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How Missouri Stacks Up in Protecting Transgender Youths at School: An Analysis of the Differing Views of Title IX and State-Level Protections

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HOW MISSOURI STACKS UP IN PROTECTING TRANSGENDER YOUTHS AT SCHOOL: AN ANALYSIS OF THE DIFFERING VIEWS OF TITLE IX AND STATE-LEVEL PROTECTIONS

I. INTRODUCTION

On August 27, 2015, national news media erupted with stories surrounding a controversy that arose out of a school district in Hillsboro, Missouri.[1] Lila Perry is seventeen years old and just like every other girl in high school, except that she was not born biologically a female.[2] Lila began to feel like she was supposed to have been a female when she turned thirteen, and four years later, she decided to appear as a female at school.[3] Lila had previously presented herself as a homosexual male, but now wished to be viewed and addressed as a female.[4] She began to refer to herself as transgender female, and outwardly expressed herself as a female with new clothing, hair, and makeup.[5] Before the 2015-2016 school year began she consulted with the Hillsboro Senior High administration about her identity.[6] The school decided to allow her to use the gender neutral faculty bathroom due to her new transgender identity.[7] Wanting to avoid segregating herself by using the gender neutral bathroom, Lila asked the administration, was given permission, and began using the women's locker rooms and restrooms.[8] "I am a girl. I am not going to be pushed away to another bathroom," she told a CNN affiliate.[9]

At the school board meeting on August 27, 2015, several angered parents expressed their discontent with the school's decision to allow Lila, an individual who is anatomically male, to change and use the restrooms in the presence of their young daughters at Hillsboro Senior High School.[10] One

1. Emmanuela Grinberg, *Bathroom Access for Transgender Teen Divides Missouri Town*, CNN (Sept. 5, 2015, 3:37 PM), http://www.cnn.com/2015/09/03/living/missouri-transgender-teen-feat [hereinafter Grinberg].

2. Grinberg, *supra* note 1.

3. Grinberg, *supra* note 1.

4. Grinberg, *supra* note 1.

5. *See* Char Adams, *Transgender Teen on the Protests Against Her Using the Girls' Bathroom: 'This Is More About Hate than It Is Anything Else'*, PEOPLE (Sept. 3, 2015, 1:45 AM), http://www.people.com/article/lila-perry-transgender-hate-high-school-protest.

6. Grinberg, *supra* note 1.

7. Grinberg, *supra* note 1.

8. Grinberg, *supra* note 1.

9. Grinberg, *supra* note 1.

10. Grinberg, *supra* note 1.

parent asked the board to stop extending privileges to "confused teenagers who want to be something they are not sexually" at other students' expenses.[11] Other parents chose to insinuate that the board was trying to avoid liability by refusing to make a policy regarding transgender students' bathroom use.[12] One bold parent even asked which side it would support if he were to sue them for violating his right to "parent" as he chooses.[13]

Prior to this instance, there is no record that the school had previously created a policy on bathroom access or whether it preferred students to use a particular restroom based on their biological sex or based on choice.[14] The concerned parents argued on behalf of their children's rights for privacy, focusing on the differences in Lila's physical anatomy.[15] After stating their discontent, they adamantly urged the school to adopt a policy which would only allow students to use the restrooms of the gender they were born with or a gender neutral restroom.[16]

In response to this controversy being raised, three of the longest-serving members of the school board resigned, including the President, Vice President, and Director.[17] Although the assumption is these members resigned due to their personal feelings regarding this issue, none of these school board members specifically stated this as reason.[18] While the President and Vice President's letter did not include a reason for their resignations[19], Director Bo Harrison cited "strained philosophical differences" as his main reason for his resignation.[20] When Harrison was contacted for comment he mentioned he had strong feelings about the transgender controversy, but said he resigned because he had been treated unfairly by the school board and school staff for years.[21]

11. Grinberg, *supra* note 1.

12. Grinberg, *supra* note 1.

13. Grinberg, *supra* note 1.

14. *See Hillsboro Senior High School Student Handbook 2016-2017* (2016), https://drive.google.com/file/d/0B4OkI17orl7sN09zOWhwV2VWT2c/view. In the forty-seven page, 2016-2017 edition of the school's student handbook, there is no mention of any policy regarding bathroom or locker room accessibility or usage. *See also Hillsboro High School Faculty Handbook 2016-2017* (2016), http://media.wix.com/ugd/010903_109db1ec597a401595960c7d7108cf41.pdf.

15. Grinberg, *supra* note 1.

16. Grinberg, *supra* note 1.

17. Kim Bell & Lily Fowler, *Three Members of Hillsboro School Board Resign Amid Controversy Over Transgender Student*, ST. LOUIS POST-DISPATCH (Sept. 10, 2015), http://www.stltoday.com/news/local/metro/three-members-of-hillsboro-school-board-resign-amid-controversy-over/article_a8408d86-71a2-5327-bf70-868417cac39e.html [hereinafter Bell & Fowler].

18. Bell & Fowler, *supra* note 17.

19. Bell & Fowler, *supra* note 17.

20. Bell & Fowler, *supra* note 17.

21. Bell & Fowler, *supra* note 17.

That same week over 150 students walked out of class protesting Lila's ability to use the women's restrooms.[22] It was clear the town was divided on the issue when a large crowd of supporters of Lila and LBGT rights organized a rally in Hillsboro Park, where Lila herself addressed the issue, determined to stand up for the rights of transgender youths across the nation.[23] Lila stated, "I believe that there are places like Hillsboro all over the county where young people are hurting, feeling alone, and being discriminated against because of who they are."[24] Despite uproar from parents, students, and the community, the school board refused to make a decision on whether the policy suggestions would be implemented.[25] The district's superintendent, Aaron Cornman, stated that the district intends to promote tolerance and acceptance of all of its students, as well as continuing to educate its students on how to respect and tolerate their fellow students.[26]

Although Ms. Perry has not alleged any sort of discrimination claim against the school at this point in time,[27] if the school were to adopt the policy suggested by the parents denying Lila access to the women's restrooms and locker rooms or any other school programming based on her sex, she may, under federal law, assert a claim of sex discrimination under Title IX.[28] Under Title IX, educational institutions who receive federal funding are prohibited from discriminating on the basis of sex and, thus, Title IX provides relief for those individuals who have been discriminated against.[29] By denying Lila access to the women's locker room and facilities she could allege disparate treatment and disparate impact caused by the district's policy based on her sex or gender identity as a transgender individual.[30]

This comment will propose an outcome for how a Missouri court would rule on Ms. Perry's potential claim for disparate treatment under Title IX. It will do so by addressing the "bathroom problem"[31] within the context of the evolution of Title IX and three major conceptions of how Title IX should be applied. Section II of this comment will discuss whether sex encompasses gender identity by providing an overview of what it means to be transgender.

22. Brynn Tannehill, *The Classmates of Trans Teen Lila Perry Should be Ashamed*, ADVOCATE (Sept. 14, 2015, 4:00 AM), http://www.advocate.com/commentary/2015/9/14/classmates-trans-teen-lila-perry-should-be-ashamed.

23. Grinberg, *supra* note 1.

24. Grinberg, *supra* note 1.

25. Grinberg, *supra* note 1.

26. Grinberg, *supra* note 1.

27. Grinberg, *supra* note 1.

28. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2013).

