering the fact that the school presented no concrete evidence that any student expressed this concern, Judge Pryor's argument seems deficient.

Moreover, nowhere in the opinion do the judges suggest sex-segregated facilities must be completely abolished. Instead the majority reiterates, "…the constitutionality of gender-separated bathrooms is not before us… no one has argued here that separating men and women's restrooms treats men and women unequally, lacks any factual basis, or perpetuates 'invidious, archaic, and overbroad stereotypes' about gender."[165] Pryor's continued assertion that the majority opinion permits the eradication of sex-segregated facilities is unsubstantiated, and he conflates sex- and transgender-based classifications to completely distort the school board's policy.

In addressing the Equal Protection claim, Pryor maintained that the policy survived heightened scrutiny because it served the interest of protecting students from being exposed to the opposite sex.[166] He attempted to demonstrate that the policy was substantially related to this interest by drawing upon data from the student population. Out of the 40,000 students in the school district, officials were aware of sixteen transgender students when the case was heard. By doing a simple mathematical equation, Judge Pryor calculated that the policy was 99.96% accurate in

[163] *Id.* at 55.
[164] *Id.* at 47.
[165] *Id.* at 29.
[166] *Id.* at 48.

properly separating bathrooms by sex. This "near perfect result" proved that the policy was substantially related to the school's interest in protecting student privacy.[167]

While this percentage may be accurate (it does not account for transgender students that school board is unaware of), this reasoning completely undermines Title IX's primary objective: to provide an educational experience free from discriminatory treatment on the basis of sex. Though the policy may only affect a small population of St. Johns County students, in refusing to provide accommodations for transgender individuals, the school board willing tolerated inflicting harm and hardship upon its students. Though Judge Pryor is correct that the Supreme Court held that *Bostock* does not automatically apply to other areas of the law, his failure to truly consider the implications of the decision, as well as his complete disregard for the precedence established in previous cases, like *Glenn* and *Whitaker,* significantly weakens his argument.

Regardless of Judge Pryor's dissent, the *Adams* decision is pivotal as it effectively relies upon the precedent set in in *Bostock's* to uphold transgender student protections under Title IX and the Equal Protection Clause. In light of a pending motion for reconsideration of the case by the entire Eleventh Circuit in June 2021, the three-judge panel that originally issued the decision vacated the ruling and issued a new opinion that reached similar, but more narrow conclusions. The amended opinion finds that the school board's policy for designating a student's sex upon enrollment violates the Fourteenth Amendment due to its arbitrary nature.[168] Interestingly, the judges declined to reach the Title IX issue given that the Equal Protection Claim grants Adams full relief.[169] The revised opinion also dedicates considerable attention to addressing Judge Pryor's dissent. Citing *Craig v. Boren* and other cases*,* the judges held that Judge Pryor's reliance on

[167] *Id.* at 50.
[168] Adams v. School Board of St. Johns County, Florida, No. 18-13592, (11th Cir. 2021) at 3.
[169] *Adams v. School Board of St. Johns County* at 38.

statistics to determine the soundness of the school's policy was unsettling as the "The relevant inquiry in this case is not what percentage of St. Johns' students are transgender, but whether the challenged policy furthers the important goal of student privacy."[170]

Despite its narrower scope, the July 2021 decision continues to uphold transgender student protections by ruling that the school's policy violates the Fourteenth Amendment. Regardless of *Bostock* and the overwhelming support for inclusive transgender restroom polices among federal appellate courts, the school board submitted a request for rehearing by the full Eleventh Circuit in August 2021.[171] The case was reheard on February 22, 2022 by a 12-judge court, but as of May 2022, no decision has been released.[172] Though a different outcome is possible, given *Bostock's* precedent and the consensus among the circuit courts regarding transgender protections under the law, it is unlikely the *Adams* decision will be significantly altered.

Grimm v. Gloucester County School Board

Only a few weeks later, the Eleventh Circuit's reasoning was further substantiated by the Fourth Circuit Court of Appeals' decision in the seminal case *Grimm v. Gloucester County School Board.* Following his gender transition, Gavin Grimm a transgender male student, was prohibited from using the boys' restroom beginning his sophomore year of high school.[173] Although Grimm used the boys' restrooms for seven weeks without issue, when the school board began receiving complaints from the community, it adopted a new policy that students must use the restrooms consistent with their "biological gender" and those with "gender identity issues" could use single-

[170] *Id.* at 35.
[171] "Adams v. School Board of St. John's County, Florida," *Freedom for All Americans* (blog), accessed December 28, 2021, https://freedomforallamericans.org/litigation/adams-v-school-board-of-st-johns-county-florida/.
[172] Patrick Dorrian, "Biden Officials to Back Trans Student in Florida Bathroom Fight," Bloomberg Law, February 22, 2022, https://news.bloomberglaw.com/litigation/biden-officials-to-back-trans-student-in-florida-bathroom-fight.
[173] Grimm v. Gloucester County School Board, No. 822 F.3d 709 (4th Cir. 2020) at 14-15.

stall gender-neutral alternatives.[174] Grimm found the policy's single-stall stipulation to be isolating and stigmatizing, which led him to practice "restroom avoidance" and caused him to develop serious mental health issues.[175]

Grimm sued the school board in 2015 on the grounds that preventing him from using the boys' restroom violated the Equal Protection Clause of the Fourteenth Amendment and constituted sex discrimination under Title IX. The Eastern District Court of Virginia denied Grimm's motion for preliminary injunction, stating it would not defer to the Obama administration's Dear Colleague Letter (DCL) requiring that transgender students be treated consistent with their gender identity.[176] In 2016, the Fourth Circuit Court of Appeals reversed the District Court's decision, holding that Grimm must be allowed to use the boys' restroom.[177] Despite this victory for LGBTQ+ students, marking the first time a federal court of appeals ruled on the issue of transgender restroom access, the Supreme Court remanded the case to the Fourth Circuit for reconsideration in light of the Trump administration's withdrawal of the Obama administration's Title IX guidance in February 2017.[178]

In 2017, during his senior year of high school, Grimm received an updated birth certificate from the state of Virginia confirming his male sex. When he asked school administrators to amend his records to reflect this change, they refused, claiming the birth certificate was invalid.[179] Grimm filed an amended complaint, alleging that in addition to violating Title IX, the school's refusal to update his records to match his gender identity also violated the Equal Protection Clause.

[174] *Grimm v. Gloucester* at 16.
[175] *Id.* at 20.
[176] *Id.* at 22.
[177] *Id.* at 24.
[178] *Id.* at 23.
[179] *Id.* at 21.

Following two more years of litigation in the lower courts, the case came before the Fourth Circuit once again in 2020 for review.

Following its second rehearing, the Fourth Circuit Court ultimately ruled in Grimm's favor, reaching a conclusion similar to its 2016 ruling: the school board's policy prohibiting transgender students from using restrooms consistent with their gender identity and refusing to amend school records violates the Equal Protection Clause of the Fourteenth Amendment and constitutes sex-based discrimination under Title IX.[180]

After establishing that Grimm's claim could not be thrown out on an administrative technicality, the court held in a 2-1 decision that the school board's policy violated the Equal Protection Clause because it was not "substantially related to a sufficiently important governmental interest."[181] Under a heightened standard of review, the court held that the policy did not stand.[182] Not only had Grimm used the boys' restroom for seven weeks without incident, but also the "…[b]odily privacy of cisgender boys…did not increase when Grimm was banned from those restrooms."[183] As with many other cases concerning the bathroom debate, the school board failed to marshal any concrete evidence to support the alleged student privacy concerns.[184] Although *Parents for Privacy v. Barr* and *Doe v. Boyertown* provide evidence of these allegations, as stated in these decisions, privacy concerns do not outweigh the harms imposed upon transgender students who are denied the right to use the facilities consistent with their gender identity.

Therefore, the policy constituted sex-based discrimination under the Equal Protection Clause because it treated Grimm differently than other boys and also penalized him for failing to

[180] *Id.* at 5.
[181] *Id.* at 33.
[182] *Id.* at 49.
[183] *Id.* at 47.
[184] *Id.* at 48.

conform to gender stereotypes.[185] Although the Seventh Circuit and the Eleventh Circuit reached similar conclusions in *Whitaker* and *Adams*, respectively, the Fourth Circuit utilized *Bostock* to address the Fourteenth Amendment claim. [186] In applying *Bostock,* a statutory decision, to the Fourteenth Amendment, the Fourth Circuit introduced another complementary legal rationale for adjudicating claims of sex discrimination in schools under the Constitution. The application of *Bostock* not only strengthens the relationship between Title VII and Title IX case law, but it also reinforces the connection between statutory protections and constitutional protections in the school context.

