



2-6-2017

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Recommended Citation

Corinne Cundiff, *A Problem of Competing Interests: A Detailed Look at Transgender Children in Schools*, 6 DePaul J. Women, Gender & L. (2017)

Available at: <https://via.library.depaul.edu/jwgl/vol6/iss1/3>

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A PROBLEM OF COMPETING INTERESTS: A DETAILED LOOK AT TRANSGENDER CHILDREN IN SCHOOLS

Corinne Cundiff

I. INTRODUCTION

The classification of transgender has been a part of the Lesbian, Gay, Bisexual, Transgender, Queer and/or Questioning, (“LGBTQ”) community for many years. However, visibility of transgender Americans has been rapidly increasing since 2014. Being transgender is no longer classified as a mental illness in the medical field. In 2012, the American Psychiatric Association eliminated the term “gender identity disorder” and began using the term “gender dysphoria.”¹ Allowing the classification of gender dysphoria to remain a medical classification permitted medical professionals to have a code they could reference for medical treatments associated with gender reassignment.² Despite the increase of awareness regarding transgender classification, there remains many legal issues and confusion that continue to create barriers for the transgender community.

Some barriers can be considered more significant for transgender children. Being a transgender child is still an idea many people cannot comprehend.³ Many uninformed opinions and critics of transgender children believe parents should do more to have their children align their behavior with the sex they were given at birth. The old belief that boys should only play with trucks and girls should only play with dolls still dominates many households today. However, there is a growing portion of American parents who support their children in expressing the gender they identify with, rather than the gender commonly associated with their biological sex. Unfortunately, this support for their children can sometimes hit a dead end once they

¹ Moni Basu, *Being Transgender No Longer a Mental ‘Disorder’ in Diagnostic Manual*, CNN (Dec. 27, 2012, 10:46 AM), <http://inamerica.blogs.cnn.com/2012/12/27/being-transgender-no-longer-a-mental-disorder-in-diagnostic-manual/>.

² *Id.*

³ See generally Matt Walsh, *This Poor Child is Confused, Not ‘Transgendered’*, THE MATT WALSH BLOG (June 3, 2014), <http://themattwalshblog.com/2014/06/03/this-poor-child-is-confused-not-transgendered/>.

become school aged. Gender plays an important role in many aspects of a child's school experience.

The topic of this article highlights the interests that are competing in many American high schools today. There is a desire for some school officials and most parents to protect the privacy interests of all the students in schools; unfortunately, the law is not providing reliable guidance. Today, there is a disagreement among federal agencies, the courts, and the legislature regarding the protection of gender identity in the law. Some of these groups look to protect discrimination and equality for transgender students under a sex discrimination classification. Other entities refuse to recognize sex and gender identity as the same. This difference of opinion has made the legal landscape of transgender issues a little hazy. Section I of this article will lay out the current state of sex and gender identity discrimination protections available under the applicable laws both in the workplace and in the educational environment. Next, Section II will discuss the major point of contention for transgender students in schools: the debate over equal access to gender specific spaces, such as bathrooms and locker rooms. Section III will detail the problems regarding the differing opinions on this access among the various branches of government and how to protect transgender students. Section IV will discuss how schools actually operate in regard to allowing transgender students equal access to gendered spaces at school. Next, Section V will discuss the Obama Administration's issuance of the "Dear Colleague" letter and the Texas federal court case that was filed as a result. Section VI will lay out pending legislation which, if passed, will fully protect transgender students from discrimination and bullying at school and remove any question regarding how these issues should be handled. Section VII is a call for action to work on reconciling differing opinions in the legal community. Finally, Section VIII will conclude with the author's opinion on how breaking these barriers can benefit all students' educational experience.

II. CURRENT LANDSCAPE OF SEX AND GENDER IDENTITY DISCRIMINATION PROTECTIONS

Under the laws of the United States, current protections mostly apply to issues of sex discrimination. Protection from sex discrimination does not always protect the transgender community, as will be discussed in detail in Section II. This Section will discuss the current laws in effect for sex discrimination and any that may pertain to gender identity discrimination, both in the workplace and in the educational environment.

A. Sex discrimination law applicable to the workplace

The National Transgender Discrimination Survey found that 26% of transgender people lost a job due to their status as transgender.⁴ Additionally, 50% of transgender individuals were harassed on the job, and 78% of students reported being harassed or assaulted at school.⁵ When a transgender person is discriminated at work the law that protects them is Title VII of the Civil Rights Act of 1964.⁶ Title VII states that it is unlawful for an employer to discriminate on the basis of sex.⁷ However, when it comes to transgender persons, sex discrimination is not a straightforward application. In 1989 the Supreme Court decided *Price Waterhouse v. Hopkins*.⁸ The theory of *Price Waterhouse* was based on sex-stereotyping as a form of sex discrimination.⁹ Since the resolution of this case, a growing number of courts have found in favor of transgender plaintiffs in employment discrimination cases.¹⁰ Transgender employee plaintiffs argue that they are being discriminated against due to

⁴ *Issues: Non-Discrimination Laws*, NAT'L CENTER FOR TRANSGENDER EQUALITY <http://www.transequality.org/issues/non-discrimination-laws>, (last visited Jan. 22, 2016).