29. *Id.*

30. *See infra* Part III (discussing Title IX in more detail).

31. Referring to the common term for the issue of what bathroom use policy is appropriate and non-discriminatory for transgender students in federally funded educational facilities.

This section will begin to introduce how the courts have viewed "sex" and "gender" within the confines of Title IX and how this has evolved over the years. We will then delve into the history and background of Title IX in Section III, in order to better understand the legislative intent behind the adoption of Title IX. Section IV of this comment will then suggest there are three different views or applications of Title IX within the courts, and will propose a solution for the bathroom problem based upon those views. This section will also evaluate how a Missouri court would rule in Ms. Perry's hypothetical claim and which view of Title IX it would be most likely to take. In the end, this comment will put forth a proposition for change in order to help solve this problem once and for all.

II. DOES "SEX" ENCOMPASS GENDER AND GENDER IDENTITY?

Biologically and psychologically there can be a disconnect between anatomical sex and gender.[32] Justice Scalia himself, a well-known conservative, acknowledged the difference between sex and gender by stating, "[t]he word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male."[33]

Sex and gender, a subjectively adopted view that a person is a man or a woman, constitute a large part of the human identity.[34] Typically this self-concept of sex and gender originates at birth, but may not always be in accordance with anatomical sex.[35] Catharine A. McKinnon, a noted feminist, lawyer, scholar, and activist, wrote in her casebook entitled *Sex Equality:*

> Gender identity can conform to the body, or parts of it, or be at odds with it, or some features of it. Whether or not it conforms to the body, gender identity generally appears to be quite inflexible; indeed, it usually seems more difficult to alter than the physical body.[36]

Further recognizing that gender identity is not something that can be chosen or changed, psychologists have determined when an individual's anatomical sex and gender identity differ the individual is suffering from a disorder they call gender dysphoria.[37] For a person to be diagnosed with gender dysphoria, there must be a marked difference between the individual's

32. CATHARINE A. MACKINNON, SEX EQUALITY 213 (2d ed. 2007) [hereinafter MACKINNON].

33. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 157 (1994) (Scalia, J., dissenting).

34. MACKINNON, *supra* note 32, at 213.

35. MACKINNON, *supra* note 32, at 213.

36. MACKINNON, *supra* note 32, at 213.

37. THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.85 (Am. Psychiatric Ass'n, 5th ed. 2013).

expressed/experienced gender and the gender others would assign him or her, and it must continue for at least six months.[38] Those who suffer from gender dysphoria, more commonly referred to as transgender individuals, manifest their identity in a variety of ways, including strong desires to be treated as the other gender or to be rid of one's sex characteristics, or a strong conviction that one has feelings and reactions typical of the other gender.[39]

A. What It Means To Be "Transgender": A Deeper Understanding

All of these descriptions of sex and gender frequently used to help understand and apply basic rights to transgender individuals, although well-researched and educated, do not provide a full enough understanding of what "transgender" means. The category transgender has come to be understood as a *collective* category of identity which incorporates a diverse array of male- and female-bodied gender variant people who had previously been understood as distinct kinds of persons, including self-identified transsexuals and transvestites, but also many others.[40] Historically, even as recently as the 1970s, these individuals were considered part of the "gay community," both by insiders and outsiders.[41] However, over the past several decades there has been a radical transformation of the classifications of gender and sexuality spectrum in the United States, creating a wide array of individuals with particular characteristics that may not fall into the legally established protected classes.[42]

The term "transgender" was not technically coined until the 1990s,[43] but most authors will attribute this term to Virginia Price who used the term "transgenderist" in the 1970s to describe individuals who, like her, lived full time in a gender other than that to which they were ascribed at birth, but without surgical intervention.[44] Advocates for cross-gender identification in the 1990s began to view gender-variant identity more radically than in the 1970s.[45] With help of advocates like Holly Boswell[46], transgender began to mean something more than a category between "transsexual" and "transvestite" and became an alternative to binary gender.[47] As this radical

38. *Id.*

39. *Id.*

40. DAVID VALENTINE, IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY 4 (2007) [hereinafter VALENTINE].

41. VALENTINE, *supra* note 41, at 15.

42. VALENTINE, *supra* note 41, at 15.

43. VALENTINE, *supra* note 41, at 4.

44. VALENTINE, *supra* note 41, at 32.

45. VALENTINE, *supra* note 41, at 32.

46. VALENTINE, *supra* note 41, at 32.

47. *See* Holly Boswell, *The Transgender Alternative*, CHRYSALIS Q. 1(2): 29–31 (1991). "The middle ground I am referring to is transgenderism. I realize this term (heretofore vague) also encompasses the entire spectrum: crossdresser to transsexual person. But for the purpose of this

view of the category continued to progress, "transgender" became a collective or umbrella category of gender identity, which communities like social services, mental health, and academia used to wrestle with the myriad of various meanings and definitions of gender variance.[48]

B. Controlling Precedent: Price Waterhouse *and Its Progeny*

With the ever growing and changing definitions of sex, gender, and gender identity, it is understandable why the applications within the court system vary. Title VII and Title IX protect individuals from being subject to discrimination *on the basis of sex*, among other protected classes.[49] However, many of these individuals' claims for sex discrimination revolve around some characteristic different than their biological sex, like their sexuality, gender or gender identity. In addressing how gender discrimination may qualify as sex discrimination for purposes of Title VII, the Supreme Court's ruling in *Price Waterhouse v. Hopkins* has since become the controlling precedent.[50]

In 1988, the United States Supreme Court ruled in *Price Waterhouse* that sex discrimination includes discrimination based on "sex stereotyping," or a person's perceived nonconformity with gender stereotypes.[51] Prior to this, the majority of courts who had considered the issue had ruled that those who did not conform to gender norms and transgender individuals were not protected by Title VII.[52] The Court held that Price Waterhouse, as an employer, had failed to prove that an employment decision to postpone a promotion to partnership for Hopkins, a female employee, had any other valid reason besides sex discrimination.[53] Hopkins had alleged she was denied the promotion because of an attitude supported by comments that she was not feminine enough, or "needed to go to charm school" and, thus, was not conforming to the sex stereotypes.[54] The Court reasoned that because

article—and for what I hope will be a continuing dialogue—I shall attempt to define transgender as a viable option between crossdresser and transsexual person, which also happens to have a firm foundation in the ancient tradition of androgyny." *Id.*

48. VALENTINE, *supra* note 41, at 33. A suggested "relatively modest list" of kinds of people that fall under this category includes: transsexuals, transvestites, cross-dressers, men or women of transgender or transsexual experience, drag queens, drag kings, female or male impersonators, genderqueers, intersexuals, hermaphrodites, fem queens, girls, boys, trannies, feminine gay men, butch lesbians, male-to-female, female-to-male, female embodied masculine persons, and even, simply, men or women. *Id.*

49. *See* 42 U.S.C. § 2000e *et seq*; *see also* 20 U.S.C. § 1681 (2013).

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

51. *Id.*

52. Dana Beyer & Jillian T. Weiss with Riki Wilchins, *New Title VII and EEOC Rulings Protect Transgender Employees*, TRANSGENDER LAW CENTER (2014), http://transgenderlawcenter.org/wp-content/uploads/2014/01/TitleVII-Report-Final012414.pdf.

53. *Price Waterhouse*, 490 U.S. at 250–52.