In reviewing Grimm's Title IX claim, the court again applied *Bostock's* definition of "sex." Following the same logic as their Fourteenth Amendment reasoning, it held that even if the school board intended to discriminate against Grimm's gender identity, it could not do so without referencing his sex. Therefore, the policy was discriminatory on the basis of sex because sex was the ultimate but-for cause for the board's actions.[187]

The dissenting opinion issued by Judge Niemeyer restates many of the arguments put forth in the *Adams* dissent. Niemeyer maintains that the policy was not discriminatory because it created distinctions based on sex permissible by Title IX.[188] In regard to the Equal Protection claim, he believes Grimm was not discriminated against since his female birth sex situated him differently

[185] *Id.* at 36 and 38.
[186] Moreover, the school's refusal to amend Grimm's records was also deemed unconstitutional under the Equal Protection Clause. Unlike students whose gender matches their birth sex, Grimm was unable to obtain a transcript indicating reflecting his male sex. This presented many difficulties for Grimm when applying for college as his high school transcript still identified his sex as female. Based on this incongruence, the court ruled that the school's decision to not amend Grimm's records was discriminatory since it was not substantially related to its important interest of maintaining accurate records. The court eloquently underscores the importance of this finding and protecting transgender student rights in general, writing that "Although preserving sex-assigned-at-birth separated restrooms may rouse more sentiment, the less-contentious school records issue sheds light on why application of such a restroom policy to transgender students is problematic."
[187] *Grimm v. Gloucester* at 52-53.
[188] *Id.* at 76-78.

than his biologically male peers.[189] However, much like Chief Justice Pryor, Judge Niemeyer failed to view transgender status as legitimate and overlooked the true focus of the majority's arguments.

Despite those who claim exclusionary transgender bathroom policies are not discriminatory, another win came for Grimm and LGBTQ+ students across the nation in June 2021 when the Supreme Court denied the school board's writ of certiorari, thereby reinforcing the Fourth Circuit's decision as binding.[190] As the decisions in *Adams* and *Grimm* emphasize, Bostock's expanded definition of sex discrimination has not only been crucial for securing LGBTQ+ rights within the workplace, but in education, as well. Though transgender student rights have primarily experienced increased protections through court decisions in the past thirty years, it is important to note that there are a handful of contradictory decisions that rule against extending legal protections to transgender students.

Anti-Transgender Litigation in Education

Johnston v. University of Pittsburgh

In the 2015 case *Johnston v. University of Pittsburgh,* the Western District Court of Pennsylvania found that the University of Pittsburgh's policy that prohibited transgender students from using the restrooms and locker rooms consistent with their gender identity did not violate the Equal Protection Clause of the Fourteenth Amendment, Title IX, and other state statutes designed to protect against discrimination.[191] When Seamus Johnston, a transgender male student, enrolled in the University of Pittsburgh in 2009, he listed his sex as "female" since his legal documents did

[189] *Id.* at 94.
[190] "Grimm v. Gloucester County School Board," American Civil Liberties Union, October 6, 2021, https://www.aclu.org/cases/grimm-v-gloucester-county-school-board.
[191] Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education et al, No. 97 F. Supp. 3d 657 (W.D. Pa. 2015 2015) at 11.

not yet reflect his gender identity. Although Johnston had used the boys' restroom and locker room facilities, as well as had taken a men-only weight training class during his first two years of college, in 2011 he was informed he could not use the male facilities until he presented an updated birth certificate.[192] Despite this warning, Johnston continued use the male facilities, which resulted in many disciplinary measures and sanctions, and eventually expulsion from the college, as well as a criminal charge for "indecent exposure, criminal trespass, and disorderly conduct."[193] In 2013, Johnston filed a four-count complaint against the University. The University subsequently filed a motion to dismiss.[194]

In a memorandum opinion, the District Court denied all four claims, finding that the University's policy was not discriminatory.[195] Although Johnston argued that he was treated differently from similarly situated students, the court held that he failed to state a cognizable claim under the Equal Protection Clause. Since "transgender" is not a suspect class, it reviewed the policy using the rational basis standard.[196] Under this standard, the court found that the University's policy advanced its interest in "…providing its students with a safe and comfortable environment for performing…life functions."[197] In short, the court ruled that protecting non-transgender students' privacy outweighed transgender students' ability to use facilities that correspond with their gender identity.

The court further opined that decisions such as *Smith v. City of Salem* and *Glenn v. Brumby* were not applicable because they did not "…treat transgender status, in and of itself, as a suspect classification," and since Johnston did not allege a gender stereotyping claim under the *Price*

[192] *Id.* at 4-5.
[193] *Id.* at 5-7.
[194] *Id.* at 9.
[195] *Id.* at 11.
[196] *Id.* at 14-15.
[197] *Id.* at 16.

theory, his Equal Protection rights were not violated.[198] Turning to cases from the 1980s, the court held that Johnston did not experience discrimination on the basis of sex under 1984 case *Ulane v. E. Airlines, Inc* which defines sex as the biological sex at birth.[199] Despite the fact that numerous cases prior to 2015 recognized *Price* as the standard for adjudicating claims of sex discrimination under Title VII and Title IX, the court asserted that since "…neither the Supreme Court nor the Third Circuit has addressed the precise issue, this Court will follow the definition embraced by *Ulane* and its progeny."[200] Given the fact that the Third Circuit ruled on this "precise issue" only three years later, it is unlikely the District Court would reach the same conclusion in the present day.

Nonetheless, the court continued with this line of reasoning when addressing Johnston's claim that the policy was discriminatory under Title IX because it discriminated against him on his transgender status and gender nonconformity. Relying on the "plain language" of the statute and the dictionary definition of sex, the court concluded that Title IX does not prohibit discrimination on the basis of gender identity.[201] Claiming there was little Title IX judicial guidance on the issue, the court differed to Title VII cases, where it found no court had explicitly ruled that Title VII protections encompass transgender status. In the court's view, cases like *Smith,* "…did not conclude that 'transgender' is a protected class under Title VII, but only that a male or female who is also transgender can assert a sex stereotyping claim under Title VII for adverse employment actions."[202] Once again, the court looked to outdated judicial decisions to conclude

[198] *Id.* at 17.
[199] *Id.* at 20.
[200] *Id.* at 20.
[201] *Id.* at, 23-24.
[202] *Id.* at 27.

sex discrimination did not encompass transgender status, and therefore the University's policy did not discriminate on the basis of sex.[203]

In addressing Johnston's sex-stereotyping claim, the court relied on Third Circuit cases that misconstrue *Price* to protect against harassment based on sex, not discrimination on the basis of sex.[204] Based on this analysis, it found that in order to state a cognizable sex-stereotyping claim, "…a plaintiff must allege that he did not conform to his harasser's vision of how a man should look, speak, and act."[205] Therefore, since the University only relied on sex as a classifying factor to prohibit Johnston from using the bathrooms and locker rooms consistent with his gender identity, it did not violate Title IX by discriminating against him for the way he "looked, acted, or spoke."[206] The court did not reach Johnston's state-law claims because he failed to allege a plausible federal claim for relief under the Equal Protection Clause or Title IX.[207] Eventually, the case was settled in 2016 under the University's newly-appointed associate vice chancellor for diversity and inclusion who vowed to "…ensure that all students have an on-campus experience that is inclusive and respectful of students' rights, including their gender identity…"[208]

Though the *Johnston* opinion worked against the expansion of transgender student rights, at the time of its adjudication there was not a definitive judicial stance on the issue of transgender student bathroom access. Considering that the case was settled and subsequent decisions rule in favor of transgender student protections, the District Court's narrow approach in interpretating related Title VII cases has since been invalidated.

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[203] *Id.* at 34.
[204] *Id.* at 34-35.
[205] *Id.* at 37.
[206] *Id.* at 39.
[207] *Id.* at 12.
[208] "Joint Statement from the University of Pittsburgh and Seamus Johnston," University of Pittsburgh News, March 29, 2016, https://www.news.pitt.edu/news/joint-statement-university-pittsburgh-and-seamus-johnston.

Texas v. United States

In a related 2016 case, *Texas v. United States,* the Northern District Court of Texas reached a similar conclusion. Following the Obama administration's enactment of its Title IX guidance on transgender students in 2016, thirteen states and agencies along with two school districts sued the Department of Education, the Equal Employment Opportunity Commission (EEOC), and other federal agencies.[209] The plaintiffs claimed that requiring schools to allow transgender students to use facilities that correspond with their gender identity is unlawful because "sex" was defined as the biological differences between men and women when Congress enacted Title VII and Title IX.[210] Although the court accepted this argument, under *Bostock* it is unlikely this rationale would succeed since the decision makes clear that legislative intent is not an acceptable basis for defining protections under the law.