⁵ *Id.*

⁶ *See* 42 U.S.C. § 2000e-2 (2016).

⁷ *Id.*

⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (U.S. 1989).

⁹ Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 562 (2007).

¹⁰ *Id.*

their nonconforming gender identities, and are therefore protected under Title VII's sex discrimination classification.¹¹

B. Sex discrimination law applicable to education

Title IX of the Education Amendments of 1972 is another body of law that protects against sex discrimination. Title IX is applicable to institutions that receive federal financial assistance, which includes schools and other educational entities.¹² Entities that receive federal financial assistance must act in a nondiscriminatory manner in various areas including: athletics, discipline, single-sex education, and employment.¹³ Currently, there is no Supreme Court jurisprudence that protects transgender students under Title IX using a sex discrimination theory, but several circuit courts have addressed this issue.¹⁴ Unlike in Title VII employment discrimination cases, courts have not yet extended the *Price Waterhouse v. Hopkins* sex-stereotyping theory to include sex discrimination under Title IX.

There are currently no federal statutes that specifically protect gender identity issues for transgender students. As of 2015, there were 18 states and the District of Columbia that have laws expressly protecting gender identity discrimination for transgender individuals.¹⁵ These protections for transgender persons can be found in the areas of housing, employment, and

¹¹ *Id.*

¹² *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. OFF. OF C.R. http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last updated Apr. 29, 2015).

¹³ *Id.*

¹⁴ *See G. G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 714 (4th Cir. Va. 2016).

¹⁵ These states include: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *See Know Your Rights: Transgender People and the Law*, ACLU, <https://www.aclu.org/know-your-rights/transgender-people-and-law>, Question #1, (last visited Jan. 26, 2016).

some public accommodations.¹⁶ When dealing with students, 17 states and the District of Columbia have laws that protect transgender students from harassment or discrimination in school.¹⁷

One of the barriers that a transgender student will face during his or her education is equal treatment. For many people today, the use of a locker room or a bathroom would not be considered a privilege. However, for many transgender students being allowed to use the locker room or bathroom of the gender they identify is a privilege that comes with major obstacles. Seeking help from the law will not always produce the same result, and this can often lead to issues for the students on both sides of this debate.

It is clear to see that the current state of the law for transgender persons, especially students, is difficult to navigate. While living in a state with gender identity protection laws could make legal issues easier to resolve, having a case brought in federal court can be extremely disheartening.

III. EQUAL ACCESS TO GENDER SPECIFIC SPACES

Schools across the country are finding themselves in a difficult position. They are forced to decide if students who identify with a gender that differs from that commonly associated with their biological sex should be allowed to access private spaces corresponding with their identity. Access to bathrooms and locker rooms continues to be a hold out point for many schools.¹⁸ However, supporting transgender students in all aspects of their school experience is beneficial for their

¹⁶ *Id.*

¹⁷ These states include: Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon, Vermont, and Washington. See *Know Your Rights: Transgender People and the Law*, ACLU, <https://www.aclu.org/know-your-rights/transgender-people-and-law>, (last visited Jan. 26, 2016)(See question one asking what states and local laws clearly prohibit discrimination against transgendered people).

¹⁸ Duaa Eldeib, *Transgender Student Rights: Education Department, Courts Not on Same Page*, CHI. TRIB. (Nov. 3, 2015), <http://www.chicagotribune.com/news/ct-transgender-students-legal-questions-met-20151103-story.html>.

development.¹⁹ Creating policies that help the transgender student feel more included can improve his or her academic outcomes.²⁰

While schools may wish to support these students, other parents in the school often object to some of these policies, particularly in the realm of equal access to bathrooms and locker rooms.²¹ Many of these parents have a concern about how providing equal access to transgender students would affect their own child.²² This can translate into a safety concern for transgender students who are attempting to use bathrooms and locker rooms that do not align with their biological sex.²³ In a 2009 study done of 300 transgender students between the ages of 13 and 20, nearly 50% of those students reported being physically harassed in school.²⁴ These stressful situations can cause transgender students to avoid using the bathroom altogether.²⁵ Some transgender students report excessive policing of the bathroom areas to ensure segregation at schools.²⁶ In 2013, 59% of transgender students reported to the Gay, Lesbian, & Straight Education Network (“GLSEN”) that they were forced to use the bathroom of their biological sex while in school.²⁷

There is a connection between the fight for equal access to bathrooms for transgender individuals, and the fight for civil rights in our country’s history. In the Jim Crow era, bathrooms

¹⁹ *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1728 (2014).

²⁰ *Id.*

²¹ *Id.* at 1729.

²² *Id.*

²³ See Caroline Dubois & Rachel Losoff, *Safe School Environments for Transgender Students*, 44 NAT’L ASS’N OF SCH. PSYCHOLOGISTS, <https://www.nasponline.org/publications/periodicals/communique/issues/volume-44-issue-1/safe-school-environments-for-transgender-students>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Allison S. Bohm, Samantha Del Duca, Emma Elliot, Shanna Holako & Alison Tanner, *Challenges Facing LGBT Youth*, 17 GEO. J. GENDER & L. 125, 141 (2016).

