Exploring the Influence of Titles VII and IX in K-12 Schools

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Introduction

In 1975, Minneapolis became the first city in the United States to pass trans-inclusive civil rights protection legislation. Since then, transgender rights have moved forward with courts over the past year extending the protections of state and federal law to transgender students. In addition, with the changes in the current administration, agencies such as OCR and the Department of Education are taking new approaches. This manuscript provides an overview of state and federal civil rights laws, addresses the current legal landscape surrounding transgender student and staff rights in the K-12 setting, and identifies top areas of contention and resulting litigation.

I. Minnesota Laws Protecting Transgender Individuals

Minnesota has been at the forefront of a progressive trend toward providing state-level protections for individuals based on sexual orientation and gender identity. It began with a trans-inclusive city ordinance in 1975 and culminated in the passing of state-wide legislation a few decades later.

a. Minneapolis City Ordinance

In March 1974, the Minneapolis City Council passed a city ordinance by voting 10-0 to ban discrimination on the basis of "affectional or sexual preference." While forward-looking for its time, the ordinance was amended the following year. This amendment broadened the reach of the ordinance by providing protections for transgender individuals. The amendment provided that discrimination on the basis of "having or projecting a self-image not associated with one's biological maleness or one's biological femaleness" would be barred. This policy was the first in the country to provide broad protections for, among other things, enrollment in schools and use of public services and accommodations. Emma Margolin, *How Minneapolis Became the First City in the Country to Pass Trans Protections*, MSNBC, https://www.msnbc.com/msnbc/how-minneapolis-became-the-first-city-the-country-pass-trans-protections-msna858606

b. Minnesota Human Rights Act

State action on this front did not come until 1993. That year, Minnesota passed the Minnesota Human Rights Act (MHRA), which became the first state-level anti-discrimination law in the nation to expressly ban discrimination against transgender individuals. The MHRA contains both employment and educational provisions that provide protections to transgender individuals.

i. Employment

The MHRA prohibits sexual orientation discrimination in the workplace. Minn. Stat. § 363.08, subd. 2. Specifically, the statute provides that it is an unfair employment practice to: "(1) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or (2) discharge an employee; or (3) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." The statutory definition of sexual orientation includes "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or

femaleness." Minn. Stat. § 363.03, subd. 44. Though it is a slightly older case, the Minnesota Supreme Court decision in *Goins v. West Group* provides some clarification as to the types of practices that may or may not give rise to a valid employment discrimination claim based on an individual's sexual orientation. 635 N.W.2d 717 (Minn. 2001). In *Goins*, the court noted that an employer's designation of employee restrooms based on biological genders does not constitute sexual orientation discrimination within the meaning of the MHRA. This notably conflicts with the interpretation of MHRA's educational provision, which is discussed below, and remains an area of contention for activists.

Despite this, the MHRA provides a number of protections for transgender individuals in the workplace and presents an avenue through which individuals can bring sexual orientation discrimination claims against their employers.

ii. Education

Currently, the MHRA education provision, Minn. Stat. § 363A.13, subd. 1, provides, "It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of ... sexual orientation." Again, the definition of sexual orientation includes "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. § 363.03, subd. 44 (2000).

In a case of first impression, the Minnesota Court of Appeals considered the case of a transgender high school student who was denied use of a locker room that corresponded to the gender with which the student identified. *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Ct. App. Minn. 2020). The student alleged violations of both the MHRA and article I, Section 2 of the Minnesota Constitution (equal protection). With respect to the alleged MHRA violation, the school district argued that *Goins* should control. The Minnesota Supreme Court in *Goins* specifically held that "an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination in violation of the MHRA." *Id.* at 717. Yet, as the N.H. court noted, *Goins* only applied in the employment context. The plain language of the MHRA education provision differs from and provides a much broader prohibition against discrimination than the MHRA employment provision. The Minnesota Department of Human Rights – arguing on behalf of the plaintiff – noted that the educational and employment provisions of the MHRA differ in important ways: "(1) education is compulsory in Minnesota, Minn. Stat. § 120A.22 (2018); (2) education is a constitutional right, Minn. Const. art. XIII, § 1; (3) students should not be required to 'shop' among schools and districts to obtain a discrimination-free education; and (4) '[s]chools play a pivotal role in a young person's development and intellectual, mental, and emotional health.'" *N.H.*, 950 N.W.2d at 561.