Nonetheless, because the Obama administration did not adhere to the proper notice-and-comment process outlined by the Administrative Procedure Act, the district judge found that the state agencies were not required to grant deference to the guidance.[211] In declaring that the states were not required to adopt the Obama administration's Title IX regulations, the court ultimately concluded that Title IX and Title VII do not prohibit discrimination on the basis of gender identity.[212] Although this decision worked against the expansion of transgender rights under both Title IX and Title VII, upon the Trump administration's recission of the Obama administration's Title IX guidance in February 2017, the plaintiffs withdrew their complaint and the case never reached the Fifth Circuit Court of Appeals for review.[213]

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[209] Texas v. United States, No. 201 F. Supp. 3d 810 (U.S. District Court for the Northern District of Texas, Wichita Falls Division 2016) at 10.
[210] *Id.* at 10-11.
[211] *Id.* at 20.
[212] *Id.* at 29.
[213] Texas v. United States, No. 16-11534 (5th Cir. 2017).

While the facts of this case do not involve any specific school district or its policies, during the roughly seven-month period the decision applied, claims of discrimination on the basis of gender nonconformity under Title VII and Title IX were no longer valid in many jurisdictions across the nation. The hostility exhibited toward the expansion of transgender protections through executive guidance underlines the importance of securing protections outside of the Title IX realm in order to safeguard transgender students from reactionary responses to changing administrative guidelines. Though this decision allowed for discriminatory treatment toward LGBTQ+ individuals to be tolerated, in light of the case's withdrawal and the most recent transgender litigation, the decision no longer carries much legal weight.

Although the courts' decisions in *Johnston* and *Texas* and in other similar cases denied protections to transgender students, following *Whitaker,* and certainly *Bostock,* much of the reasoning presented in these opinions are no longer valid under the expanded definition of sex. Thus, while these cases are important to consider in order to understand the extent of the transgender rights across the country, subsequent rulings render these opinions less significant.

Conclusion: The Power of the Courts

The overall success of advancing transgender rights through the judiciary suggests that the courts may be the most successful avenue for expanding transgender rights under the law. By building upon previous decisions to gradually extend the scope of Title VII, Title IX, and the Equal Protection Clause, transgender individuals now have a strong legal foundation for addressing claims of sex discrimination in both the workplace and the school setting. Table 1.2 provides an overview of the cases discussed in this chapter and Chapter II and their unique roles in expanding transgender protections.

The importance of *Bostock v. Clayton County* in ensuring these protections must be underscored. While it is likely that federal appellate courts would have continued to uphold transgender student protections under *Price Waterhouse*'s theory of sex-stereotyping, as in cases such as *Whitaker v. Kenosha*, the *Bostock* decision firmly establishes the precedent that students cannot be discriminated against on the basis of their transgender status. Not only does this declaration effectively overturn anti-transgender decisions, like those in *Johnston v. University of Pittsburgh* or *Texas v. United States,* but it also sends the strong message that school policies and practices denying transgender students access to facilities consistent with their gender identity are unlawful, as demonstrated in in *Adams v. School Board of St. Johns County* and *Grimm v. Gloucester*.

Though many remain opposed to *Bostock*'s far-reaching legal consequences, the decision is not as radical as some may perceive it to be. As the long legal history explained in this chapter and the previous one demonstrates, in many ways, the Supreme Court simply reaffirmed what numerous lower courts had maintained for years. Though the Biden administration's executive orders mandating the application of *Bostock* to Title IX raises questions of constitutionality, a court's decision to integrate *Bostock* into Title IX cases involving sex discrimination is not out of the ordinary. As Table 1.2, which appears on page 70, shows, the reliance upon Title VII decisions to expand transgender student protections has occurred for over twenty years. Though individuals and state officials may question the executive branch's integration of *Bostock* into its Title IX and Title VII guidance*,* it is much more challenging to dispute the principle of judicial deference.

For this reason, it is imperative to continue to advance transgender student rights through the courts. While the executive branch contributes to directing transgender protections under the law, the turbulent nature of administrative guidance can also be extremely detrimental. Within the

last ten years, Title IX transgender protections have taken many shapes. From inclusive policies under the Obama administration, to relatively no legal standing under the Trump administration, and most recently, robust protections under President Biden's direction, it is clear that changing policies in presidential administrations have subjected Title IX transgender protections to great uncertainty. Although the executive branch has generally favored transgender student protections, as the Trump administration's stark rollback of almost all LGBTQ+ student rights illustrate, transgender student protection under Title IX is not guaranteed.

Unlike administrative guidance, however, state and federal court decisions are particularly beneficial for securing transgender student protections because they are insulated from changing administrations and are much more tedious to overturn than executive guidance. Though it is likely cases involving exclusionary transgender policies will continue to arise, *Bostock,* along with the growing case law supporting transgender students, indicates that the contentious bathroom debate may have been put to rest.

This assertion is further supported by the introduction of the Equal Protection Clause to Title IX cases. Although the majority of the courts in this chapter did not rely solely upon Title IX regulations when reaching its decision, a handful of cases grappled with the temporal and often contradictory nature of executive Title IX guidance. Most prominently, *Grimm v. Gloucester* was remanded to the Fourth Circuit due to changing Title IX regulations. In *Parents for Privacy v. Barr* and *Adams v. St Johns County,* the decisions also note that the withdrawal of Title IX documents present a potential issue.[214] Evidentially, changing Title IX guidelines is not only harmful for

[214] In *Parents for Privacy v. Barr* the plaintiffs argued that "…the withdrawal of the relevant guidance documents, the Federal Defendants, in part, caused the District to adopt the Student Safety Plan, because the guidance 'has not been formally repealed, and it has continuing legal force and effort [that is] binding.'" Similarly, in *Adams v. St Johns County,* the court addresses this issue, writing "The School Board believes the withdrawal of the 2016 guidance signifies the DOE's new position that sex discrimination does not include discrimination because of gender identity.

transgender student protections, but as *Texas v. United States* demonstrates, also raises questions of constitutionality.

Considering the complicated problem of judicial deference to executive Title IX regulations, the introduction of the Equal Protection Clause presents transgender students with a sound legal basis for staking claims of sex discrimination despite changing Title IX guidelines. Pulling transgender student protections out of statutory law means these students are no longer confined to the parameters set forth by changing presidential administrations. While this is still an emerging area of Title IX litigation, the growing reliance on the Fourteenth Amendment to support transgender student litigation suggests these rights could be definitively secured in schools despite what the executive branch dictates. It is likely that this legal foundation will inform the most recent issue facing transgender students: participation in athletics. Unlike the bathroom debate, there has been less conclusive guidance on transgender athletes from the executive branch and courts alike. However, the strong legal foundation established to address the bathroom controversy is hopeful evidence that the trend toward transgender equity will continue in school sports.

We are unpersuaded. The 2017 letter contained no substantive interpretation of the meaning of 'sex discrimination' in Title IX. It merely withdrew the 2016 guidance for lack of sufficient legal explanation and formal process."

Table 1.2 The Relationship Between Title VII and Title IX Jurisprudence

Case	Year	Court	Decision	Title VII	Title IX	EPC*	Due Process	Unenumerated Constitutional protections	State law claim
Price Waterhouse v. Hopkins	1989	Supreme Court	Gender stereotyping constitutes sex discrimination under Title VII.	X					
Nabozny v. Podlesny	1996	7th Cir.	Schools can be held liable for failing to protect homosexual students from harassment.			X	X		
Onacle v. Sundowner Offshore Services, Inc.	1998	Supreme Court	Same-sex sexual harassment constitutes sex discrimination under Title VII.	X					
Montgomery v. Independent Sch. Dist.	2000	District court	Harassment toward students based on gender non-conformity constitutes harassment prohibited by Title IX.		X**	X	X		X
Smith v. City of Salem	2004	6th Cir.	Sex stereotyping based on a person's gender non-conforming behavior constitutes discrimination under Title VII.	X		X	X		
Glenn v. Brumby	2011	11th Cir.	Per *Price*'s theory of sex-stereotyping, discriminating against an individual on the basis of their gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause.			X			
Johnston v. Univ. of Pittsburgh	2015	District court	A university does not violate the Equal Protection Clause or Title IX by denying transgender students from the restroom/locker room that corresponds with their gender identity.		X	X	X		X
Texas v. United States	2016	District court	Title IX and Title VII protections do not prohibit discrimination on the basis of gender identity.	X	X				
Whitaker v. Kenosha Unified Sch. Dist.	2017	7th Cir.	Per *Price*'s theory of sex-stereotyping, a school policy that requires transgender students to use a bathroom opposite their gender identity punishes violates Title IX and the EPC.		X	X			
*Doe v. Boyertown Area Sch. Dist.***	2018	3rd Cir.	A school's policy permitting transgender students to use restrooms/locker rooms consistent with their gender identity does not violate cisgender 14th Amendment privacy protections under the EPC or violate Title IX.		X			X	X
*Parents for Privacy v. Barr****	2020	9th Cir.	A school's policy permitting transgender students to use restrooms/locker rooms consistent with their gender identity does not violate cisgender 14th Amendment privacy protections under the Due Process clause, Title IX, or the First Amendment right of free exercise of religion.		X		X	X	
Bostock v. Clayton County	2020	Supreme Court	Title VII's prohibition on sex discrimination in the workplace encompasses discrimination on the basis of sexual orientation and gender identity.	X					
Adams v. St. John's County, Florida	2020	11th Cir.	A school policy that prohibits transgender students from using the restroom that corresponds to their gender identity violates Title IX and the EPC.		X	X			
Grimm v. Gloucester	2020	4th Cir.	A school policy that prohibits transgender students from using the restroom that corresponds to their gender identity, as well as refusing to amend school records, violates Title IX and the EPC.		X	X			

Red denotes unsuccessful claims.
*EPC = Equal Protection Clause of the Fourteenth Amendment.
**In *Montgomery,* the Title IX claim prevailed under theories of sexual harassment, not discrimination based on sex.
***Analyses for these cases are from the plaintiff's (non-transgender individuals) perspective.