54. *Id.* at 256.

aggressiveness is a trait the partners require for promotion, the employer's objections to Hopkins's aggressiveness placed her in an "intolerable and impermissible catch 22."[55]

The Court had previously recognized that Congress had intended to prohibit this type of discrimination based on sex stereotypes.[56] In its analysis, the Court stated that remarks at work based on sex stereotypes alone do not prove that gender played a part in a particular employment decision.[57] Rather in these circumstances, the plaintiff must show that the employer actually relied on her gender in making its decision, but it need not be the sole factor in the decision.[58] The Court ultimately held that the employment decision constituted sex discrimination under Title VII of the Civil Rights Act of 1964.[59] By agreeing that "Title VII lifts women out of this bind," the Court interpreted sex discrimination to include not just discrimination on one's sex in the sense of being *biologically* male or female, but also discrimination on the basis of how one presents one's *gender* relative to one's biological sex.[60]

Since the Supreme Court's *Price Waterhouse* decision, the holding has been understood and expounded to cover more individuals than the Court initially addressed. Although there are currently no explicit statutory protections in federal law against homosexual or transgender discrimination, many courts have held that *Price Waterhouse*'s ban on "assuming or insisting that [employees] match the stereotype associated with their group"[61] forbids employers from discriminating against gender-deviant LGBT employees.[62] The Equal Employment Opportunity Commission (EEOC) has also since ruled that discrimination against transgender workers categorically violates *Price Waterhouse*.[63]

Although the decision technically only binds in Title VII employment discrimination cases, this definition of discrimination based on gender and sex stereotyping has been used in many transgender discrimination cases outside of

55. *Id.* at 251.

56. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 (1978). "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Id.*

57. *Price Waterhouse*, 490 U.S. at 251.

58. *Id.*

59. *Id.*

60. Erin E. Buzuvis, *"On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J.L. GENDER & SOC'Y 219, 230 (2013) [hereinafter Buzuvis].

61. *Price Waterhouse*, 490 U.S. at 251.

62. Zachary R. Herz, Note, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 400 (Nov. 2014).

63. *Id.* at 401 (referring to the decision in Macy v. Holder, EEOC Decision No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012)).

the Title VII context. In a case about sexual violence against a transgendered inmate by a prison guard under the Gender Motivated Violence Act, the Ninth Circuit ruled under *Price Waterhouse* that sex encompasses both sex – that is, the biological differences between men and women – *and* gender.[64] It further went on to say that discrimination based on failure to meet gender norms, or because one fails to act in the way expected of a man or woman, is also forbidden.[65] The court held under the acts, the terms 'sex' and 'gender' have become interchangeable.[66]

The *Price Waterhouse* gender nonconformity interpretation of "because of sex" has already proven influential in Title IX cases, although not necessarily in cases with transgender students.[67] In *Montgomery v. Independent School District 709*, a student alleged that he had been harassed on the basis of his gender and sexual orientation.[68] Despite the fact that the student was targeted for what others believed to be his sexual orientation, the court determined that the extent to which this harassment targeted the way he presented his gender gave him a right to relief under Title IX and *Price Waterhouse* precedent.[69] Since *Montgomery*, many plaintiffs, both male and female, have prevailed in harassment cases by invoking *Price Waterhouse*.[70] Even in cases where plaintiffs' cases were dismissed, such outcomes were due to insufficient evidence that gender nonconformity motivated the harassment, not a disagreement about whether "because of sex" incorporates gender nonconformity as a matter of law.[71]

Although *Price Waterhouse* controls how courts should rule in cases where there has been discrimination based on sex stereotyping and gender identity in Title VII cases,[72] there has been debate over how the precedent should be applied in cases with transgender discriminations simply because the Supreme Court may not have imagined the implications of this decision on transgender

64. Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).

65. *Id.*

66. *Id.*

67. Buzuvis, *supra* note 61, at 233.

68. Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1083 (D. Minn. 2000).

69. *Id.* at 1083.

70. Buzuvis, *supra* note 61, at 234 (citing Patterson v. Hudson Area Sch., 551 F.3d 438 (6th Cir. 2009); Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816 (C.D. Ill. 2008); Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219 (D. Conn. 2006); Theno v. Tonganoxie Unified Sch. Dist No. 464, 377 F. Supp. 2d 952 (D. Kan. 2005)).

71. Buzuvis, *supra* note 61, at 234 (citing to several cases with these outcomes, e.g., Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 861, 867 (8th Cir. 2011); A.E. ex rel. Evans v. Harrisburg Sch. Dist. No. 7, No. 6:1 1-CV-6255-TC, 2012 WL 4794314 (D. Or. Oct. 9, 2012); Estate of Carmichael v. Galbraith, No. 3:11-CV-0622-D, 2012 WL 4442413 (N.D. Tex. Sept. 26, 2012); Hoffman v. Saginaw Pub. Sch., No. 12-10354, 2012 WL 2450805 (E.D. Mich. June 27, 2012)).

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

rights. Though *Price Waterhouse* did not involve a transgender plaintiff, transgender plaintiffs are among those who have prevailed under this interpretation.[73]

C. How Would a Title IX Claim in a "Bathroom Problem" Case Be Decided?

Many LGBT advocates caution against giving too much attention to the "bathroom question," given evidence from a growing number of school districts suggesting that transgender-friendly policies work.[74] Over the past few years, several similar school policies throughout the nation have been called into question to determine what protections and rights transgender students have at public schools.[75] These cases allege discrimination on the basis of sex under Title IX.[76] Even using *Price Waterhouse* to apply in Title IX cases, many courts continue to apply these standards in differing ways depending on how each court views Title IX.[77] Without direct guidance from the legislation or the Supreme Court on how to rule in this particular instance, a number of cases at the district and state court levels have interpreted nondiscrimination laws to apply to transgender students, granting them equal access to school facilities, including bathrooms.[78] However, there are many courts who have not adopted this rule.

Recently, in September of 2015, this very issue of restroom and locker-room access sex discrimination due to a student's transgender gender identity was addressed in Virginia.[79] Sixteen-year-old transgender male Gavin Grimm sued the Gloucester County School Board for the right to use the men's bathroom.[80] The school had a policy requiring that men and women use

73. Buzuvis, *supra* note 61, at 230. In *Smith v. City of Salem*, the court drew a parallel between an employer who discriminates against women because they do not wear dresses or makeup and employers who discriminate against men because they do wear dresses or makeup, or otherwise act femininely. If the former is an example of sex discrimination, as *Price Waterhouse* says, so too is the latter. Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004).

74. Grinberg, *supra* note 1.

75. Michael E. Miller, *Feds say Illinois school district broke law by banning transgender student from girls' locker room*, WASH. POST (Nov. 3, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/11/03/feds-say-illinois-school-district-broke-law-by-banning-trans-student-from-girls-locker-room/ [hereinafter Miller].

76. *Id. See also* Glenn v. Brumby, 632 F. Supp. 2d 1308, 1316 (N.D. Ga. 2009) (holding that the equal protection clause of the Fourteenth Amendment protects transgender government employees from discrimination on the basis of their transgender identity).

77. *See infra* Part IV (defining and laying out three differing views under Title IX).