Ultimately, the *N.H.* court concluded that MHRA's education provision prohibited segregating and separating transgender students with respect to locker-room use. The court noted that the plain language supported this interpretation. In particular, it found that the state legislature did not include locker-room usage among the enumerated exceptions to the MHRA's educational provisions. *See* Minn. Stat. § 363A.23, subds. 1–2 (2018) (exempting religious or denominational institutions from certain religion- or sex-based admission-discrimination prohibitions and

exempting athletic teams from certain sex-discrimination prohibitions); *see also* Minn. Stat. § 645.19 (2018) ("Exceptions expressed in a law shall be construed to exclude all others.").They also found federal Title IX jurisprudence to be persuasive and consistent with the court's reading of the plain language of the MHRA. *See State v. McClenton*, 781 N.W.2d 181, 191 (Ct. App. Minn. 2010) ("[A]lthough we are not bound to follow precedent from other states or federal courts, these authorities can be persuasive."). The court also noted that the MDHR's interpretation of the MHRA—as discussed above—was of "great weight" and in accordance with the court's reading. *See Minn. Mining & Mfg., Co. v. State*, 289 N.W.2d 396, 399-400 (Minn. 1979) (noting that MDHR's interpretation of the MHRA is entitled to "great weight"). The court further noted that it could look to the Minnesota Department of Education School Safety Technical Assistance Council's toolkit regarding transgender and gender nonconforming students for guidance.

The council was established by the Minnesota Safe and Supportive Schools Act in 2014. Minn. Stat. § 127A.051, subd. 1 (2018). In 2017, the council promulgated the above-referenced toolkit, entitled *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students*. The toolkit was compiled to "provide information to assist schools in establishing or amending school policies to ensure that all students are provided with a safe and supportive school environment." It covers a wide range of school policies, including names and pronouns, athletics, homecoming, prom, and school events, dress code, restrooms, locker rooms, and hotel accommodations. While the toolkit does not create any binding legal obligations, it nevertheless provided important guidance to the *N.H.* court, and will likely continue to influence courts in subsequent decisions.

II. Protections for Transgender Individuals under Titles VII, and IX

a. Title VII

Title VII of the Civil Rights Act of 1964 provides broader protections than its Title VI counterpart. Title VII makes it "unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). Areas that may give rise to a Title VII violation include, but are not limited to, recruiting, hiring, promoting, transferring, training, disciplining, discharging, assigning work, measuring performance, or providing benefits. It applies to employers in both the private and public sectors that have fifteen or more employees. It additionally applies to the federal government, employment agencies, and labor organizations. The Equal Employment Opportunity Commission is responsible for enforcing Title VII and related employment discrimination laws.

For many years, there was a lingering question of whether Title VII coverage could be extended to gay or transgender individuals. Slowly, federal courts began interpreting Title VII to apply to and protect transgender individuals. *See, e.g., Smith v. Cty. of Salem*, 378 F.3d 566 (6th Cir. 2004); *Shroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). In 2012, the EEOC issued an important decision in *Macy v. Holder*, in which it held for the first time that discrimination against transgender employees is covered by Title VII. After the EEOC's holding, courts across the country continued to issue decisions that extended Title VII coverage to homosexual and transgender individuals.

However, it was not until the landmark decision in *Bostock v. Clayton County, Georgia* that the Supreme Court weighed in on the issue. 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020). There, the Court considered the claims of three employees who were fired by their respective employers for being either homosexual or transgender. The court ultimately sided with the EEOC, holding that an employer violates Title VII, which makes it unlawful to discriminate against an individual "because of" their sex, by firing an individual for being homosexual or a transgender person.

Alito's dissent in *Bostock* noted that the majority's holding will have a significant impact in the Title VII and Title IX contexts and will impact school environments in a number of ways. This may include the use of shared facilities, participation in athletics, freedom of speech, and some constitutional claims. Some of these areas will be discussed in greater detail in the Title IX section below. As predicted, *Bostock* has had a profound impact on educational settings. Since the decision, which had the effect of bringing homosexual and transgender employees within the ambit of Title VII, courts have increasingly applied the reasoning and holding to the Title IX context.

b. Title IX

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." Title IX, which was passed after Title VI, uses language that tracks that of Title VI, but prohibits discrimination on the basis of sex in education programs or activities of recipients of federal financial assistance. It is simultaneously broader than Title VI, as it has no counterpart to Title VI's limited applicability to employment practices. Title IX is therefore capable of redressing sex discrimination in employment, admissions, as well as general educational activities, by federally funded education programs. The Department of Education's Office for Civil Rights (OCR) is responsible for the enforcement of Title IX.