CHAPTER IV

The Future of Transgender Student Litigation: Athletics

While the bathroom debate is now more or less settled, addressing how transgender students fit into the athletic realm is a much more challenging task. Despite resounding judicial support for inclusive transgender student bathroom policies, the transgender athlete debate emphasizes how athletic policies are markedly different than restroom policies and thus require independent consideration.[215] Recent interpretations of Title IX allow for two equally valid claims of discrimination to be made by both cisgender and transgender students. Those who oppose transgender athletes, particularly transgender females, argue that the biological differences between men and women give transgender females an unfair competitive advantage over cisgender athletes, thus reducing opportunities for success for female athletes in violation of Title IX. However, others view policies barring transgender athletes from participating on the team consistent with their gender identity as discriminatory on the basis of sex under the *Bostock* decision. The delicate balance between creating an inclusive and equitable athletic environment for transgender students while still protecting and promoting equal opportunities in sports for female athletes lies at the heart of the issue.

This chapter will explore the growing number of transgender student athlete cases to ascertain the judiciary's current stance on the legal questions. Relying upon established transgender student case law, it will also consider potential limitations in applying the rationale expounded in transgender student bathroom cases to those regarding athletic participation. Though

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[215] Cole, "Title IX's Application to Transgender Athletes: Recent Developments"; Michael J. Lenzi, "The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies," American University Washington College of Law, accessed February 24, 2022, 881, https://www.wcl.american.edu/impact/lawwire/the-trans-athlete-dilemma-a-constitutional-analysis-of-high-school-transgender-student-athlete-policies/.

transgender student athlete cases are still in their earliest stages of litigation, recent memorandum opinions and orders suggest that the courts will play a substantial role in guiding the development of legal protections for transgender student athletes. Taking into account state polices that restrict transgender students' ability to participate in sports as well as changing administrative guidelines, this chapter aims to support the overarching argument that the courts are best suited to expand transgender student rights under the law.

Executive Branch Involvement

The debate surrounding transgender student athlete participation in sports is a relatively new development in cases involving transgender rights. Unlike the bathroom debate that spans over the last twenty years, awareness of transgender student athletes and subsequent litigation arose in the 2010s following a series of executive orders and notices.

In 2015, James A. Ferg-Cadima, Obama's Acting Deputy Assistant Secretary for Policy, wrote in his "Letter to Emily Prince" that schools "…generally must treat transgender students consistent with their gender identity."[216] Though he was mostly referring to sex-segregated restroom and locker room facilities, the letter raised questions about how transgender student athletes would fit into Title IX-sanctioned sex-segregated sports. The Obama administration's stance on the matter was confirmed in its 2016 Dear Colleague Letter (DCL) which stated that schools must treat "…a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity."[217] Despite the stipulation that schools must treat transgender students consistent with their gender identity, the

[216] Ferg-Cadima, "Letter to Emily Prince from James Ferg-Cadima, Acting Deputy Assistant Secretary for Policy" 2.
[217] Lhamon and Gupta, "Dear Colleague Letter on Transgender Students" 2.

DCL specifically stated that Title IX "…does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport."[218] Though the Obama administration was enthusiastically supportive of inclusive transgender student policies in general, this statement created a level of ambiguity concerning the types of student athlete policies permissible under Title IX during his presidency. The fact that the DCL attempted to promote transgender inclusion in schools, while simultaneously failing to offer clear guidance on athletics, exemplifies the difficulty of creating inclusionary transgender polices while still respecting a central goal of Title IX: promoting equality for a traditionally under-supported group—female athletes.[219]

The Obama administration's liberal approach to Title IX transgender regulations drastically shifted when President Trump came into office. Due to the discontinuities regarding the interpretation of sex in Title IX between the Fourth Circuit Court of Appeals in *Grimm v. Gloucester* and the federal district court in Texas in *Texas v. United States*, the administration withdrew Obama's guidance in February 2017 using a Dear Colleague Letter.[220] Though the DCL insisted that "All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment," the lack of clear guidelines on how to accomplish this goal made it difficult to interpret Title IX and how it applied, if at all, to transgender students.

Over three years later in May 2020, the Trump administration finally released its updated Title IX guidelines in a 554-page document titled "Nondiscrimination on the Basis of Sex in

[218] Lhamon and Gupta, "Dear Colleague Letter on Transgender Students," 3.
[219] Julie Tamerler, "Transgender Athletes and Title IX: An Uncertain Future," *Jeffrey S. Moorad Sports Law Journal* 27, no. 1 (March 22, 2020): 151.
[220] Melnick, *The Transformation of Title IX,* 233-235.

Education Programs or Activities Receiving Federal Financial Assistance."[221] As mentioned previously, the document implemented highly controversial changes to Title IX's sexual harassment policy but made little mention of how the administration would address LGBTQ+ students. In regard to transgender student athletes specifically, the document asserted "These final regulations concern sexual harassment and not the participation of individuals, including transgender individuals, in sports or other competitive activities," underlining a consistent theme throughout Trump administration of refusing to confront transgender youths.[222]

Just over a year after the implementation of the Trump administration's Title IX guidance, in March 2021, President Biden completely reversed his predecessor's polices. Biden announced in Executive Order 14021 that his administration's understanding of Title IX discrimination on the basis of sex includes both sexual orientation and gender identity.[223] Three months later in June 2021, the Office of Civil Rights (OCR) affirmed Biden's order stating that in light of the *Bostock* decision, it would enforce Title IX to prohibit discrimination on the basis of sexual orientation and gender identity in all educational programs that receive federal dollars.[224] Though the notice of interpretation does not mention transgender athletes specifically, it does recognize that discriminatory treatment includes polices that enable students to be "…excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities…"[225] This suggests that the provision applies in equal force to transgender student athletes. While the Biden administration's official Title IX regulations will

[221] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.
[222] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 310179.
[223] Exec. Order 14021.
[224] Goldberg, "Letter to Students, Educators, and Other Stakeholders Re Executive Order 14021," 1.
[225] Goldberg, "Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County," 11.

not be released until 2022, it is likely that they will continue to build upon the current documents and support the expansion of transgender student rights in athletics.[226] This view is supported by the Biden administration's filing of amici briefs in important transgender student right cases, such as *Adams v. School Board of St. John's County* and *B.P.J. v. West Virginia.*[227]

As with the debate surrounding transgender student bathroom access, the past three presidential administrations have advanced vastly different Title IX protections for transgender student athletes. As argued previously, the fluctuating nature of administrative Title IX guidance subjects transgender student athlete protections to great uncertainty. The question of transgender student athlete eligibility carries another level of complexity as several states have subverted the current administration's position on the issue through legislative measures that outwardly prohibit transgender student athletes from participating on sports teams consistent with their gender identity. Unlike the bathroom debate, however, these policies have been enacted on the state level rather than the local level, which undoubtedly impacts a much larger population of students. Backed by the power and legitimacy of a legislative body rather than the small-scale policymaking measures of school boards, these pieces of legislation raise significant alarm for transgender student athletes across the country.