78. *Id.*

79. Miller, *supra* note 76. The article goes so far as to call this phenomena "Bathroom Wars." *Id.*

80. G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., No. 4:15cv54, 2015 WL 5560190, at *1 (E.D. Va. Sept. 17, 2015).

separate bathrooms and locker rooms, and denied Gavin access to the men's room because he was biologically female.[81] The United States Department of Justice filed an amicus brief and a statement of interest in this case in an effort to correct certain views of the protections of Title IX for transgender students.[82] After discussing precedent set forth in *Price Waterhouse* and its progeny, the Statement of Interest went on to say: "Under Title IX, discrimination based on a person's gender identity, a person's transgender status, or a person's nonconformity to sex stereotypes constitutes discrimination based on sex. As such, prohibiting a student from accessing the restrooms that match his gender identity is prohibited sex discrimination under Title IX."[83]

Despite these statements from the Department of Justice, the Eastern District of Virginia held the school's bathroom policy did not violate Title IX, citing a Department of Education regulation allowing for separation of bathroom and locker rooms on the basis of sex.[84] In doing so, it stated its major motivation as protecting the other students' constitutional right to privacy.[85]

Federal officials continue to attempt to address this issue. The Department of Education released a document on December 1, 2014 that demonstrated its intent to protect transgender individuals.[86] While simply answering frequently asked questions of how Title IX is applied in these "single-sex classes"[87] for transgendered students, the Department of Education suggested that gender identity discrimination is sex discrimination.[88]

> How do the Title IX requirements on single-sex classes apply to transgender students? Answer: All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based

81. *Id.* at *2–3.

82. *See* Statement of Interest of the United States, G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., No. 4:15cv54, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015), (No. 4:15cv54), 2015 WL 5560190, ECF No. 28.

83. *Id.* at *1–2.

84. *G.G. ex rel. Grimm*, 2015 WL 5560190, at *6. The court cited a regulation of the Code of Federal Regulations, 34 C.F.R. § 106.33, which states a recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex. *Id.*

85. *Id.* at *13.

86. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES 25 (Dec. 1, 2014) [hereinafter OCR, QUESTIONS AND ANSWERS].

87. OCR, QUESTIONS AND ANSWERS, *supra* note 87, at 1. This document refers to single-sex classes and extracurricular activities that are covered by 34 C.F.R. § 106.34(b). The Code of Federal Regulations allows a federal funding recipient that operates a non-vocational coeducational elementary or secondary school to provide non-vocational single-sex classes or extracurricular activities, subject to certain requirements. 34 C.F.R. § 106.34(b).

88. OCR, QUESTIONS AND ANSWERS, *supra* note 87.

> discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.[89]

Furthering this report is an investigation from the Department of Education Office of Civil Rights from a case with strikingly similar facts to the issue arising out of Hillsboro.[90] In 2013, the administration of District 211 in Palatine, Illinois refused to let a transgender female to change in the female locker rooms before and after her physical education class.[91] The district instead allowed the aforementioned student, named "Student A" in reports, to change in a single stall restroom only for her access to be unlocked before her PE class, swim classes, and athletic activities and to be locked up when she was finished.[92] Student A filed a complaint against District 211 in December of 2013 alleging discrimination based on her sex in violation of Title IX.[93]

After a two-year investigation, the Department of Education Office for Civil Rights (OCR) released their report on November 2, 2015, finding that the school's policies were in violation of Title IX for excluding Student A from participation in and denying her the benefits of its education program, providing services to her in a different manner, subjecting her to different rules of behavior, and subjecting her to different treatment on the basis of sex.[94] The Office for Civil Rights cited the regulation implementing Title IX, at 34 C.F.R. § 106.33 in making its determination, which provides that a recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.[95] It went on to proclaim that all students, including transgender students, are protected from sex-based

89. OCR, QUESTIONS AND ANSWERS, *supra* note 87.

90. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., Case No. 05-14-1055 (Nov. 2, 2015) [hereinafter OCR, Case No. 05-14-1055].

91. OCR, Case No. 05-14-1055, *supra* note 91, at 1-2.

92. OCR, Case No. 05-14-1055, *supra* note 91, at 4. However, Student A felt this segregated her more because she would have to walk out and around all of the locker rooms before entering the gymnasium to not draw extra attention to herself. OCR, Case No. 05-14-1055, *supra* note 91, at 5.

93. OCR, Case No. 05-14-1055, *supra* note 91, at 1.

94. OCR, Case No. 05-14-1055, *supra* note 91, at While the Office for Civil Rights recognizes the District's reasoning that in putting these policies into place it was trying to protect the constitutional privacy rights of all of its students, the District already had installed privacy curtains for changing in its locker rooms, which would be sufficient to protect those privacy rights of individuals who did not want to change out in the open. However, the District had still denied Student A access to the locker rooms to change behind these privacy curtains and had thusly subjected her to stigma and different treatment based upon her sex. OCR, Case No. 05-14-1055, *supra* note 91, at 12.

95. OCR, Case No. 05-14-1055, *supra* note 91, at 9.

discrimination under Title IX.[96] The report stated that the school's denial of her access to these facilities "has also meant that, in order to satisfy her graduation requirements and receive a high school diploma, Student A has had no other option but to accept being treated differently than other students by the District."[97]

Despite the Department of Education and Department of Justice's attempts to show their intention to include gender identity as a basis for sex discrimination, courts have continued to struggle with this issue. Several courts have thus looked to the history and legislative intent of Title IX to solve the problem.

III. THE HISTORY AND EVOLUTION OF TITLE IX: DECADES OF CHANGE

As the civil rights movement was reaching its peak, Congress enacted The Civil Rights Act of 1964, which made great strides in attempting to eliminate discrimination based on religion, race, origin, and color.[98] The Act was the first public law to acknowledge the difference in employment relations between men and women and prohibited discrimination based on sex in employment decisions with Title VII.[99] As the women's civil rights movement gained momentum, sex bias and discrimination in schools emerged as a major public policy concern.[100] As more Americans were beginning to take notice of the employment opportunities and earning differences between men and women, they began to look at the educational opportunities provided to women.[101] By looking into the nation's colleges and universities, many found inequalities that, in effect, inhibited the progress of women.[102]

As a result, advocacy groups began to file class action lawsuits against these colleges and universities, as well as the federal government, complaining of an industry-wide pattern of sex bias against women who were students or worked in colleges and universities.[103] As a result, a special House Subcommittee on Education met in the summer of 1970, where Edith Green, chairperson of the committee, introduced a bill which unsuccessfully attempted to add a prohibition on sex discrimination to the Education Amendments of 1971.[104] Title IX was introduced in the Senate by Senator Birch Bayh the next

96. OCR, Case No. 05-14-1055, *supra* note 91, at 9.

97. OCR, Case No. 05-14-1055, *supra* note 91, at 10.

98. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

99. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000(e) *et seq.* (1964).

100. CIVIL RIGHTS DIV., U.S. DEP. OF JUSTICE, TITLE IX LEGAL GUIDE 16 (Jan. 11, 2001) [hereinafter CRD, TITLE IX LEGAL GUIDE].