²⁷ *Id.*

were often marked “white only.”²⁸ The privacy of what goes on in bathrooms and locker rooms have people often feeling vulnerable and exposed, which creates the resistance to allowing this equal access.²⁹ Just as Black people in the civil rights era fought against the laws that were enacted to prevent their equality, transgender individuals continue to face similar discrimination and segregation.³⁰ Arguments made today reflect opinions that laws are necessary to prevent transgender persons from entering the bathrooms of the gender they identify with to protect the privacy and public safety.³¹ However, when students are forced to use unisex bathrooms they feel singled out and this often results in consequences of being late to class or being teased.³²

The debate regarding equal access to bathrooms and locker rooms is not just happening in the media and at school board meetings. The biggest debate currently happening is among the United States Department of Education, the Department of Justice, and the federal courts. This disagreement continues to convolute the legal argument, and makes it more difficult for those supporting transgender students to know what they are required to do by law.

IV. DIFFERING OPINIONS AMONG THE LEGISLATIVE, JUDICIAL, AND EXECUTIVE BRANCHES

While the legal landscape by itself is difficult to understand, it becomes increasingly more difficult when certain

²⁸ Katy Steinmetz, *Everything You Need to Know About the Debate Over Transgender People and Bathrooms*, TIME (Jul. 28, 2015), <http://time.com/3974186/transgender-bathroom-debate/>.

²⁹ *Id.*

³⁰ Doctor Comrade, *Two Forms of Segregation: How Transgender Discrimination is Similar To and Different From Racial Segregation*, HANDSY COMPREHENSIVE EXAM (Mar. 28, 2016), <http://www.handsycomprehensiveexam.com/blog/2016/3/26/two-forms-of-segregation-how-transgender-discrimination-is-similar-to-and-different-from-racial-segregation>.

³¹ See Tribune Wire Reports, *Indiana Bill Targets Bathroom Use by Transgender People*, CHI. TRIB. (Dec. 24, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-indiana-bill-bathroom-transgender-20151224-story.html>.

³² Steinmetz, *supra* note 28.

branches and agencies have a difference of opinion on what is legally protected. This Section will detail a case concerning Township High School District 211 in Palatine, Illinois, (“Palatine School District”), and the U.S. Department of Education Office of Civil Rights, and also a recent case in federal court that was brought under a very similar issue as the case involving the Palatine School District. The outcome of these two cases was strikingly different, and the discussion will highlight some of the courts’ reasoning as well as distinguishing facts.

In December of 2013, a high school transgender student in the Palatine School District filed a complaint with the U.S. Board of Education Office of Civil Rights.³³ The complaint alleged that the School District denied the student access to the girls’ locker rooms because of her gender nonconformity.³⁴ The transgender student, Student A, specifically alleged that the School District discriminated against her on the basis of sex.³⁵

Student A was born a male and began identifying as a female at a young age.³⁶ Student A began her transition during her middle school years;³⁷ she legally changed her name, and began taking a course of hormone therapy.³⁸ Prior to Student A attending high school, her parents contacted the school and spoke with them about the issues involving registration and access to restrooms and locker rooms.³⁹ The school granted Student A access to all female restrooms, but provided alternate options for locker room use.⁴⁰ The Superintendent of the School District was concerned about balancing the “rights and needs”

³³ Letter from Adele Rapport, Reg’l Dir., U.S. Dep’t of Educ. Off. of C.R., to Dr. Daniel E. Cates, Superintendent, Twp. High Sch. Dist. 211 (Nov. 2, 2015), <http://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 2.

³⁷ *Id.*

³⁸ *Letter from Adele Rapport, Supra* note 33, at 2.

³⁹ *Id.*

⁴⁰ *Id.* at 3.

of Student A with the privacy needs of the other students.⁴¹ Just as the title of this article suggests, this problem of competing interests is one of the main reasons provided for refusing to allow equal access to gendered spaces for transgender students. Student A used various changing facilities in the school to get ready for gym.⁴² However, issues persisted, preventing these facilities from being equal to the locker rooms that the other girls in the school were given.⁴³ Additionally, these changing areas were always located farther from the gym, which often made her late to gym class.⁴⁴

These same issues were also a problem for Student A in her participation in girls' athletics.⁴⁵ Student A expressed disappointment with being treated differently than the other girls on her team, and therefore often felt excluded.⁴⁶ The girls on her team would engage in pre-game bonding and, as a result of being banned from the girls' locker room, Student A was not allowed to participate in this normal routine.⁴⁷

After an investigation, completed by the United States Department of Education Office of Civil Rights ("OCR"), OCR determined that, with respect to the locker room access, the school was in violation of Title IX.⁴⁸ In the "Applicable Legal Standard" section of the letter sent to the School District, OCR provided the wording of Title IX, specifically, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity...."⁴⁹ OCR ended this paragraph by concluding that "[a]ll students, including transgender students, are protected from **sex-based** discrimination under Title IX."⁵⁰

⁴¹ *Id.*

⁴² *Id.* at 4.

⁴³ *Letter from Adele Rapport, supra* note 33, at 4.

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Letter from Adele Rapport, supra* note 33, at 13.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.*, (emphasis added).