Anti-Trans Athlete Legislation

States are at odds with one another about how to address transgender student athletes; some legislatures are expanding protections for transgender student athletes, while many more are restricting the rights of transgender students at the outset. In March 2020, Idaho became the first

[226] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.
[227] "B.P.J. v. West Virginia State Board of Education," American Civil Liberties Union, accessed March 15, 2022, https://www.aclu.org/cases/bpj-v-west-virginia-state-board-education; "Adams v. The School Board of St. Johns County, Florida," Lambda Legal, accessed March 15, 2022, https://www.lambdalegal.org/in-court/cases/fl_adams-v-school-board-st-johns-county.

state to categorically bar transgender female athletes from participating in women's sports with the passage of the Fairness in Women's Sports Act. Following Idaho's lead, eleven additional states passed legislation to prohibit transgender student athletes from participating on the sports team that corresponds with their gender identity.[228] On the other hand, fifteen states and Washington D.C. have specific laws that protect transgender students from discrimination by allowing them to participate in sports consistent with their gender identity.[229] Yet, in addition to the current twelve states that have exclusionary transgender athlete laws, there are a number of other state legislature across the country working to enact their own version of Idaho's ban.

2021 was a record-breaking year for anti-transgender student athlete legislation.[230] Despite the fact that there is little to no scientific evidence behind these polices, by the end of the 2021 legislative session, over 94 pieces of legislation had been introduced in thirty-six state legislatures across the country.[231] This trend continues to persist. As of May 2022, there are currently over forty proposed bills pending in twenty-five different state legislatures that aim to bar transgender students, especially transgender females, from participating in women's sports.[232] Though these bills primarily originate in conservative states, state legislatures with proposed anti-trans bills include liberal-leaning states like Rhode Island and Illinois.[233]

The divided state legislative landscape creates many obstacles for transgender student athletes. Without federal legislative guidance on the matter, legal protections for transgender athletes depends primarily on where students live and go to school. This not only precipitates

[228] "Bans on Transgender Youth Participation in Sports," Movement Advancement Project, March 3, 2022, https://www.lgbtmap.org/equality-maps/sports_participation_bans.
[229] Shoshana K. Goldberg, "Fair Play: The Importance of Sports Participation for Transgender Youth" (Center for American Progress, February 8, 2021), https://www.americanprogress.org/article/fair-play/.
[230] LePage, "What's Behind the Legislative Push to Ban Transgender Athletes."
[231] LePage, "What's Behind the Legislative Push to Ban Transgender Athletes."
[232] "Legislative Tracker: Youth Sports Bans Filed in the 2022 Legislative Session," *Freedom for All Americans*, accessed May 28, 2022, https://freedomforallamericans.org/legislative-tracker/student-athletics/.
[233] "Legislative Tracker: Youth Sports Bans Filed in the 2022 Legislative Session."

inequitable treatment, but it also creates a disjointed legal landscape that is challenging to navigate on the national level. Moreover, states with exclusionary policies contradict both the *Bostock* decision and the Biden administration's stance on the matter. The discord on the issue of transgender student athletes between the Supreme Court, the current presidential administration, and state legislatures underscores the need for clear judicial review and guidance on how to best address legal protections for transgender student athletes.

Considering anti-trans legislative proposals, as well as changing executive guidelines, as with the bathroom debate, it is important to turn to the courts to provide more stable guidance on how to address transgender student athlete protections. Though transgender athlete cases are still in their earliest stages of litigation, the decisions and orders issued by courts around the country thus far provide a window into how transgender student athlete protections may change through judicial intervention in the near future.

Current Litigation

Unlike the multiple settled cases involving transgender students' access to restroom facilities consistent with their gender identity, there are currently no transgender student athlete cases that have reached a definitive decision. More importantly, in the three most legally robust pending cases, courts have refrained from addressing the constitutionality of transgender student athlete participation in sports, instead opting to take a more neutral approach by deciding cases on technicalities. Nonetheless, these cases are important to examine as they are working to build the foundation for future discussions and are indicative of the direction the courts may take on the issue.

Soule v. Connecticut Association et al.

As one of the most highly publicized transgender student cases, *Soule v. Connecticut et al.* greatly propelled the issue of transgender student athlete participation in sports to the national stage. In February 2020, Selina Soule and Chelsea Mitchell, then high school seniors, and Alanna Smith and Ashley Nicoletti, then high school sophomores, sought a preliminary injunction against the Connecticut Interscholastic Athletic Conference's (CIAC) policy that permits transgender students to compete in sports consistent with their gender identity without hormone treatment or surgical procedures.[234] Soule and her peers alleged that without an injunction, they would continue to face unfair competition due to the participation of two transgender female athletes, Andraya Yearwood and Terry Miller, then high school seniors.[235] Prior to seeking an injunction, the plaintiffs filed a federal Title IX complaint with the Office of Civil Rights (OCR) claiming that Yearwood and Miller limited cisgender female athletes' success on the girls' track and field team due to their purported physical advantages. However, following an investigation, the OCR took no action against the two transgender athletes.[236]

Due to the Covid-19 pandemic, the plaintiff's motion for a preliminary injunction was unable to be heard and their request for an expediated trial was denied on the grounds that the 2020 track season was likely to be canceled.[237] Upon resuming litigation, however, both Soule and Mitchell had graduated from high school and were no longer eligible to compete in CIAC-sponsored events.[238]

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[234] Soule et al v. Connecticut Association of Schools, Inc. et al., No. 3:20-cv-00201 (United States District Court for the District of Connecticut 2021) at 2-3 and 5.
[235] *Soule et al v. Connecticut Association of Schools, Inc. et al* at 3.
[236] *Ibid.*.
[237] *Id.* at 4-5.
[238] *Id.* at 8.

The District Court of Connecticut considered whether the plaintiffs maintained standing in obtaining the requested injunction against CIAC's policy following Soule and Mitchell's graduation. In an April 2021 order, a district judge held that the two other plaintiffs, Smith and Nicoletti, who were still eligible to compete in high school track as high school juniors, lacked standing because they failed to identify a transgender student who was likely to compete against them in the upcoming track season.[239]

To address the question of standing, the court turned to the Second Circuit Court of Appeals' "capable of repetition yet evading review" exception. In order to apply the exception and effectively maintain standing, the "injury's reoccurrence," which in this case is the participation of another transgender female athlete on the girls' track and field team, must be "'reasonably likely" and not "…at best, only a theoretical and speculative possibility.'"[240] Since Smith and Nicoletti were unable to identify any transgender female athletes who would compete against them in the 2021 track and field season, the judge declared their case was moot. It is important to note, however, that while this ruling allows CIAC's inclusive transgender student athlete policy to stand, it does not prevent students from filing a new action should a similar situation arise again[241]

The plaintiffs also requested an injunction to alter the records of the races Yearwood and Miller competed in by removing their scores from the final results to move every other female participant up one position.[242] This too, lacked validity because the plaintiffs failed to satisfy the "redressability element of standing."[243] Under this principle, it must be likely, not merely speculative, that a favorable judicial decision would sufficiently rectify the alleged misconduct.

[239] *Id.* at 17.
[240] *Id.* at 16.
[241] *Id.* at 17.
[242] *Id.* at 18.
[243] *Ibid.*

The judge determined, however, that if the court amended the records, it would not significantly address the supposed injuries faced by the cisgender female runners.[244] As explained in the order, Chelsea Miller is the only student to whom this argument applies since eliminating Yearwood and Miller from the records would allow her to add four additional wins to her résumé.[245] However, the judge found this argument unpersuasive as "…it seems inevitable that before making an offer to Mitchell, a prospective employer impressed by her record would learn that she did not actually finish first in the four races…even with the requested changes, Mitchell's position with regard to her employment prospects would remain essentially the same."[246]

Finally, the order held that the plaintiffs were not entitled to monetary damages because per Title IX's regulatory measures the defendants, Yearwood and Miller, did not receive adequate notice that they were liable for the conduct in question.[247] Although the Trump administration withdrew Obama's Title IX guidelines in February 2017, according to the District Court, the Obama guidelines remained in effect until the Trump administration issued its update Title IX regulations, which it did not so until February 2020.[248] Yearwood and Miller were not informed of the OCR's new interpretation of Title IX, one that declared that sex-segregated sports teams must be separated by biological sex, until May 2020, several months after the action was brought against them. Moreover, the Trump administration's guidelines were withdrawn in February 2021, thus rendering its guidance invalid when the District Court reviewed the case.[249]

The complicated role that the OCR guidance plays in this case underscores the argument presented throughout this thesis that relying upon the OCR and presidential administrations to

[244] *Id.* at 19.
[245] *Ibid.*
[246] *Id.* at 19-20.
[247] *Id.* at 21.
[248] *Id.* at 24.
[249] *Id.* at 25.

provide concrete and stable guidelines for transgender students is inadequate for securing transgender student protections under the law. As the judge's discussion of the OCR's changing stance highlights, in a span of only four years, transgender students went from having full protection under Title IX to no protection at all.