OCR's approach to transgender issues has markedly changed during the past several presidential administrations. Under the Obama administration, there was an emphasis to enforce protections for transgender students more vigorously under Title IX. In 2016, the DOE OCR and DOJ's Civil Rights Division jointly issued a letter instructing that discrimination based on sex encompassed "discrimination based on a student's gender identity, including discrimination based on a student's transgender status."

The Trump administration reversed course on this issue prior to *Bostock*. In 2017, the DOE and DOJ withdrew the Obama administration's letter. Following *Bostock*, the outgoing Trump administration agreed that Title IX covers individuals based on LGBTQ status. However, the Trump administration also noted that certain types of conduct could not constitute illegal discrimination, such as providing unfettered access to school facilities and participation in athletic competitions that correspond with a person's gender identity.

The Biden administration has ushered in yet another change in the federal government's approach to transgender issues in school environments. On his first day in office, Biden issued an executive order which directed federal agencies to implement *Bostock* and to enforce federal

prohibitions on sex discrimination against individuals based on sexual orientation and gender identity. Exec. Order 13,988, 86 Fed. Reg. 7023 (January 20, 2021).

The order itself specifically referenced Title IX. Later in 2021, the OCR issued a Notice of Interpretation regarding *Bostock*. Office of Civil Rights, Federal Register Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf. In the Notice, the OCR provided that Title IX prohibits discrimination against LGBTQ students and employees in public schools, colleges, universities, and other recipients of Department funds. This was not necessarily surprising given that Title IX is generally seen as the sister statute of Title VII. In any event, it indicated that the current administration was willing to apply the *Bostock* holding specifically in the Title IX context. In interpreting the scope of Title IX's prohibition on sex discrimination the Supreme Court and lower federal courts have often relied on the Supreme Court's interpretations of Title VII. *See, e.g.*, *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001). OCR will fully enforce Title IX to prevent discrimination based on sexual orientation and gender identity, which may include "allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity."

The Biden administration has not been unique in its approach to effectively apply *Bostock* in the Title IX context. The Notice, in fact, admits as much. Both before and after *Bostock*, courts across several jurisdictions have been willing to extend Title IX protections to individuals based on their LGBTQ status. This will likely continue as the administration reaffirms its commitment to enforcing protections of transgender individuals under Title IX. The discussion below includes some of the areas that may see an increase in Title IX litigation in the wake of *Bostock*.

The Biden administration is poised to make additional changes to Title IX with forthcoming revisions to the regulatory updates that were adopted in 2020 under the Trump administration. On February 18, 2022, the U.S. Department of Education announced it had sent a draft of proposed amendments to the Title IX regulations to the Office of Information and Regulatory Affairs, a division of the Office of Management and Budget that coordinates the review of all executive branch regulations. This may be a sign that new regulations will be effective and expected to be implemented potentially as soon as school year 2022-2023.

The contents of the new Notice of Proposed Rulemaking are not yet available for public review. However, the timeline appears consistent with what the Department of Education previously indicated, specifically, that regulations could be proposed and available for comment by April 2022. The regulations may go beyond updating the grievance process for instances of sexual harassment and may expressly address discrimination based on gender identity and sexual orientation. Regulatory changes may also affect students with disabilities who are protected under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act, since

students with disabilities are often disproportionately more likely to face sexual assault, sexual violence, and sexual harassment. New regulations will likely impact schools and a generate a potential wave of litigation concerning the enforceability and scope of the regulations.

c. Title VII and Title IX Claims in a post-*Bostock* Legal Landscape

i. Use of Shared Facilities

One area that has seen a flurry of litigation following *Bostock* involves the use of shared facilities by transgender students. Several federal circuit courts that have examined this issue have concluded that preventing a transgender student from using a school restroom or locker room consistent with the student's gender identity violates Title IX. Many federal district courts have reached similar conclusions.

***Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020)**, *as amended* (Aug. 28, 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert filed*, No. 20- 1163 (Feb. 24, 2021).

This high-profile case has been winding through the courts for several years. The plaintiff, Gavin Grimm, sued the school district under Title IX and the Equal Protection Clause, alleging sex discrimination based on the school's requirement that the student, a transgender male, be barred from the boys' bathrooms. Grimm had been using the boys' restroom during his sophomore year without incident. Responding in part to community pressure, the school board passed a resolution limiting the use of male and female restroom and locker room facilities to facilities matching their "biological gender, with alternative private facilities available for students with "gender identity issues." The district also refused to amend his school records despite his obtaining a court order and amended birth certificate reflecting his male gender. As a result, Grimm suffered from stigma, urinary tract infections due to bathroom avoidance, and suicidal thoughts that led to hospitalization as a result.

Grimm sued alleging violations of Title IX and the Equal Protection clause, and the federal district court granted summary judgment in his favor. On appeal, the Fourth Circuit affirmed. On the Equal Protection claim, the court applied heightened-scrutiny to a sex-based classification and held that transgender people constitute at least a quasi-suspect class. Under this scrutiny, the district policies were not substantially related to its purported interest in protecting privacy and maintaining accurate records, and therefore violated the Equal Protection Clause.

Under Title IX, the Court held that the district's restroom policy was discrimination on the basis of sex in violation of Title IX. Simply put, Grimm was prohibited worse than students with whom he was similarly situated (other boys) because he could not use the restroom corresponding with his gender. The failure to amend his records also violated Title IX.

On June 28, 2021, the Supreme Court denied certiorari on this case, bringing it to a close and leaving it as binding precedent in the Fourth Circuit (and persuasive authority elsewhere).

***Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1305 (11th Cir. 2020).**

This case considered the question of whether the school district's policy of barring Drew Adams – a transgender student – from using the boys' restroom squared with the Equal Protection Clause and Title IX's prohibition of sex discrimination.

Mr. Adams entered Nease High School in ninth grade, after he began transitioning and presenting as a boy. Mr. Adams's mother informed the school that Adams was transgender, currently transitioning, and should be considered a boy student, but did not discuss Adams's bathroom use with the school. For his first six weeks as a ninth grader, Mr. Adams used the boys' restroom. One day, however, the school pulled Mr. Adams from class and told him he could no longer use the boys' restroom because students had complained. These complaints came from two unidentified girl students who saw Mr. Adams entering the boys' restroom. There were no complaints from boy students who shared bathroom facilities with Adams. Regardless, school officials gave Mr. Adams two choices: use a single-stall, gender-neutral bathroom in the school office, or use the girls' facilities.

After these complaints, the school district barred Mr. Adams from entering the boys' restroom and Adams brought claims under the Equal Protection Clause and Title IX. In considering the Title IX claim, the court noted that every court of appeals to consider bathroom policies akin to that of the school district noted to that such policies were violative of Title IX. The Seventh Circuit has held that "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender nonconformance, which in turn violates Title IX." *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017). The Sixth Circuit, in affirming a preliminary injunction order, stated that, under Title IX, "transgender students are entitled to access restrooms for their identified gender rather than their biological gender at birth." *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016)

The court also made note of the unfortunate consequences of excluding transgender students from restrooms corresponding with their gender identity. *Whitaker*, 858 F.3d at 1045–47 (affirming a finding of irreparable harm because excluding a transgender student from the boys' restroom "stigmatized" the student and caused him "significant psychological distress" including "depression and anxiety" (quotation marks omitted)); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016) (per curiam) (affirming a finding of irreparable harm because excluding a young transgender student "from the girls' restrooms has already had substantial and immediate adverse effects on [her] daily life[,] ... health[,] and well-being"); *see also Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 2602, 192 L.Ed.2d 609 (2015) (recognizing that "laws excluding same-sex couples from the marriage right impose stigma and injury").

In considering the Title IX claim, the court noted that *Bostock* was of great import, despite its applicability to Title VII. Both titles prohibit discrimination on the basis of sex. Moreover, both rely on a "but for" causation standard, which *Bostock* found critical to its broader interpretation of sex discrimination. Guided by the reasoning in *Bostock*, the court held that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex. The court also noted the policy violated Equal Protection.