In December of 2015, OCR and Palatine School District reached a settlement agreement.⁵¹ As a part of the agreement, Palatine School District agreed to provide Student A with access to girls' locker rooms and Student A would use private changing stations provided by the school.⁵² While this settlement agreement was a compromise between Palatine School District and Student A, parents of other students from the high school were not happy with the agreement and in May of 2016 went to Federal District Court in the Northern District of Illinois to request that a judge reverse the agreement.⁵³

In a case from the Eastern District of Virginia, a transgender student pursued a different remedy than Student A. Instead of filing a complaint with the United States Department of Education, the transgender student in this case appealed a school board decision to deny access directly to the District Court.⁵⁴ This case highlights the drastic difference of opinion between the courts and the U.S. Department of Education. Gavin Grimm, a 15-year-old transgender boy, faced similar struggles as the student from the Palatine School District. Gavin was born a female, and began hormone therapy in 2014 after coming out to his family.⁵⁵ Gavin had legally changed his name and began dressing as a boy.⁵⁶ In 2014, Gavin found himself before the school board in order to receive access to the boys' bathroom at his high school.⁵⁷ Originally when Gavin began attending the high school in Gloucester, VA, he was given

⁵¹ *Settlement Reached With Palatine, Ill., Township High School District 211 to Remedy Transgender Discrimination*, U.S. Dept. of Educ. (Dec. 3, 2015), <http://www.ed.gov/news/press-releases/settlement-reached-palatine-ill-township-high-school-district-211-remedy-transgender-discrimination>.

⁵² *Id.*

⁵³ Eric Peterson, *District 211 Sued Over Transgender Student's Locker Room Access*, Daily Herald (May 4, 2016, 06:01PM), <http://www.dailyherald.com/article/20160504/news/160509515/>.

⁵⁴ Sarah Goodyear, *Seat of Unrest*, DAILY NEWS (Jan. 12, 2016), <http://interactive.nydailynews.com/2016/01/transgender-students-war-over-public-school-bathrooms/>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

access to the boys' bathrooms, however, after complaints were received, the school board decided held official vote on whether Gavin's access was necessary.⁵⁸ In a 6-1 vote the school board decided that Gavin would not be allowed access to the boys' bathroom, but would be given use of a private unisex restroom instead.⁵⁹

Gavin took this decision to Federal District Court in Virginia. He requested that the Court issue a preliminary injunction returning his access to the boys' bathroom at school.⁶⁰ Additionally, Gavin filed a complaint that challenged the school board's restroom policy under the Equal Protection Clause and Title IX of the Education Amendments.⁶¹ In support of the complaint, the Department of Justice filed a Statement of Interest stating that the school board's bathroom policy was in violation of Title IX.⁶² This is significant because it identifies another agency that supports the theory that sex discrimination is the same as gender identity discrimination. The school board filed a motion to dismiss, and the Court granted the motion.⁶³ Both parties used cases in which the court applied Title VII to support their argument.⁶⁴ Ultimately, the Court found that Gavin's Title IX claim was precluded by the Department of Education's regulations that "expressly allow schools to provide separate bathroom facilities based on sex."⁶⁵ In support of this finding, the Court relied on section 106.33 of the Department of Education's regulations that references "biological sex," however, the Court refused to decide if "sex" included "gender identity."⁶⁶ Only a couple of paragraphs later in the same opinion, the Court refused to defer to the Department of Education's interpretation of Title IX that OCR provided in another statement of interest.⁶⁷ In this statement OCR stated:

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *G.G. v. Gloucester County Sch. Bd.*, 132 F. Supp. 3d 736, 741 (E.D. Va. 2015).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 742

⁶⁵ *G.G.*, 132 F. Supp. 3d at 744.

⁶⁶ *Id.*

⁶⁷ *Id.* at 745.

The Department’s Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school must treat transgender students consistent with their gender identity.⁶⁸

However, because the Department of Education did not present any support of this interpretation of their own regulation, the Court rejected it.⁶⁹ The Court reasoned that since the wording of the regulation was not ambiguous as to the terms, no “controlling weight” must be given to the document.⁷⁰ This interpretation by the Court directly goes against the determination of “sex” that was provided by the Department of Education’s interpretation of their own regulation, as well as the statement given by the Department of Justice.

After the decision by the District Court in Virginia, Gavin appealed to the Fourth Circuit.⁷¹ The primary question on this appeal was whether section 106.33 of the Department of Education’s regulation was ambiguous.⁷² If the regulation was ambiguous the Court could give the Department of Education’s interpretation more deference under *Auer v. Robbins*.⁷³ Section 106.33 gives schools the right to provide “separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such

⁶⁸ *Id.*

⁶⁹ *Id.* at 745-46.

⁷⁰ *G.G.*, 132 F. Supp. 3d at 747.

⁷¹ *G. G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 714 (4th Cir. 2016).

⁷² *Id.* at 719-20.