Despite the judge's reaffirmation of transgender student athletes' ability to participate in sports consistent with their gender identity, the plaintiffs filed an appeal with the Second Circuit Court in July 2021 hoping to reverse the lower court's order.[250] No further litigation has occurred since. As with other transgender athlete cases, the court's decision focuses on technicalities and fails to grapple with the larger constitutional question of the scope of Title IX and Fourteenth Amendment protections. Though the *Bostock* decision was in effect for nearly a year when this case was last adjudicated, the judge overlooked its influence, writing in a footnote that "The parties dispute the significance of *Bostock* for cases arising under Title IX's prohibition of sex discrimination. But there is no need to get into that dispute now."[251] The failure to apply *Bostock*'s principles indicates the need for additional guidance on the matter, which hopefully the Second Circuit Court of Appeals will provide in a timely manner.

Hecox v. Little

Following the passage of Idaho's Fairness in Women's Sports Act, Lindsay Hecox along with another teenage student, referred to as Jane Doe, filed a motion for preliminary injunction to enjoin the policy, claiming it violates Title IX and the Fourteenth Amendment's guarantee of equal protection.[252] The law contains three primary provisions. First, any public school or institution in

[250] "Soule v. Connecticut Association of Schools," Freedom for All Americans, accessed March 13, 2022, https://freedomforallamericans.org/litigation/soule-v-connecticut-association-of-schools/.
[251] *Soule et al v. Connecticut Association of Schools, Inc. et al* at 29.
[252] Hecox et al. v. Little et al., No. 1:20-cv-00184-DCN (United States District Court for the District of Idaho 2020) at 4 and 13.

Idaho whose students compete against other public schools and institutions must designate sports teams as either male, female, or coed on the basis of "biological sex." It also states that athletic teams designated as "female" are not open to students of the male sex. However, since no comparable provision is provided for sports teams designated as "male," cisgender females or transgender male athletes could play on the boys' teams without issue.[253]

Second, the bill creates a "dispute process" for any individual who wishes to contest the sex of a transgender or cisgender female athletes. To resolve a dispute, female athletes must provide a health examination or other statement signed by their personal health care provider to confirm their female sex.[254] As with the first provision, there is no dispute process in place for those who wish to question the legitimacy of a male athlete's sex since the law does not restrict students' participation on men's teams.[255]

Finally, to ensure compliance, the law outlines an enforcement mechanism that creates a private cause of action for any individual negatively impacted by a violation of the statue.[256] From the time of its introduction to the legislature, both the current and former state Attorney Generals cautioned that the law proscribed disparate treatment on the basis of sex in violation of the Constitution.[257] Regardless of these concerns, as well as the impending Covid-19 pandemic that forced governments across the world to shut down, Governor Little signed the controversial bill into law on March 30, 2020.[258]

Lindsey Hecox is a transgender female student athlete at Boise State University in Idaho. As a lifelong runner, she intended to try out for the Boise State women's cross-country and track

[253] *Hecox v. Little* at 11.
[254] *Id.* at 12.
[255] *Id.* at, 3.
[256] *Id.* at 12.
[257] *Id.* at 9 and 11.
[258] *Id.* at, 4.

teams during the 2020-2021 school year. Under the current National Collegiate Athletic Association (NCAA) rules, Hecox is eligible to participate with her cisgender peers after one year of hormone suppressing treatment, which she has completed.[259] Jane Doe is a seventeen-year-old cisgender female student athlete at Boise High School who worries that under the new law, her "masculine" appearance and characteristics will provoke her competitors to challenge her "biological sex."[260] In response to their motion for preliminary injunction, Governor Little, the Idaho Superintendent of Public Instruction, and a handful of other state actors, filed a motion to dismiss, alleging that Hecox and Doe's claims lacked standing and were not ripe for review.[261] An additional group of two cisgender female collegiate athletes, Madi and MK, filed a concurrent motion to intervene after having "deflating experiences" competing against a transgender female athlete in 2019 at the University of Montana.[262] Though the larger question at hand involves the constitutionality of the Fairness in Women's Sports Act and whether it violates Title IX and the Fourteenth Amendment, at present, the Idaho District Court has only addressed the three separate motions.[263]

As the proceedings demonstrate, *Hecox v. Little* is a complicated case that involves multiple actors with varying interests in defending or disputing the Fairness in Women's Sport's Act. Considering the complexity of the case, which is still in its earliest and most technical stage of litigation, the discussion of the case focuses on the aspects that are most related to the transgender student athlete debate.

[259] *Id.* at 6-7.
[260] *Id.* at 7.
[261] *Id.* at 1.
[262] *Id.* at 8.
[263] *Id.* at 3 and 13.

In August 2020, the Chief Judge of the District of Idaho issued a memorandum opinion and order granting Hecox and Doe's motion for preliminary injunction, granting the motion to intervene, and granting in part and denying in part the defendant's motion to dismiss.[264] Addressing the motion to intervene to determine the parties of the case, the judge held that Madi and MK, the two cisgender female athletes, have a protected interest in ensuring the equality of athletic opportunity. Citing the original intent and premise of Title IX as it has applied to athletics for the last fifty years, the opinion found that protecting cisgender female athletes' access to athletic opportunity is "…unquestionably a legitimate and important interest."[265] By granting the motion to intervene, the decision incorporates the perspective of cisgender athletes whose concerns mirror those of the plaintiff's in *Soule.* This suggests that cisgender student concerns are legitimate and may play a larger role in litigation than they have in cases involving transgender student bathroom access. Though Madi and MK are collegiate athletes who are still subjected to the NCAA's regulations, which permit transgender female athletes to participate on women's teams after a year of hormone treatment, even if a challenged law only partially protects an intervenor from harm it "…does not mean that the intervenor does not have an interest in preserving that partial protection."[266] In recognizing this interest, Madi and MK joined the defendants in defending the Idaho law.

The decision then turned to the defendant's request for a motion to dismiss. The defendants argue that Hecox and Doe lack standing because they failed to allege that they have suffered an injury in fact and there is no guarantee that the law will be enforced against them.[267] They reached this conclusion by reasoning that Hecox cannot be subjected to exclusionary treatment and Doe

[264] *Id.* at 1.
[265] *Id.* at 18.
[266] *Id.* at 19.
[267] *Id.* at 32 and 38.

cannot be subjected to verify her sex until each athlete makes a women's sports team.[268] The judge found this rationale unpersuasive for many reasons.

As it pertains to Hecox, the law is discriminatory because it prevents her from trying out for the women's teams all together.[269] Although, as the state emphasizes, the law has yet to be enforced against her, the Supreme Court has long held that equal protection constitutes "…denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit."[270] Since the law prohibits Hecox from trying out in the first place, thus subjecting her to unequal treatment, Hecox adequately alleged an injury.[271] Moreover, the civil liability faced by schools that permit transgender female athletes to compete means the law's enactment is "…essentially guaranteed," which will inevitably cause harm Hecox in the future.[272]

As pertains to Doe, it is clear that the law subjects her to different and less favorable treatment based on her sex.[273] Male athletes who play on men's teams do not face the risk of having their sex disputed. This creates a disparity based on sex since similarly situated female athletes are subjected to different treatment than similarly situated male athletes—a clear violation of the Fourteenth Amendment.[274] Though Doe's sex has not been challenged, this does not change the fact that the law imposes different treatment for female athletes. The decision adds that "If the Court withholds its decision, both Plaintiffs risk being forced to endure a humiliating dispute process and/or invasive medical examination simply to play sports," further underlining the injustice the law supports.[275] Considering this, the judge rejected the defendant's claim that the

[268] *Id.* at 32.
[269] *Id.* at 33.
[270] *Id.* at 34.
[271] *Id.* at 34.
[272] *Id.* at 33 and 39.
[273] *Id.* at 41.
[274] *Id.* at 43.
[275] *Id.* at 49.

plaintiffs have no standing, denying this part of their requested motion to dismiss. However, the defendant's assertion that Hecox and Doe have only alleged an as-applied challenge to the law was upheld because its provisions can be applied constitutionally.[276] This means that instead of challenging the act "facially," or in all possible applications, further litigation will only consider how the particular application of the law in these circumstances violates Title IX or the Fourteenth Amendment.[277]

Building upon the rationale discussed when reviewing the motion to dismiss, the District Court granted Hecox and Doe's motion for preliminary injunction, holding that under intermediate scrutiny their case is likely to succeed in proving the law is unconstitutional as it discriminates on the basis of transgender status and on the basis of sex.[278] Rather than promoting a general separation between male athletes and female athletes, the law not only excludes transgender student athletes, a historically disadvantaged group, from participating in women's sports, but it also further discriminates against cisgender women by subjecting them to the sex dispute process.[279]

The defendants contend the law is constitutional under the Ninth Circuit's ruling in *Clark ex rel. Clark v. Arizona Interscholastic Association,* which found that there are legitimate reasons for prohibiting males from participating on female sports teams. However, the court underlined that this case is dissimilar as it involves the question of sex-segregated sports teams, which is not central to the case at hand. Moreover, the decision finds that maintaining sex-segregated teams