101. CRD, TITLE IX LEGAL GUIDE, *supra* note 101.

102. CRD, TITLE IX LEGAL GUIDE, *supra* note 101.

103. CRD, TITLE IX LEGAL GUIDE, *supra* note 101.

104. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 17.

year, who explained that its purpose was to combat "the continuation of corrosive and unjustified discrimination against women in the American educational system."[105] On June 23, 1972, after several months of debate between the House and Senate[106], President Nixon signed Title IX of the Education Amendments of 1972 into law, codified at 20 U.S.C. § 1681.[107]

Title IX prohibits educational institutions from discriminating on the basis of sex.[108] The Title applies to all aspects of education programs or activities operated by those institutions receiving federal financial assistance[109], including colleges, universities, elementary and secondary schools.[110] Title IX is "a comprehensive federal law that has removed many barriers that once prevented people, on the basis of sex, from participating in educational opportunities and careers of their choice."[111]

A. Relief Under Title IX: A Brief Overview to Title IX and Transgender Issues

Title IX recognizes three general types of prohibited discrimination: (1) disparate treatment, (2) disparate impact, and (3) retaliation.[112] Disparate treatment actions are those that treat similarly situated persons differently on the basis of a prohibited classification.[113] To establish disparate treatment, one needs to show that similarly situated individuals were treated differently because of, or on the basis of their sex.[114] Disparate impact focuses on the consequences of a facially sex-neutral policy or practice, rather than on the intent to cause sex based results like disparate treatment.[115] Analyzing

105. 118 Cong. Rec. 5803 (1972). "[A] strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second class citizenship for American women." *Id.* at 5804.

106. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 18–19.

107. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 7,19.

108. 20 U.S.C. § 1681. "No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.*

109. *See* Grove City Coll. v. Bell, 465 U.S. 555, 592 n.8 (1984) (holding that Title IX is program-specific and only applies to the particular portion of a recipient's program that received financial assistance). Congress then passed the Civil Rights Restoration Act of 1987 overturning *Grove City*, which extended the definition of "program or activity" to include all operations of the facility receiving financial assistance. 20 U.S.C. § 1687 (2015).

110. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 7.

111. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 7.

112. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 57.

113. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 57.

114. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 58. The decision maker must be aware of the complainant's sex and took action, wholly or partially, based on their sex. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 58.

115. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 63.

disparate impact actions, the focus is on the results of the actions taken rather than the underlying intent.[116] Retaliation as a cause of action under Title IX ensures that beneficiaries are willing and able to participate in the enforcement of their own rights without fear of what might happen if a claim is filed.[117] Any institution's retaliation against a person who has filed a complaint or who assists enforcement agencies in discharging their investigative duties violates Title IX.[118]

Most often claims of sex discrimination arise under a disparate treatment theory because there is a clear difference in treatment because of sex. However, in many cases with transgender individuals, these claims will arise under both disparate treatment and disparate impact.[119] Once alleged, in order to find sex discrimination, a court would need to find that the claimant was excluded from participation in, denied benefits for, or discriminated against on basis of sex by any educational program or activity receiving Federal financial assistance[120] in order to grant relief under Title IX.

B. The Evolution of On The Basis of Sex *in Relation to Transgender Individuals*

Title IX reads "No person in the United States shall, *on the basis of sex*, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[121] While many courts have yet to hear a case of transgender sex discrimination under Title IX, the courts who have addressed it are split on how to apply precedent set forth, due to the many differing views of what sex should be protected under Title IX. Up until the late 1980s, there was a debate centering on whether discrimination *on the basis of sex* is in reference to only the basis of anatomical sex or if it also includes gender identity.

In determining whether there is sex discrimination, courts have traditionally viewed sex and gender as being based upon biological and anatomical sex.[122] Many courts looked to precedent from a 1984 Seventh Circuit case, *Ulane v. Eastern Airlines*, in which the court determined that the plain meaning of *on the basis of sex* in Title VII implies that it is unlawful to

116. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 63.

117. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 70.

118. CRD, TITLE IX LEGAL GUIDE, *supra* note 101, at 57.

119. *See* OCR, Case No. 05-14-1055, *supra* note 91 (where both gender neutral policies created a disparate impact on the student and the outright treatment of the student was disparate).

120. 20 U.S.C. § 1681(a) (2015).

121. *Id.* (emphasis added).

122. Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. Of Higher Educ., 97 F. Supp. 3d 657, 670 (W.D. Pa. 2015).

discriminate against women because they are women and against men because they are men.[123] The court concluded "a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."[124]

Twenty-six years after Title IX was enacted, in 1998, the Supreme Court further addressed the intent of Congress.[125] In *Gebser v. Lago Vista Independent School District*, the Court stated that Title IX was enacted with two principal purposes in mind: (1) to avoid use of federal resources to support discriminatory practices, and (2) to provide individual citizens effective protection against those practices.[126] Looking at this declaration of intent, many would assume the broad use of the term "citizens" would protect *all* citizens from discrimination. However, many courts have analyzed this intent in conjunction with a plain reading of the statute to derive the intent of the legislature, similar to that of the reading in *Ulane*. Title IX's plain language does not provide a basis for a transgender status claim as it makes no direct reference to gender or gender identity.[127] In its plain terms "on the basis of sex" means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex.[128] Thus, when analyzing under legislative intent, many courts have in the past ruled narrowly,[129] finding that transgender status is not a protected class under Title IX nor does it fall under discrimination on the basis of sex.

As mentioned throughout this comment, the major Supreme Court precedent from *Price Waterhouse* in 1988 changed the conversation. It is now commonly understood that the term sex discrimination also encompasses gender and gender norms, and, thus, gender identity.[130] The Supreme Court in *Price Waterhouse v. Hopkins* ruled that for the purposes of sex discrimination under Title VII, discrimination *on the basis of sex* includes discrimination based on gender stereotyping, or characteristics often referred to as "gender

123. Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984).

124. *Id.*

125. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S 274 (1998).

126. *Id.* at 286.

127. *See Johnston*, 97 F. Supp. 3d at 676–77. The court was sympathetic to the issue, but mentioned that it could do nothing about the application of the Title as is. The court went on to state "The exclusion of gender identity from the language of Title IX is not an issue for this court to remedy. It is within the province of Congress – and not this court – to identify those classifications which are statutorily prohibited." *Id.*

128. *Id.*

129. *See* Sommers v. Budget Marketing, Inc. 667 F.2d 748, 750 (8th Cir. 1982) (concluding that the word "sex" is to be given its traditional definition rather than an expansive one; holding because Congress has not shown an intention to protect transsexuals, discrimination based on one's transsexualism does not fall within the purview of the Act in a Title VII case).

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

norms,"[131] which has hence been applied to protect transgender individuals from discrimination based on their transgender status.

IV. THE THREE DIFFERING VIEWS OF SEX DISCRIMINATION

While there is a general consensus that discrimination based on sex or gender violates both Title VII and Title IX, there remains a variety of views on how these provisions should be applied. These varying views continue to be represented in the varying outcomes within different courts for issues like discrimination on the basis of sex for homosexual and transgender individuals. This comment suggests there are three viewpoints courts will take when deciding Title IX cases that have evolved since the adoption of Title IX. The first view is that of the people who say that Title IX is designed to "protect the weaker sex" and to ensure that females are allowed the same opportunities as males. The second view is that of the people who say that Title IX is designed to create equality between both men and women despite their differences, and should work to ensure equal opportunities for both males and females. The third and final view is that of the people who say that Title IX should be read in a gender-blind manner to ensure that all sexes and genders, are viewed and treated the same without specifically addressing their sex or gender as a reason.