⁷³ *Id.* at 719; see *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997)(standing for the proposition that an agency that is interpreting its own regulation is afforded a higher level of deference unless the interpretation is “plainly erroneous or inconsistent with the regulation.”)

facilities proved for students of the other sex.”⁷⁴ The Fourth Circuit found that the regulation was ambiguous as it related to transgender students, and, therefore, the Department of Education’s interpretation of its own regulation is entitled to deference.⁷⁵

In interpreting the statute, the Fourth Circuit next considered whether the Department of Education’s interpretation was clearly erroneous, and ultimately found that the Department’s interpretation was permitted.⁷⁶ Having decided the Department’s interpretation was permissible, the Fourth Circuit gave controlling weight to the Department of Education’s interpretation, and ultimately remanded the case back to the District Court in Virginia to decide on Gavin’s requested injunction based on this interpretation of section 106.33 of the Department of Education’s regulations.⁷⁷ This was decision in favor of transgender students and their ultimate quest for substantive equality; a federal court has now recognized that the Department of Education’s regulation pertaining to transgender students was valid and therefore schools in that Circuit are required to abide by it.

Comparing Gavin’s case with the determination made by the Department of Education in the Palatine School District highlights why this area of the law is so incredibly difficult for schools and school districts to navigate. The positive decision in Gavin’s appeal provides the law for schools to apply when it comes to transgender students in the Fourth Circuit, but it is unfortunately not binding in other jurisdictions. How are schools supposed to translate these differences of opinions into a workable format? Does Title IX require that schools provide equal access to transgender students? Some courts say no, but the U.S. Department of Education, which is responsible for administering Title IX, says that equal access should be provided. The next Section discusses how schools are working

⁷⁴ *G. G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016)(quoting 34 C.F.R. § 106.33.)

⁷⁵ *Id.* at 721.

⁷⁶ *Id.* at 721-22 (relying on multiple definitions of “sex” and reconciled some of the terms in the definition such as “sum of various factors” to determine that “a hard-and-fast binary division on the basis of reproductive organs” was applicable in most cases but not “universally descriptive.”)

⁷⁷ *G. G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 726 (4th Cir. 2016).

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with transgender students in their districts amid this obscure legal jurisprudence.

V. A LOOK AT HOW SOME SCHOOLS CURRENTLY SUPPORT TRANSGENDER STUDENTS

The issue of equal access to gender specific spaces is not unique to the two incidents from the Palatine School District and Gloucester, Virginia, as discussed above. Transgender students are dealing with struggles in many schools across the country. Section A will detail how one school district in Illinois is currently supporting the transgender students that attend their high schools despite the lack of clear guidance on how to handle these situations. Additionally, Section B will provide further information that is found within the policies of two of the largest school districts in the country, New York City and Chicago, and how these policies regarding transgender students are being implemented.

A. Community Unit School District 300

Community Unit School District 300 (“District 300”) is located in the northwest suburbs of Illinois. With approximately 20,884 students, District 300 is the 6th largest school district in Illinois.⁷⁸ Amongst the students served, the District currently has two transgender students that they are aware of.⁷⁹ Through an interview with the current Superintendent of District 300, Fred Heid, we are provided with an inside look at how one of the largest school districts in Illinois is navigating this area of the law. The current policy that is in place for working with transgender students in District 300 can be found in their administrative handbook, which is provided to administrators

⁷⁸ 2016 *Largest School Districts in Illinois*, NICHE <https://k12.niche.com/rankings/public-school-districts/largest-enrollment/s/illinois/> (last visited Feb. 10, 2015).

⁷⁹ Interview with Frederick Heid, Superintendent, Cmty. Unit Sch. Dist. 300, in Algonquin, Ill. (Jan. 8, 2016).

and only for reference if issues should arise.⁸⁰ This handbook is not available for the public, but Mr. Heid indicated that it is a policy that allows for the schools to have a “continuity of practice” on the best ways to work with and for transgender students.⁸¹

When asked the normal progression of events for identifying a transgender student, Mr. Heid stated that the first contact is typically made by the parent.⁸² A parent will notify the school that their child is transitioning and identifying with a gender that does not correspond with their biological sex.⁸³ After the parent has contacted the school, “a conversation begins about what are the expectations for transitioning and supporting that child in the academic area.”⁸⁴ District 300 works to provide guidance and support to the parents, and the Superintendent strives to be as transparent as possible in all areas.⁸⁵

In regard to providing their current transgender students access to the bathrooms and locker rooms of the gender they identify with, Mr. Heid indicated that the two transgender students are given their own facilities to use.⁸⁶ These transgender students made the choice to have their own facilities; this was the choice that was most comfortable for them when they were working with the schools on a support plan.⁸⁷ However, the issue of equal access to locker rooms and bathrooms was a source of apparent frustration for Mr. Heid, as he expressed concern that as Superintendent, he was responsible for developing this policy.⁸⁸ He questioned why there was no “general template as to how you should approach this issue.”⁸⁹ If there were to be a complaint by a parent and that parent requested their child not be in the same class as the transgender student, Mr. Heid was genuinely unsure of the right action to take. “Do I change the student’s class or do I give them a waiver

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Interview with Frederick Heid, *supra* note 79.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Interview with Frederick Heid, *supra* note 79.

from P.E., I don't know if that's right."⁹⁰ He often said "[the schools] have to wait for the courts to deal with it."⁹¹ The guidance from the court is what he feels protects the School District from being sued, and without that guidance, schools are left at the forefront of the fight.⁹²

At the end of the interview, Mr. Heid stated, "[m]y beliefs don't come into play, my job is not to impose my own belief system on an entire...community."⁹³ This statement may be instructive for administrators confronted with a similar situation. As a person of authority at the forefront of this developing issue, staying neutral and supportive is effective. At the school level, the conflicts that are occurring in the legal field provide no guidance on what legally the school districts are required to do.