[276] *Id.* at 50.
[277] *Id.* at 49.
[278] *Id.* at 61.
[279] *Id.* at 64.

does "…not appear to be implicated by allowing transgender women to participate on women's teams."[280]

The defendants then allege that the law is necessary to fulfill the state's interest in promoting "sex equality" by providing opportunities for female athletes to demonstrate their skills and obtain scholarships and other awards.[281] While Hecox and Doe do not debate the importance of these governmental interests, the law does not sufficiently relate to this goal. As demonstrated by the legislative history of the bill, no evidence was provided to establish that transgender females' participation in women's sports displaced cisgender athletes or that such exclusionary legal measures are necessary to promote "sex equality."[282] Furthermore, the defendant's allegation that transgender females hold an "absolute advantage" over their cisgender peers, despite hormone suppressing treatment, is an overbroad generalization that is not based in fact.[283] This claim is not supported by expert medical knowledge and it does not reflect the policies of other elite athletic regulatory bodies, such as the NCAA and the International Olympic Committee (IOC).[284]

Based on this evidence, the court concluded that the law is not substantially related to the goal of protecting equal athletic opportunities for female athletes.[285] In fact, as with many cases concerning the transgender student bathroom debate, the law presents a loophole that undermines sex-specific teams all together. If Hecox's health care provider were to verify her sex as female, which her counsel confirmed that she would, Hecox would be allowed to compete on the women's team without issue.[286] Thus, the true intent behind the law cannot be to promote equal athletic opportunities for female athletes by maintaining sex-segregated sports teams. Instead, as the court

[280] *Id.* at 63 and 66.
[281] *Id.* at 67.
[282] *Id.* at 67.
[283] *Id.* at 74.
[284] *Id.* at 71-72.
[285] *Id.* at 73.
[286] *Id.* at 76.

explains, the legislation serves as an avenue for the Idaho legislature to express its disdain for transgender individuals.[287] Since animus is never an "exceedingly persuasive" justification for discriminatory treatment, nor is unnecessary invasive medical examinations to verify a female athlete's sex, Hecox and Doe's preliminary injunction was granted finding that they are both likely to succeed on the merits.[288]

The court issued a prohibitory injunction to preserve the status quo while awaiting trial on the merits.[289] Prior to the Fairness in Women's Sport's Act, the Idaho High School Activities Association (IHSAA), the primary interscholastic regulatory association in Idaho, allowed K-12 transgender female student athletes to participate on girls' teams after completing one year of hormone therapy to suppress testosterone for the purpose of gender transition.[290] In granting the prohibitory injunction, these standards are in effect in the state of Idaho until the litigation of this case concludes.

Following the Idaho District Court's decision to temporarily enjoin the law, the defendant's filed an appeal with the Ninth Circuit Court in November 2020 claiming that the lower court erred in its decision. Before continuing litigation, however, the Ninth Circuit remanded the case to the District Court in June 2021 to determine if Hecox's claim was moot in light of her changed enrollment status.[291] During the 2021-2022 school year, Hecox took a leave of absence and was not a full-time student at Boise State University, which called into question her eligibility to compete. Four months later in October 2021, the lower court determined that Hecox is still eligible to compete in the NCAA league and that she plans to reenroll in Boise State for the Spring 2022

[287] *Id.* at 76.
[288] *Id.* at 79 and 83.
[289] *Id.* at 56.
[290] *Id.* at 9.
[291] Hecox v. Little Order (United States District Court for the District of Idaho June 24, 2021) at 1.

semester.[292] Since providing the Ninth Circuit with updated facts of the case, no further litigation has ensued. Although the law remains enjoined, until the appellate court offers its opinion on the matter, the future of the case is unclear.

B.P.J. v. West Virginia State Board of Education

Similar to *Hecox*, *B.P.J. v. West Virginia Board of Education* addresses a West Virginia law that prohibits transgender student athletes' participation on a sports team that corresponds with their gender identity. During the 2021 legislative session, the West Virginia state legislature passed the Protect Women's Sports Act which, like *Hecox,* requires that any sports team sponsored by a public secondary school or higher education institution be designated as either male, female, or coed. The law defines "male" and "female" as an individual's "biological sex determined at birth."[293]

In light of this legislation, B.P.J., an eleven-year-old transgender female student in West Virginia, was denied from joining her middle-school's girls' cross-country and track teams.[294] Regardless of the fact that B.P.J has presented as female since the third grade and began hormone therapy to prevent male puberty following her diagnosis of gender dysmorphia in 2019, she was barred from participating on teams consistent with her gender identity when she entered middle school in the fall of 2021.[295] In response, B.P.J.'s mother filed a complaint and a subsequent motion for a preliminary injunction against the West Virginia Board of Education, the Harrison County Board of Education, and other state actors and regulatory agencies, alleging that denying her

[292] Hecox v. Little Stipulated Facts in Response to Ninth Circuit Order (United States District Court for the District of Idaho October 15, 2021) at 10.
[293] B.P.J. v. West Virginia State Board of Education, No. 2:21-cv-00316 (United States District Court for the Southern District of West Virginia 2021) at 3.
[294] *B.P.J. v. West Virginia State Board of Education* at 2.
[295] *Id.* at 2-3.

daughter from participating on the girls' cross-country and track teams violates Title IX and the Equal Protection Clause of the Fourteenth Amendment.[296]

In July 2021, a West Virginia District Court judge issued a memorandum opinion and order granting B.P.J.'s motion to preliminarily enjoin the Protect Women's Sports Act on the grounds that she has a likelihood of success in demonstrating that the statute is unconstitutional and violates Title IX.[297] Regarding the Title IX claim, the opinion cites the Fourth Circuit's decision in *Grimm v. Gloucester* and *Bostock v. Clayton County* to support its conclusion that the statute is discriminatory on the basis of sex because it cannot be explained without referencing a student's biological sex.[298] Therefore, B.P.J.'s sex, as in other transgender cases that utilize *Bostock's* logic, is the but-for cause of her exclusion from the girls' sports teams. The opinion further explains that the law harms B.P.J. for many of the same reasons articulated in earlier transgender bathroom cases, such as feelings of isolation and stigmatization regarding her transgender status.[299] The use of the *Bostock* in the early stages of litigation is a departure from *Hecox*, which declined to incorporate the seminal decision in its opinion. Relying upon *Bostock* to substantiate transgender individuals' struggles outside the workplace reinforces the assertion that the judiciary continues to be a successful avenue for expanding transgender student rights, as well as strengthens B.P.J.'s case by supporting her claims with a Supreme Court decision.

The opinion then turns to the alleged Fourteenth Amendment violation. Using a familiar line of reasoning, West Virginia asserts that its policy is not discriminatory because it is premised on "biological sex" and does not treat B.P.J. differently than similarly situated biological males.[300]

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[296] *Id.* at 4.
[297] *Id.* at 2.
[298] *Id.* at 12.
[299] *Id.* at 13.
[300] *Id.* at 7.

However, relying heavily on the *Grimm v. Gloucester* decision, the court refuted this rationale, declaring that B.P.J. is "…not most similarly situated with cisgender boys; she is similarly situated to other girls."[301] Therefore, the law violates the Fourteenth Amendment guarantee of equal protection because B.P.J. is the only who girl who is prohibited to participate in girls' athletics.

The decision further explains that since the law discriminates on the basis of transgender status, a quasi-suspect class, it is subject to heightened scrutiny.[302] Considering that B.P.J.'s hormone treatment prevents endogenous puberty, as well as the fact that cross-country and track and field are non-contact sports, the court ruled that the law is not substantially related to the state's goal of protecting female athletes' safety since B.P.J. does not pose any significant physical threat to her cisgender peers.[303] Moreover, given that only a very small percentage of the population are transgender athletes, the state's claim that the law intends to ensure equal athletic opportunities for female athletes is also invalid.[304]

Based on this reasoning, the court enjoined West Virginia's policy, thus allowing B.P.J. to participate on the girls' sports teams. While granting the injunction is a win for B.P.J. and signals growing judicial support for inclusive or partially inclusive transgender student athlete policies, there are two important implications to consider. First, as with *Hecox,* the preliminary injunction is as-applied, meaning other transgender students in West Virginia who wish to participate in athletics consistent with their gender identity can still be prohibited from doing so.[305] Second, as in previous decisions, the opinion does not offer insight on the constitutionality of the matter;

[301] *Id.* at 7.
[302] *Id.* at 8.
[303] *Id.* at 9.
[304] *Id.* at, 9.
[305] *Id.* at 4.

instead, it leaves the question—whether the law is "facially unconstitutional"—to later stages of litigation.[306]