A. Those Who Say "Protect the Weaker Sex": A Parental View

Under this view, the idea is that women have been classified as needing to be protected. Proponents of this view suggest that females are often taken advantage of and that Title IX is designed specifically to protect females from such hardships. This view often looks to remove barriers for females to opportunities that males often have.

At the most basic level, the triggers for the enactment of Title IX and the intent of Congress in enacting Title IX seem to align most with this view. The Department of Education declares the primary objective of Title IX is "to avoid the use of federal money to support sex discrimination in education programs and to provide individual citizens effective protection against those practices."[132] Women had to overcome a significant amount of barriers to receive the same education and educational programming that men received.[133] A large push for Title IX came from the realm of college athletics.[134] Before

131. *Id.*

132. *Overview of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681*, JUSTICE (Aug. 7. 2015), http://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq.

133. *See supra* Part III.

134. *Title IX Enacted*, HISTORY (2009), http://www.history.com/this-day-in-history/title-ix-enacted.

Title IX was enacted, there were very few opportunities for women athletes.[135] The NCAA offered no athletic scholarships for women and held no championships for women's teams.[136] "Title IX was designed to correct those imbalances."[137]

This view suggests Title IX in itself is set out not to equalize the sexes in publicly funded schools and programs, but rather to protect females in particular from inequalities and from harassment. Schools are not required merely to treat similarly situated students alike; rather, they must work to remedy sexual harassment as well.[138] In requiring schools to do so, the Court has imposed on schools a mandate that appreciates the damaging effects that peer sexual harassment has on students' education, particularly that of girls and young women.[139] In doing so, schools are then required to attempt to equalize educational opportunities that would otherwise be missed out on as a result of peer sexual harassment.[140]

Further, this view look to protect the privacy and modesty of females. In looking at this view, it is important to point out the similarities to the arguments of many of the parents in Hillsboro who stood up to the school board claiming their daughters needed protection from this violation of privacy.[141] One parent in particular said, "We believe the current situation violates rights of other students. Girls have a right to privacy of their own bodies, and parents have a right to raise their children the way they want."[142] This was the view that was the sole motivation for the outcome in *Grimm*.[143] This court stated that by protecting the bodily privacy of the other students, the school board was protecting a constitutional right, and cited to several cases discussing the right to privacy one is guaranteed in his or her naked body.[144]

The solution to the bathroom problem under this view is to enforce a strict policy of bathroom use associated with the sex assigned to an individual at birth, much like the decision from *Grimm.*[145] This solution has been suggested

135. *Title IX Enacted*, *supra* note 135.

136. *Title IX Enacted*, *supra* note 135.

137. *Title IX Enacted*, *supra* note 135.

138. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 266-67 (2005) [hereinafter Cohen].

139. *Id.*

140. *Id.*

141. Grinberg, *supra* note 1.

142. Grinberg, *supra* note 1.

143. *See G.G. ex rel Grimm*, 2015 WL 5560190.

144. *Id.* at *13 (citing Doe v. Luzerne County, 660 F.3d 169 (3d Cir. 2011); Brannum v. Overton Cnty. Sch. Bd., 516 F.3d 489, 494 (6th Cir. 2008); Poe v. Leonard, 282 F.3d 123, 138–39 (2d Cir. 2002); York v. Story, 324 F.2d 450, 455 (9th Cir. 1963)).

145. *Id.* at *1.

by many courts.[146] Transgender individuals are not selectively excluded from bathrooms, but they are excluded from certain bathrooms on the same basis as all biological males and females, biological sexual assignment.[147] These courts have consistently concluded that requiring individuals to use bathrooms consistent with their birth or biological sex rather than their gender identity is not discriminatory conduct in violation of federal and state constitutions and statutes.[148] One court in particular even went so far as to say, "it would be a stretch to conclude that a 'restroom,' in and of itself, is educational in nature and thus an education program" as required to state a prima facie case under the statute."[149] Under this view, bathroom usage would also be monitored closely, in particular to ensure the privacy of these young women was protected. Asking transgender students, like Ms. Perry, to use a facility that of their birth sex would not be considered discrimination based on sex under this view.

B. Those Who Say "Different But Equal": A Different Sexes But Same Treatment View

Under this view, the idea is that there are males and there are females. Although slightly anatomically different, there are two sexes that are both human and both deserve the same opportunities. The proponents of this view typically see Title IX as a way to level out differences between males and females. Under this view, both sexes should receive equal opportunities, rights, and facilities and should be guaranteed the same protections under law.

Some of the most prevalent supporters of this view are those who support feminist theory. Although there are differences between males and females, the two should be equal. The most basic form of feminist theory takes root in general principles of formal equality that can be traced back to the Aristotelian ideal of 'the same treatment of similar persons.[150] If one is the same, one is to be treated the same; if one is different, one is to be treated differently.[151] This concept of equality is empirical in that how one ought to be treated is based on the way one is, but it is also symmetrical, as if two sides of an equation were

146. *See, e.g.* Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657 (W.D. Pa. 2015); Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003); Hispanic Aids Forum v. Bruno, 16 A.D.3d 294, (N.Y. App. Div. 2005); Goins v. West Group, 635 N.W. 2d 717 (Minn. 2001); Causey v. Ford Motor Co., 516 F. 2d 416 (5th Cir. 1975); Doe v. Clark Cnty. Sch. Dist., No. 206-cv-1074-JCM-RJJ, 2008 U.S. Dist. LEXIS 71204, (D. Nev. Sept. 17, 2008).

147. *Hispanic Aids Forum*, 16 A.D.3d at 298.

148. *Johnston*, 97 F. Supp. 3d at 681.

149. *Doe*, 2008 U.S. Dist. LEXIS 71204 at *3.

150. Cohen, *supra* note 139, at 259.

151. MACKINNON, *supra* note 32, at 4.

conjoined with a mathematical = sign.[152] This theory of formal equality is a principle of equal treatment: individuals who are alike should be treated alike, according to their actual characteristics rather than assumptions made about them based on stereotypes.[153]

Seeing differences in sex and gender under this "different but equal" view, a court analyzing Ms. Perry's discrimination in Hillsboro would be most likely to rule that the law should treat her the same regardless of her anatomical sex. The Supreme Court holding in *Personal Administrator of Massachusetts v. Feeney*, demonstrates this view of sex equality best in addressing a non-Title IX or Title VII issue.[154] The case came from a discriminatory challenge to a preference for hiring veterans based on proof that the preference impacted women as a group more severely than men because women were less likely to be veterans.[155] The Court found that the law treated individuals the same based on sex: men and women with veterans' preferences were treated equally, and men and women without veterans' preferences were treated equally.[156]

The solution to the bathroom problem under this view is similar to what many schools now offer. Males and females may use the restroom of their sex at birth or may use a gender neutral or faculty restroom. A court with the "different but equal" view may look to *Feeney*, and, thus, would likely only be concerned with whether students had been treated equally under the law regardless of their male or female anatomy. This view would also suggest, like the first view, that transgender individuals are not selectively excluded from bathrooms, but they are excluded from certain bathrooms on the same basis as all biological males and females, biological sexual assignment.[157] In doing so, the law is treating males and females in the same manner, and there is no discrimination on the basis of sex. Asking transgender students, like Ms. Perry, to use a gender-neutral facility or that of their birth sex would not be considered discrimination based on sex under this view.