Interestingly, however, the court's decision was subsequently vacated in a later panel opinion by the same court on July 14, 2021. *Adams v. School Board of St. Johns County,* Florida, 3 F.4th 1299 (9th Cir. 2021). The revised opinion did not reach the Title IX question, and only reached one ground under the Equal Protection Clause, as opposed to the three Equal Protection rulings in the previous opinion. In dissenting from this opinion, Judge Pryor argued that the bathroom policy did not violate Title IX and, in so doing, noted that the *Bostock* holding should not be extended to this case.

A petition for a rehearing *en banc* was granted on August 23, 2021, thus vacating the previous panel opinion. There will likely be more developments in this ongoing case in the coming months.

***Parents for Privacy v. Barr*, 949 F.3d 1210, 1228 (9th Cir. 2020).**

This case concerned whether an Oregon public school district could permit transgender students to use school bathrooms, locker rooms, and showers that match their gender identity rather than their biological sex. Plaintiffs brought a challenge to the school district's policy, alleging that it violated Title IX, as well as several constitutional rights, such as the right to privacy, the parental right to direct the education and upbringing of one's children, and free exercise of religion.

With respect to the Title IX challenge, the plaintiffs specifically argued that the school district's policy created a sexually harassing hostile environment. The plaintiffs focused on the third and fourth elements of a Title IX hostile environment claim, namely whether there was harassment because of sex that was so severe, pervasive, and objectively offensive that it deprived Plaintiffs of access to the educational opportunities or benefits provided by Dallas High School. The District Court rejected the plaintiffs' Title IX challenge, which was subsequently upheld by the Ninth Circuit. In so holding, the court found that the plaintiffs failed to show any sort of discriminatory gender animus underlying the policy. And the plaintiffs failed to point to any case law where their "equal harassment" theory gave rise to a cognizable Title IX claim.

In addition, the court noted that the alleged harassment was not "so severe, pervasive, and objectively offensive to rise to the level of a Title IX" violation." The plaintiffs did not allege that the transgender students made inappropriate comments, flaunted nudity, or physically touched them. Instead, they felt harassed by the mere presence of transgender students. This, without more, was not enough to satisfy a hostile environment sex discrimination claim.

***Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034, 343 Ed. Law Rep. 672 (7th Cir. 2017)**, cert. denied, 138 S. Ct. 1260 (2018).

In this pre-*Bostock* decision, the Seventh Circuit considered whether the school's unwritten bathroom policy – which prohibited a student from using the bathroom corresponding with his gender identity – violated Title IX and the Equal Protection Clause.

The case involved a transgender student who was born a female but began to identify as male during his freshman year of high school. He cut his hair, began to wear more masculine clothing, and began to use the name Ashton and male pronouns. In the fall of 2014, the beginning

of his sophomore year, he told his teachers and his classmates that he is a boy and asked them to refer to him as Ashton or Ash and to use male pronouns.

After transitioning, he was notified that the administration had decided that he could only use the girls' restrooms or a gender-neutral restroom in the school's main office. He believed that use of either would undermine his transition and draw unnecessary attention to his transgender status. He also worried that he might be disciplined if he tried to use the boys' restroom, which would hurt his chance to get into college. He tried to restrict his water intake at school to avoid having to use the restroom, but this often resulted in several side effects, including fainting and dizziness. During his junior year, he began using the boys' restroom for six months without incident. However, on one occasion, a teacher noticed him doing so, and reported him to the administration. He retained counsel and brought a claim against the school. The student moved for preliminary injunction and the school district moved to dismiss for failure to state a claim.

In reviewing his Title IX claim, the court noted that it often looks to Title VII when construing Title IX. It looked to sex-stereotyping cases, in which plaintiffs brought Title VII claims for discrimination based on their failure to conform to certain gender stereotypes. In *Price Waterhouse v. Hopkins*, for example, the Supreme Court found that the plaintiff had adequately alleged that her employer, in violation of Title VII, had discriminated against her for being too 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Thus, the Court embraced a broad view of Title VII, as Congress "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." The court also noted that many courts have found that a transgender plaintiff can state a claim under Title VII or sex discrimination on the basis of a sex-stereotyping theory.