The two cases discussed in Section III are examples of this apparent lack of guidance. School districts are dealing with a threat from the Department of Education to remove their federal funding for discrimination on the basis of sex. At the same time, some courts are saying school districts are allowed to deny transgender students access to gender specific spaces if the student's request conflicts with the student's biological sex, and that not allowing a transgender student to have access to the locker room or bathroom of the gender they identify with is gender identity discrimination, which is not protected under Title IX. District 300 has found that families and students are accepting of the transgender students within their District, and has not experienced any issues regarding such discrimination. But it is important to note that the transgender students from District 300 have not requested equal access to these gender specific spaces, and if that situation presents itself to Superintendent Heid, it is clear that he would not have the proper legal guidance.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

B. Schools in New York City and Chicago

As of 2014, the New York City Department of Education is the largest school district in the country.⁹⁴ They serve approximately 1 million students.⁹⁵ Their policy regarding transgender students can be found on the New York City Department of Education webpage.⁹⁶ The District has a stated policy that access to bathrooms and locker rooms will be based on a consideration of many factors, including the safety of all students involved.⁹⁷ However, the District ends this section with a simple statement, “[a] transgender student should not be required to use a locker room or restroom that conflicts with the student’s gender identity.”⁹⁸

Chicago Public Schools (“CPS”) is the third largest school district in the United States, serving approximately 403,000 students.⁹⁹ CPS similarly has a stated policy regarding the support of transgender and gender nonconforming students.¹⁰⁰ The CPS policy states that students will be allowed access to the restrooms and locker rooms that correspond with the gender they identify with “consistently” at school.¹⁰¹ CPS states its goal is to “ensure the safety, comfort, and healthy development of students who are transgender or gender

⁹⁴ 2014 AS&U 100: *Largest School Districts in the U.S. by Enrollment, 2012-13*, AMERICAN SCHOOL & UNIV. <http://asumag.com/research/2014-asu-100-largest-school-districts-us-enrollment-2012-13> (last visited Oct. 31, 2016).

⁹⁵ *Id.*

⁹⁶ *Transgender Student Guidelines*, NEW YORK CITY DEPT. OF EDUC. <http://schools.nyc.gov/RulesPolicies/TransgenderStudentGuidelines/default.htm> (last visited Feb. 12, 2016).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ AMERICAN SCHOOL & UNIV. *supra* note 94.

¹⁰⁰ *CPS Guidelines Regarding the Support of Transgender and Gender Nonconforming Students*, CPS http://cps.edu/SiteCollectionDocuments/TL_TransGenderNonconformingStudents_Guidelines.pdf, (last visited Aug. 31, 2016).

¹⁰¹ *Id.*

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nonconforming, and to maximize their social integration.”¹⁰² This CPS policy was announced on May 3, 2016, which was an update from its previous guidelines that were originally established in 2014.¹⁰³

Both school districts provide a clear indication that they will allow a transgender student to use the bathroom or locker room of the gender they identify with. With major school districts, such as New York City and Chicago, showing a clear indication of supporting their transgender students, it is no surprise that the Obama Administration issued guidance in May 2016, which stated schools should allow transgender students the right to use the bathrooms of the gender they identify with.¹⁰⁴

VI. GUIDANCE FROM THE OBAMA ADMINISTRATION FOR SCHOOLS

On May 13, 2016, the Obama Administration, through the United States Department of Justice and United States Department of Education, issued a letter that was addressed “Dear Colleague.”¹⁰⁵ The letter is intended to act as “significant guidance” for schools’ Title IX obligations in regard to transgender students.¹⁰⁶ In fact, the letter indicates to recipients that it does not add any additional “requirements to applicable law, but provides information and examples to inform recipients

¹⁰² *Id.*

¹⁰³ Juan Perez Jr., *CPS Updates Guidelines for Transgender Students and Employees*, CHI. TRIB. (May 3, 2016), <http://www.chicagotribune.com/news/ct-cps-transgender-student-teacher-policy-met-20160503-story.html>.

¹⁰⁴ Dave Boyer, *Obama says Schools Demanded Advice on Transgender Bathrooms*, WASH. TIMES (May 16, 2016), <http://www.washingtontimes.com/news/2016/may/16/obama-schools-demanded-advice-transgender-bathroom/>.