C. Those Who Say "Turn A Blind Eye": A Gender Neutral View

The gender-blind or gender neutral view aims to be more about equality regardless of sex or gender differences. Most proponents of this view say that sex, gender, sexual orientation, or otherwise should not create different rights or discrimination in the eyes of the law. Proponents of this view often see Title IX's prime function as being able to address many civil and human rights concerns by removing discrimination based on labels based on sex or gender,

152. MACKINNON, *supra* note 32, at 4.
153. Cohen, *supra* note 139, at 221.
154. *See* Personal Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).
155. *Id.*
156. *Id.*
157. *Hispanic Aids Forum*, 16 A.D.3d at 298.

requiring equal and fair treatment for all, regardless of sex, gender, or gender identity. This view of Title IX specifically considers gender identity due to transgender status as a definitive part of "sex."

Many proponents of a gender blind view under Title IX and in sex equality have made correlations between sexism and racism. We know that it is wrong to have racially segregated establishments or to discriminate based on race. But segregation based on sex is common and unfortunately so is sex discrimination. Richard Wasserstrom drew on this correlation by looking at segregation of bathrooms.[158] "We know, for instance, that it is wrong, clearly racist, to have racially segregated bathrooms. There is, however, no common conception that it is wrong, clearly sexist, to have sexually segregated ones."[159]

The Supreme Court made a point to move towards a more gender neutral or gender-blind rule of law in *Reed v. Reed*.[160] The case ruled on a state estate law that specified males must be preferred to females when appointing administrators of estates.[161] The Court required that legal sex distinctions have a "rational basis" in order to be constitutional.[162] Catharine McKinnon, in her casebook *Sex Equality*, went so far as to say that this ruling "[g]ave birth to the modern constitutional movement for sex equality under law."[163] This case was further strengthened by *Craig v. Boren*.[164] The Court further required that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.[165] Since this ruling, it has been widely read as elevating gender neutrality to a more demanding standard than before by requiring a stronger showing before sex distinctions will be allowed.[166]

Putting things into perspective, on its face, a solution to the bathroom problem under this view would be to enforce a policy only permitting the use of gender neutral facilities for everyone, regardless of sex or gender identity. However, this is by no means a practical or economic solution to the bathroom problem. A mandate of this kind would require all educational institutions to renovate and remodel their restrooms and locker rooms to become individual, single stalls. Perhaps a solution under this view is not necessarily to only allow

158. Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 592 (1977).

159. *Id.*

160. *See* Reed v. Reed, 404 U.S. 71 (1971).

161. *Id.*

162. *Id.* at 76. "The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314." *Id.*

163. MACKINNON, *supra* note 32, at 218.

164. Craig v. Boren, 429 U.S. 190 (1976).

165. *Id.* at 197.

166. MACKINNON, *supra* note 32, at 228.

some sort of single stall, gender-neutral bathrooms, but may be something less restrictive entirely. There have been many proposed solutions to this issue trying to seek some sort of compromise,[167] but the simplest and most practical solution to the bathroom problem under this view is to incorporate a transgender-friendly policy that allows individuals to use the restroom and locker room of their gender identity. Asking transgender students, like Ms. Perry, to use a gender-neutral facility or that of their birth sex would certainly be considered discrimination based on sex under this view.

D. Application: How Would a Missouri Court Rule?

Understanding that there is no clear federal protection at this point in time, many states have decided to step in and address the discrimination and bullying of transgendered individuals on their own through their state Human Rights Commissions. Many of the recent school discriminations cases not only arise from Title IX or Equal Protection claims, but will also include claims under state discrimination or anti-bullying statutes. Although Missouri has protected individuals from hate crimes based on sexual orientation including gender identity,[168] the state legislature has not yet amended any of its discrimination laws to address school discrimination practices or bullying based on these qualifiers.[169] Missouri is one of only twenty-four states who have yet to do so.[170] Without specific federal or state legislation to guide this court in cases of Title IX discrimination of transgender individuals, it would necessarily have to look to the authority set within its own circuit or by the superior courts.

If Lila Perry, or another Missouri resident, were to bring a discrimination claim under Title IX, it would appear within the Eighth Federal Circuit. Hillsboro, Missouri falls within the Eastern District of Missouri, which, to this day, has yet to address a transgender discrimination claim under either Title IX or Title VII. This particular issue would be a case of first impression for the District. Without district precedent, an Eastern District Missouri court would likely look to precedent set forth by the Eighth Circuit Court of Appeals for binding precedent or to other district courts within the Eighth Circuit to find persuasive precedent.

167. *See* Grinberg, *supra* note 1. One parent in Hillsboro even suggested some sort of compromise by "maybe cordoning off a section of the girls' locker room or designating some restrooms 'transgender-friendly' so students know what to expect."

168. MO. REV. STAT. § 577.035 (2016).

169. MO. REV. STAT. § 213.010 (2016). The Human Rights Act of Missouri does not protect against discrimination based on gender identity or sexual orientation. *Id.* The Chapter includes protections against discrimination based on race, color, religion, national origin, ancestry, sex, disability, or familial status. *Id.*

170. MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/safe_school_laws (last visited Sep. 12, 2016).

The Eighth Circuit Court of Appeals in a 1982 case, *Sommers v. Budget Marketing*, ruled that the term "sex" was intended to be construed narrowly and should not include transsexual or transgendered individuals within the confines of discrimination based on sex.[171] However, in several lower district courts as well as other circuit Courts of Appeals, this decision has been questioned in the post-*Price Waterhouse* era.[172] These courts suggest that cases such as *Ulane*[173] and *Sommers* are now rendered unhelpful to the analysis of law the Court because the "narrow view" of the term sex in Title VII has since been *eviscerated* by *Price Waterhouse*.[174]

Without any further mention on how to interpret "sex" in the post-*Price Waterhouse* era by the Court of Appeals, the Court for the Eastern District of Missouri would likely refer to precedent set within its Circuit. In *Rumble v. Fairview Health Services*, the United States District Court for the District of Minnesota determined in a Title VII case that courts have broadly characterized an individual's transgender status as part of that individual's "sex" or "gender" identity, as a result of the ruling in *Price Waterhouse*.[175] This Eighth Circuit court rationalized that because the term "transgender" describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping within the precedent set forth in *Price Waterhouse*.[176] Therefore, an individual's transgender status is necessarily part of his or her sex or gender identity when asserting a claim for discrimination on the basis of sex.[177]

The Court may also want to, in its analysis, take into account the concerns of the parents of the female students at the school demanding privacy for their young daughters. These parents have privacy concerns for their young daughters that will not likely be easy to ignore. However, taking this into account the precedent set forth within the district controlled by *Price Waterhouse* as well as the guidance issued by federal officials, the Court would certainly be inclined to rule in accordance with the view of gender neutrality under Title IX. Despite the lack of state-level protections in Missouri for

171. *See* Sommers v. Budget Mktg., 667 F.2d 748 (8th Cir. 1982). "[For] the purposes of Title VII the plain meaning must be ascribed to the term "sex" in absence of clear congressional intent to do otherwise. Furthermore, the legislative history does not show any intention to include transsexualism in Title VII." *Id.* at 750.

172. *See* Radtke v. Misc. Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund, 867 F. Supp. 2d 1023 (D. Minn. 2012) (citing Smith v. City of Salem, 378 F.3d 566, (6th Cir. 2004)).

173. *See* Ulane v. Eastern Airlines, 742 F.2d 1081 (7th Cir. 2008).