The court ultimately supported this sex-stereotyping theory and found that Ash has sufficiently established a probability of success on the merits of his Title IX claim. The school district subsequently filed a petition for certiorari with the U.S. Supreme Court, which was followed in January 2018 by the school's Motion to Dismiss indicating the case had been resolved in the student's favor. It was later abrogated on other grounds by *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020).

ii. Student Participation in Athletic Competitions

In 40 states and the District of Columbia, there is currently no state-level bans on transgender students participating in sports consistent with their gender identity. *See Bans on Transgender Participation in Youth Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/sports_participation_bans. There are currently 16 states, including the District of Columbia) that have policies which facilitate the inclusion of transgender and non-binary students in high school athletics. *See State Athletic Association Guidance on Inclusion of Transgender and Nonbinary Students, and State Athletic Ban Legislation and Executive Orders,* GLSEN, https://www.glsen.org/policy-maps.

Six states currently require students to participate in athletics based on their birth certificate or sex assigned at birth. Another three states bar transgender participation unless they have undergone surgery. Additional restrictive policies exist in 16 states. Finally, there are currently 10

states that have not issued any statewide guidance on best practices regarding transgender and non-binary students in athletics.

Some states have passed legislation that bars the gender-affirming participation of transgender student athletes. This began with HB 500 in Idaho in 2020—which has been challenged in federal court in *Hecox v. Little*—and, since then, similar bills have been introduced in more than 30 states. Legislation has been enacted in Alabama, Arkansas, Florida, Mississippi, Montana, Texas, Tennessee, and West Virginia. The governor of South Dakota has also issued a state ban via executive order.

Additional states have begun to work toward codifying bans. For example, the Arizona Senate recently passed SB1165, which would ban transgender girls from playing on sports teams aligning with their gender identity from kindergarten through college. The Indiana and South Dakota state houses have each passed bills – HB1041 and SB46, respectively – which would have the same effect for K-12 students. The Georgia Senate is considering SB266, which essentially mirrors the Arizona Senate bill.

Despite these recent trends, some courts have blocked these efforts by extending Title IX protections, at least temporarily, to transgender students in this context.

***Hecox v. Little*, 479 F.Supp.3d 930 (D. Idaho 2020).**

Idaho is one of the 10 states that has enacted legislation preventing transgender individuals from participating in sports corresponding with their gender identity. On March 30, 2020, Idaho Governor Bradley Little ("Governor Little") signed (the "Act") into law. Idaho Code Ann. § 33-6201–6206, which categorically barred transgender women from participating in women's sports. Plaintiffs challenged the constitutionality of the new law and sought a preliminary injunction preventing the enforcement of the Act. Defendants asserted that Plaintiffs lacked standing, that their claims were not ripe for review, that certain of their claims failed as a matter of law, and that they were not entitled to injunctive relief.

The question before the Court was whether the State of Idaho should be enjoined from enforcing a newly enacted law which precludes transgender female athletes from participating on women's sports. The court recognized the difficulty in balancing the interests. On the one hand, as Plaintiffs noted, the Ninth Circuit has held that cisgender students do not have a legally protectable interest in excluding transgender students from single-sex spaces. *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228 (9th Cir. 2020) (rejecting Title IX and constitutional claims of cisgender students based on having to share single sex restrooms and locker facilities with transgender students). On the other hand, Title IX plays an incredibly important role in addressing past discrimination against women in athletics and promoting athletic opportunity between the sexes. *Clark, ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982).

Defendants relied extensively on the Trump Administration's OCR Letter – Letter Demanding Enforcement Action – which opined that allowing transgender high school athletes in Connecticut to participate in women's sports violated the rights of female athletes under Title IX. However, as the court noted, the OCR Letter itself states that "it is not a formal statement of OCR

policy and should not be relied upon, cited, or construed as such." Moreover, the court indicated that it was likely inconsistent with the recent holding in *Bostock*. As such, it rejected the claim that the letter rendered Plaintiffs ineligible to participate in women's sports.

While it did not spend considerable time on the Title IX question, the court granted Plaintiffs' preliminary injunction, noting that they are likely to succeed in establishing the Act was unconstitutional as written. The injunction was appealed and is being actively litigated.