¹⁰⁵ Letter from Catherine E. Lhamon, Assistant Secretary for C.R., U.S. Dep’t of Educ., & Vanita Gupta, Principal Deputy Assistant Att’y Gen. General for C.R., U.S. Dept. of Justice, (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

¹⁰⁶ *Id.* at 1.

about how the Departments evaluate whether covered entities are complying with their legal obligations.”¹⁰⁷

The important guidance that this document provides comes under the section heading “Compliance with Title IX.”¹⁰⁸ In this section of the letter, the Department of Education and Department of Justice inform schools that they must treat a student’s sex as the gender they identify with when implementing Title IX regulations that treat students differently on the basis of sex.¹⁰⁹ The Departments justify this interpretation by stating that it consistent with the way courts and other agencies have interpreted federal laws that prohibit sex discrimination.¹¹⁰ The letter goes further when discussing sex-segregated facilities to say that “a school may not **require** transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so.”¹¹¹ For the purposes of this article, this is the most significant point of the letter because it defines sex discrimination to include gender identity discrimination for Title IX, and uses sex discrimination to encompass gender identity discrimination, which has not been recognized by the federal courts or any statutes. The letter also provides other general guidelines to assist schools in working with their transgender students.

In response to this letter, various states, state agencies, and school districts brought a lawsuit against the Department of Education and the Department of Justice, among others, challenging the assertion made in the letter that Title IX requires students be given access to the restrooms and locker rooms of the gender that the identify with.¹¹² In *Texas et al. v. United States of America et al.*, the plaintiffs were seeking a preliminary injunction enjoining the defendants from enforcing the guidelines ,which informed schools they must allow a student to

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (referring to *Price Waterhouse v. Hopkins*, *supra* note 8 and *G.G. v. Gloucester Cnty. Sch. Bd.*, *supra* note 44.)

¹¹¹ Letter from Catherine E. Lhamon *supra* note 105 at 3. (emphasis added).

¹¹² See *State of Texas et al. v. United States of America et al.*, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016).

use the bathroom or locker room of the gender that the student identifies with.¹¹³ A preliminary injunction hearing was held by the District Court in Texas, and the injunction was granted.¹¹⁴ This injunction meant that the Department of Education could not legally withhold any Title IX funding from a school that did not allow a transgender student from using the bathroom or locker room of the gender that the student identifies with.¹¹⁵

What is notable about this opinion by the District Court in Texas is that this Court also evaluated the Departments' interpretation of section 106.33 to determine if their interpretation was entitled to deference under *Auer v. Robbins*,² just as the Fourth Circuit did in Gavin Grimm's appeal.¹¹⁶ However, unlike the Fourth Circuit, the District Court found that the section 106.33 was not ambiguous.¹¹⁷ This is significant because it again highlights the split among the courts regarding the proper way to interpret the Department of Education's regulations. This adds more confusion for schools that are looking for guidance on how to handle access to gender specific spaces.

The "Dear Colleague" letter appeared to be promising guidance for schools, but the recent decision by the District Court in Texas quickly removed that hope. With the battles in the courts being so tumultuous, the best hope that schools have for a definitive answer to this problem is to rely on Congressional action, but the hope that any pending legislation will pass that protects transgender students is not a guarantee.

VII. PENDING LEGISLATION

¹¹³ *Id.* at *17.

¹¹⁴ *Id.* at *1. (challenging whether or not the Department of Education and the Department of Justice violated the Administrative Procedure Act by issuing these guidelines without first engaging in notice and comment as required by the APA).

¹¹⁵ *Id.* at *17.

¹¹⁶ *Id.* at *14.

¹¹⁷ *Id.*

Currently there are three bills that are pending in Congress. This Section will discuss each one and what changes these laws could make if they pass. With such a disagreement between the Department of Education and the courts, this legislation would mean there would be a clear answer on how to work with transgender students in schools. Section A will discuss the Student Non-Discrimination Act of 2015. Section B will discuss the Equality Act of 2015. Finally, Section C will discuss the Safe School Improvement Act of 2015.

A. The Student Non-Discrimination Act of 2015

The Student Non-Discrimination Act was introduced to the Senate on February 10, 2015, by Senator Al Franken from Minnesota.¹¹⁸ The purpose of the Act is “to ensure that all students have access to public education in a safe environment free from discrimination...on the basis of sexual orientation or gender identity.”¹¹⁹ Number five in the purpose section of the bill specifically addresses the current disagreement between the courts and the Department of Education and Department of Justice regarding discrimination on the basis of gender identity. This bill would allow the Department of Education and the Department of Justice to regulate and enforce Title IX of the Education Amendments of 1972 “in a manner that effectively addresses discrimination.”¹²⁰

The central text of the Act prohibits any student, on the basis of sexual orientation or gender identity, to be excluded from participation or be denied benefits of any program that receives federal financial assistance.¹²¹ Also, this bill will allow civil remedies if the student has been discriminated against in violation of the Act.¹²² The wording of the bill seems to be a clarification of Title IX by removing the ambiguities of determining if “sex” is the same thing as sexual orientation or gender identity.