Despite these shortcomings, the District Court continued to uphold the enjoinment of the West Virginia law when it denied the defendants' motion to dismiss the case in December 2021.[307] Since the law does not include a specific mandate that the West Virginia Secondary Schools Activities Commission (WVSSAC), the state-wide student athlete regulatory body, enforce the law against her, the defendants claimed that B.P.J. lacks standing because no harm has occurred.[308] The Harrison County Board of Education added that it would not enforce the law against B.P.J. either.[309] The court found this argument unconvincing. After determining that the court still holds subject matter jurisdiction over the issue, it ruled that litigation can continue because B.P.J.'s claims do not require any further factual development; the law prevents her from participating on girls' sports teams, and "…no future factual development will change that effect."[310] Taking this into account along with the already-stated facts of the case, the defendant's motion to dismiss was denied, confirming B.P.J.'s allegation that the Protect Women's Sports Act constitutes discriminatory treatment on the basis of sex in violation of Title IX and the Equal Protection Clause.[311] Though this decision is a positive step toward securing transgender student athlete rights in the state of West Virginia, as of May 2022 both parties filed motions for summary judgment, indicating that further litigation, which could potentially be harmful to transgender student athlete rights, will ensue.[312]

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[306] *Id.* at 4.
[307] B.P.J. v. West Virginia State Board of Education, No. 2:21-cv-00316 (United States District Court for the Southern District of West Virginia December 1, 2021).
[308] *Id.* at 5.
[309] *Id.* at 5.
[310] *Id.* at 6.
[311] *Id.* at 7.
[312] "B.P.J. v. West Virginia State Board of Education."

In the early stages of litigation, the ultimate outcome of the three cases presented remains unclear. Yet, in granting preliminary injunctions that either block anti-transgender student athlete laws, as in *Hecox v. Little* and *B.P.J. v. West Virginia,* or affirm policies that permit transgender student athletes to compete, as in *Soule v. Connecticut Association et al.,* it appears that courts will support favorable outcomes for transgender student athletes as litigation proceeds. However, since the current set of transgender student athlete cases were decided on technicalities, without specific attention given to the larger constitutional issue at hand, their ultimate outcome remains uncertain.

While this uncertainty is unsettling for transgender students who are most directly affected by these policies, it is important to note that from the outset of transgender student bathroom litigation, cases were often decided on technicalities, too. Though litigation is currently focusing on the technical aspects of transgender student athlete cases, it does not mean the decisions are ineffectual. In other words, as with the bathroom debate, these decisions are paving the way to enable greater discussions of constitutionality while simultaneously working to build case law that specifically pertains to transgender student athletes.

Conclusion: What's Next for Transgender Student Athletes?

The cases discussed in this chapter contribute to the burgeoning transgender student case law by defending the expansion of transgender student athlete protections under both Title IX and the Equal Protection Clause. Unlike early cases involving transgender student bathroom access, the "coupling" effect of Title IX and the Equal Protection Clause is already in effect as transgender student athletes continue to put forth both constitutional and statutory claims of discrimination. This strategy is likely influenced by the successful judicial history of securing transgender bathroom rights. "Coupling" Title IX and the Equal Protection Clause in these foundational cases supports the argument that transgender student case law is evolving into its own legal entity.

Having a strong legal basis in transgender student-specific cases supports the expansion of transgender athlete protections because it enables courts to draw upon legal reasonings specific to the transgender experience to support their opinions. This makes it more difficult for opponents to challenge the judiciary's use of non-Title IX decisions to substantiate claims of discrimination. The fact that three district courts from different states across the country (Connecticut, Idaho, and West Virginia) ruled in favor of transgender student athletes regarding both Title IX and Equal Protection Clause protections suggests that if the judiciary continues the trend of ruling in favor of transgender individuals, it is likely that transgender student athlete rights will also become more secure through court action. Yet, until an appellate court opines on the matter, the outcome of future cases is still uncertain.

Scholars and activists on both sides of the legal debate who advance transgender rights or seek to protect women's athletic opportunities, remain divided on the issue. Some believe that inclusive and partially-inclusive policies—policies that require some form of hormone therapy for a duration of time before female transgender athletes can participate on women's sports teams—are constitutional and support the underlying objectives of Title IX.[313] Many note, too, that since these policies are consistent with other elite athletic regulatory organizations, such as the NCAA and the IOC, they should become the standard.[314] Others, like the cisgender individuals in the cases discussed, see restrictive policies that rely upon birth sex to determine a student's sports team as the only answer. Much to the dismay of countless advocates who believe that Title IX is necessary to ensure equal opportunity in women's sports, some scholars radically argue that gendered sports

[313] Lenzi, "The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies," 887.
[314] Lenzi, "The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies," 857 and 859.

and the statute itself should be completely abolished.[315] Most scholars can agree, however, that Congress should amend Title IX to provide more clarity about the extent of the statute's scope.[316] Yet, this would arguably be an incredibly challenging feat given today's polarized political climate.[317] As these varied policy proposals demonstrate, there is a certain degree of dissatisfaction surrounding the current status of transgender students athletes and an overall lack of consensus on how to best address their eligibility while still maintaining a level playing field for cisgender female athletes.

As state legislatures continue to enact laws that prohibit the participation of transgender student athletes and executive guidance changes from administration to administration, judicial input regarding transgender student athlete protections under the law is much needed. While litigation does not rapidly expand LGBTQ+ protections, the courts have been the most consistent protector of transgender rights in the past twenty years and will most likely continue to be on this transgender student issue, as well.

Though the current rulings in transgender student athlete cases are positive, these decisions represent only a small portion of the complex legal landscape for transgender students across the country. Further research is necessary to explore litigation beyond the limited scope of the cases analyzed in this chapter as state legislatures continue to propose legislation that not only raise questions of constitutionality, but also work to make transgender youths' lives exceedingly difficult. Recent examples include the governor of Texas' March 2022 order to investigate gender-affirming health care for transgender youths as child abuse and a proposed Florida policy—the "Don't Say Gay"—bill that would prohibit the "instruction" or "discussion" of sexual orientation

[315] Tamerler, "Transgender Athletes and Title IX," 175.
[316] Cole, "Title IX's Application to Transgender Athletes: Recent Developments," 3; Tamerler, "Transgender Athletes and Title IX," 175.
[317] Tamerler, "Transgender Athletes and Title IX," 176.

in schools.[318] Though the courts' progress on transgender student athlete protections is encouraging, it is important to remember that these protections are just one small piece of the larger fight for augmented transgender protections in all areas of the law. Giving proper analysis to the way in which transgender athlete cases intersect with other legislative measures aimed at reducing the status of transgender individuals is essential to understanding the challenges the LGBTQ+ community and its allies face. Identifying these obstacles and creating a plan to address them is crucial to work toward creating a sound legal landscape for transgender individuals in their school years and beyond.

[318] Tamerler, "Transgender Athletes and Title IX."

CONCLUSION

The growing demand to address transgender student protections in the educational context has been met with varying policy responses. Although the recognition of transgender rights has occurred at all levels of the government in the last thirty years, the judicial system has proven to be the best avenue for securing transgender student protections under the law. Through a careful evaluation of each branch of government's response to the call for increased transgender student protections, it is apparent that executive and legislative measures often fall short. Changing executive guidelines render transgender student protections uncertain as each presidential administration enters office and the deeply polarized nature of the country's politics means state legislatures often pass conflicting legislation. Although many agree that amending Title IX at the federal level is necessary, the current political landscape makes updating the statute to clarify its meaning and scope unlikely.

While litigation may be a less expedient method for securing transgender student rights under the law, state and federal court decisions provide a heightened level of security because they are insulated from political influences and changing administrative regulations. Additionally, overturning judicial rulings is often a more tedious process than revising executive branch actions. The introduction and reliance upon the Equal Protection Clause of the Fourteenth Amendment in recent Title IX cases—the "coupling' effect—provides another safeguard as it offers transgender students a legally robust basis for staking claims of discrimination despite Title IX regulations or state legislation that may reduce protections. This is further supported by Professor R. Shep Melnick, who, though highly critical of informal Title IX policymaking procedures, states: "The major reason Republican presidents have had such trouble revising Title IX rules is that they are

so embedded in court precedence."[319] This accurate observation supports the very heart of the argument in favor of continued litigations.

Although many questions concerning transgender student protections remain unresolved, especially in the athletic context, new and ongoing litigation will undoubtedly continue to provide answers to these complicated issues in the near future. Indeed, the strong legal foundation established in recent years for transgender students to combat discriminatory treatment offers promising evidence that transgender student protections will continue to expand in the judiciary in an effort to create a safe and equitable educational experience for all children regardless of their gender identity.

[319] Melnick, *The Transformation of Title IX,* 254.

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