174. *Radtke*, 867 F. Supp. at 1032 (emphasis added).

175. Rumble v. Fairview Health Servs., 2015 U.S. Dist. LEXIS 31591, at *4 (D. Minn. 2015).

176. *Id.*

177. *Id.* at *5.

transgendered individuals, a Missouri federal court analyzing Ms. Perry's hypothetical claim for discrimination would likely find in favor of Ms. Perry, ruling that discrimination based on her gender identity constitutes discrimination on the basis of sex under Title IX.

V. CONCLUSION: A PROPOSAL TO CHANGE

Despite federal officials' assertions that barring students from restrooms that match their gender identity is prohibited under Title IX,[178] it is evident that, until recently, there was still no clear standard for states to apply when assessing the "bathroom problem." In 2016, a number of states attempted to pass transgender bathroom bills into law, and two succeeded at the time of this writing.[179] In March of 2016, North Carolina Governor Pat McCrory signed into law the Public Facilities Privacy & Security Act, a bathroom bill.[180] The Act requires students at North Carolina state schools to use the facilities that coordinates with their *biological sex*, which the Act describes as the "physical condition of being male or female, which is stated on a person's birth certificate."[181] Even though there have been very few states to pass such a law, this led to a dichotomy between state laws and guidance from departments of the federal government, which directly contradict each other.

"There is a public interest in ensuring that *all students*, including transgender students, have the opportunity to learn in an environment free of sex discrimination."[182] Without question, guidance by federal officials such as the Department of Education and the Department of Justice had done little to solve this issue. The lower-level courts continued to apply Title IX in cases of transgender students in an inconstant manner. Although these courts have expressed the three views of protections under Title IX as addressed above, it seems that as the case law surrounding this issue evolves, the gender-neutral view has become the official view of a significant amount of courts and federal offices.

Recently, in August 2016, the Supreme Court temporarily blocked the decision by the Fourth Circuit in *Grimm*[183] while it decided whether it would

178. *See* Statement of Interest of the United States, G.G. *ex rel* Grimm v. Gloucester Cnty. Sch. Bd. (No. 4:15cv54), 2015 WL 5560190, ECF No. 28.

179. *See e.g.* H.R. 1008, 2016 Leg., 91st Sess. (S.D. 2016); *see also* Greg Botelho & Wayne Drash, *South Dakota governor vetoes transgender bathroom bill*, CNN (Mar. 2, 2016 1:51 AM), http://www.cnn.com/2016/03/01/us/south-dakota-transgender-bathroom-bill/.

180. H.B. 2, Gen. Assemb. of N.C., Second Extra Sess. (N.C. 2016).

181. *Id.*

182. *See* Statement of Interest of the United States, G.G. *ex rel* Grimm v. Gloucester Cnty. Sch. Bd. (No. 4:15cv54), 2015 WL 5560190, ECF No. 28, at *2 (emphasis added).

183. G.G. *ex rel*. Grimm v. Gloucester Cnty. Sch. Bd., No. 4:15cv54, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015) (discussed *infra* in Section II(C)).

hear the case.[184] Meanwhile, federal Judge Reed O'Connor of the Federal District Court for the Northern District of Texas issued a nationwide injunction that blocked the Obama administration from enforcing new guidelines that were intended to expand restroom access for transgender students across the country.[185] The injunction kept transgender students from using school bathrooms and other facilities that correspond with their gender identity.[186]

In February 2017, the Trump administration decided not to challenge the nationwide injunction issued in *Texas et al.* in court, ending the effort by the Obama administration to change policy.[187] The United States Department of Justice and Department of Education then issued a "Dear Colleague" letter announcing that they were withdrawing the previous policy and guidance that prohibitions on the basis of sex, under Title IX, require access to sex-segregated facilities on the basis of gender identity.[188] The letter states there "must be due regard for the primary role of states and local school districts in establishing educational policy,"[189] which directly supports President Trump's expressed views that this is a states' rights issue.[190] Following the Trump administration's change in policy, the Supreme Court remanded *Grimm* back to the lower courts for further review.[191]

In order to create a uniform application of Title IX throughout the nation and guarantee *every* student is protected from discrimination based on sex, a federal rule *needs* to be created to address the protections of transgender individuals. This federal rule should be in accordance with the gender-neutral view of Title IX expressed by federal officials under the Obama administration. It may directly address the bathroom problem, suggesting transgender students may use the bathroom that associates with that of their gender identity, or it may specifically state that transgender students may

184. Gloucester Cnty. Sch. Bd. v. G.G., No. 16A52, 579 U. S. ___, (Aug. 23, 2016) (on application to recall and stay).

185. State of Texas, et al., v. United States of America, No. 7:16-cv-00054-O, 2016 U.S. Dist. LEXIS 113459 (N.D. Tex Aug 21, 2016).

186. *See id.*

187. *See* Liam Stack, *Trump Drops Defense of Obama Guidelines on Transgender Students*, N.Y. TIMES (Feb. 11, 2017), https://www.nytimes.com/2017/02/11/us/politics/trump-transgender-students-injunction.html?_r=0/.

188. US Dep't of Justice & Dep't of Ed., Dear Colleague Letter (February 22, 2017) [hereinafter *Dear Colleague Letter*].

189. *Dear Colleague Letter*, *supra* note 188, at 1.

190. *See* THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY, Press Briefing by Press Secretary Sean Spicer #15 (Feb. 23, 2017).

191. Gloucester Cnty. Sch. Bd. v. G.G, No. 16-273, 579 U.S. ___ (Mar. 6, 2017). "Judgment VACATED and case REMANDED to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017." *Id.* As of the time of this writing, there has been no development in the lower courts on this matter.

participate in any school event, class, or use any facility in accordance with their gender identity. This type of rule has the ability to solve a massive inequality within the current school systems, and is winning favor with many proponents of civil rights and state Human Rights Commissions.

Whether the Supreme Court will get another opportunity in the next few years to grant certiorari on an issue like this is not certain. It is also uncertain how the Justices would rule on such an issue, due to the recent change in policy by the Department of Justice and Department of Education. However, in the wake of *Obergefell v. Hodges*,[192] where the Supreme Court took a gender-blind approach and ruled that the fundamental right to marry is also guaranteed to same-sex couples, this type of rule may not be so far off. It may even come down to an adoption of new federal legislation on this issue, if the issue does not appear before the Supreme Court. The application of Title IX is *not* a states' right issue. The rights and privileges associated with public education cannot and has not been a states' rights issue for over half a century. As evidenced in long-standing precedent *Brown v. Board of Education*, *all* students deserve equal protection of the law, not separation based on some personal characteristic or trait.[193]

Realistically, the Supreme Court may not grant certiorari to a case similar to *Grimm* following its remand in March, so the judiciary might not end up being the creator of such a federal ruling. Whether it be through a new legislation, or amending Title IX to include transgender as a protected class, there may come a time when the legislature will need to step in and set the controlling rule on this issue. Regardless of how this proposed new federal rule might come about, it is time for someone to step in and stand up for the equality of *all students* in their protections against discriminations on the basis of sex in the educational system.

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192. *See* Obergefell v. Hodges, 135 U.S. 1039 (2015).

193. *See* Brown v. Bd. of Ed., 347 U.S. 483 (1954) "We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal." *Id.* at 495.

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