B. Equality Act of 2015

¹¹⁸ Student Non-Discrimination Act of 2015, S.439, 114th Cong. (2015).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

The Equality Act was introduced to the House on July 23, 2015, by Representative David Cicilline.¹²³ This bill is an amendment to the Civil Rights Act of 1964.¹²⁴ This amendment will add sexual orientation and gender identity as protected categories under the Act.¹²⁵ The biggest achievement, if this bill were to pass, would be the specification that it would prohibit a person from “being denied access to a shared facility, including restroom, a locker room, and a dressing room, that is in accordance with the individual’s gender identity.”¹²⁶ This bill has received support from several large U.S. companies including: Apple, Dow, American Airlines, General Mills, Google, and Nike.¹²⁷

A comprehensive anti-discrimination law such as this would be a big accomplishment for the LGBTQ community because then there will be no question that sexual orientation and gender identity discrimination are considered protected classes. Adding these protected categories would mean that companies and schools would be required to recognize transgender persons as a protected class, and they would be prohibited from discriminating against them. Also, expressly allowing transgender students equal access to bathrooms and locker rooms would remove the confusion on the right options for schools to provide to their transgender students. This bill has only been introduced into House and was referred to the Subcommittee on the Constitution and Civil Justice as of late-2015 and has since stalled in progress.¹²⁸ This is an indicator that the bill is not a priority for the members of the House.

C. Safe School Improvement Act of 2015

¹²³ Equality Act of 2015, H.R.3185, 114th Cong. (2015).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Google Joins Chorus of Companies Backing LGBT Bill*, FORTUNE <http://fortune.com/2015/07/28/google-equality-act-lgbt/> (last visited Oct. 31, 2016).

¹²⁸ Equality Act of 2015, *supra* note 123.

The Safe School Improvement Act of 2015 was introduced in the Senate on January 29, 2015, by Senator Robert Casey.¹²⁹ This bill mostly deals with schools providing policies that prohibit bullying and harassment.¹³⁰ This bill would require schools to create policies that would specifically address bullying and harassment based on sexual orientation and gender identity.¹³¹

This bill does not expressly address the issue of equal access to bathrooms and locker rooms. However, if this bill should pass, arguably, based on the language of the statute, Congress had intent to protect sexual orientation and gender identity as a classification safe from discrimination and harassment. There is major support behind this bill because currently there is no federal law that discusses bullying and harassment in schools as experienced by the LGBTQ community.¹³² It is likely that the first two bills that are pending will receive much more opposition than the Safe School Improvement Act. If this bill should pass, it may be the only tool advocates may rely on when seeking to provide transgender students with substantive equality.

VIII. A CALL TO ACTION

Allowing transgender students equal access to bathrooms and locker rooms is a developing area of law, and as it develops the courts are only one piece of the puzzle. Gavin Grimm's appeal has the potential to be a step in the right direction by creating a precedent for district courts to follow within the Fourth Circuit. It also gives notice to the Supreme Court, who recently granted the writ of certiorari that was filed by the Gloucester County School Board, about how the Circuit courts are considering this issue.¹³³ However, the discourse

¹²⁹ Safe School Improvement Act of 2015, S.311, 114th Cong. (2015).

¹³⁰ *Id.*

¹³¹ *Safe Schools Improvement Act (S.311/H.R.2902)*, GLSEN
<http://www.glsen.org/article/safe-schools-improvement-act-s-311hr-2902>
(last visited Feb. 12, 2016).

¹³² *Id.*

¹³³ Mark Walsh, *Supreme Court to Weigh Transgender Rights, Education Department Authority*, EDUC. WEEK, (Oct. 28, 2016, 3:49PM),

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that still remains in the federal court system on how to handle transgender students' bathroom rights is still a long way away from being decided.

The strongest argument for protection from discrimination for transgender students would come from the passing of the pending legislation in Congress. Advocacy for these laws is the best way to help see them pass both the Senate and the House. If more legislators are aware that their constituents want to see discrimination protection for transgender students, the legislators may work to move these bills through Congress.

The Equality Act and the Student Nondiscrimination Act would offer the most protection, and will also encounter the most opposition. Using the democratic process and voicing support to legislators would help show how important these issues are in the community. The legislative process can be a long and arduous road for a bill. However, community activism creates change. Tens of thousands of bills are introduced to Congress each year.¹³⁴ Only 4% of those bills become law.¹³⁵ It is the job of our Congress and their staff to be informed about the issues that are important to their constituents. The more the members of Congress hear from those that they represent, the more the issue will become an important part of their agenda.

IX. CONCLUSION

The battle for equal access to bathrooms and locker rooms is just the beginning for transgender students. It is unfortunate that transgender individuals cannot currently rely on the same protections against discrimination that the larger student population has available to them. A key to seeing

http://blogs.edweek.org/edweek/school_law/2016/10/us_supreme_court_to_weigh_tran.html.

¹³⁴ *Analysis Methodology*, GOVTRACK

<https://www.govtrack.us/about/analysis#prognosis>, (last visited Feb. 13, 2016).

¹³⁵ *Id.*

protections under the law become available to transgender students is being active in the democratic process.

Currently, transgender students must make their appeal for equal access to the schools they attend. A student in New York City and CPS can rely on stated policy that provides them with equal access, while a student in North Carolina or Texas, who were plaintiffs in the case against the United States and the Department of Education, may have to fight a harder to overcome a non-existent policy. The legal landscape is evolving for transgender students within the country. With the amount of publicity this area of the law is receiving, it is likely that there will be some changes in the coming years. At the very least, one would hope that the courts or the legislature are able to provide guidance to schools on how they can support the competing interests between transgender and non-transgender students.