***B.P.J. v. West Virginia State Board of Education*, 2021 WL 3081883 (S.D. W. Va. 2021).**

West Virginia has also enacted a state-wide ban on transgender women participating in women's sports. On March 18, 2021, ten delegates in the West Virginia House of Delegates introduced House Bill 3293, strategically referred to as the "Save Women's Sports Bill." West Virginia Governor Jim Justice signed the bill into law on April 28, 2021, and it was codified as West Virginia Code, Section 18-2-25d, entitled "Clarifying participation for sports events to be based on biological sex of the athlete at birth."

B.P.J., an eleven-year-old transgender student, joined her elementary school's all-girl cheerleading team. B.P.J. practiced and competed with this team without incident. However, once the law went into effect, she was effectively barred from participating in girls' sports. B.P.J., through her mother, filed this lawsuit against the West Virginia State Board of Education, the Harrison County Board of Education, the West Virginia Secondary Schools Activities Commission ("WVSSAC"), State Superintendent W. Clayton Burch, and Harrison County Superintendent Dora Stutler. She brought both Equal Protection and Title IX claims against Defendants and sought a preliminary injunction preventing enforcement of the law.

The court ultimately sided with B.P.J. and found that she would likely succeed on the merits of her Title IX claim. In particular, the court relied on the holding in *Bostock* and found that she was discriminated based on sex. Because the other elements of the preliminary injunction were satisfied, the preliminary injunction was granted, enjoining Defendants from enforcing the law against her. However, the case is still being actively litigated.

iii. Dress Codes

Another area that will be affected – as transgender and gender nonconforming individuals are increasingly brought within the ambit of Title VII and Title IX – is the establishment of dress codes by schools and employers. Some courts have begun to consider allegedly discriminatory dress codes in both school and employment contexts, and whether the enforcement of such dress codes comports with Title IX.

***See Peltier v. Charter Day School, Inc.*, 8 F.4th 251 (4th Cir. 2021).**

While this case does not directly involve transgender students, it nevertheless has important Title IX implications relating to dress codes. The dress code at issue in this case included certain requirements for both boys and girls, certain requirements for boys only and certain requirements for girls only.

Three female students sued the school and the company that manages it challenging one of the requirements applicable only to girls—that they wear skirts, jumpers, or skorts, instead of pants or shorts. They argued that the school's dress code constitution a violation of the Equal Protection Clause and Title IX. The focus of these claims was the effect that skirts had on young girls. Plaintiffs claimed that the skirt requirement created practical problems, such as restricting their ability to move freely and comfortably. It limited their ability to stay warm in the winter. It also distracted them from their academic work. Besides these practical concerns, Plaintiffs also raised concerns about the psychological effects of this requirement. These concerns included reinforcing and solidifying gender roles, which translated to boys being put in a position of power over girls.

The court first noted that dress codes are covered by Title IX. It noted that "Congress did not list any specific discriminatory practices when it wrote Title IX." Rather, "Congress gave the statute a broad reach" by writing a "general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." As such, dress codes could not be excluded from Title IX. Second, the court considered how Title IX should be applied. There is, as the court notes, little precedent in this area of the law. However, the court found that Plaintiffs' first two theories—whether Plaintiffs were "excluded from participation" or were "denied the benefits of" an educational program in their education at Charter Day—were self-evident from Title IX's text. The third theory—that they were "subjected to discrimination" based on sex—was not self-evident.

The court ultimately remanded the case to the district court to determine whether there was a genuine issue of material fact as to whether the skirt requirement excluded Plaintiffs from participation, denied them education benefits or subjected them to discrimination under Title IX. A rehearing *en banc* was later scheduled in the case. Despite this, the court's original decision to bring dress codes within the ambit of Title IX could potentially be of great significance in school environments with gender-specific dress codes.

iv. Preferred Pronouns

Lastly, the *Bostock* holding will likely affect how courts evaluate claims of involving misgendering or refusal to use an individual's preferred pronouns in both school and employment settings. It may also give rise to a greater number of cases involving people who refuse to use a student's preferred pronouns, whether that be for religious reasons or other personal beliefs. *See, e.g., Kluge v. Brownsburg Community Sch. Corp.*, 2021 WL 2915023 (S.D. Ind. 2021).

This issue has yet to be to be heavily litigated in the Title IX context, but courts appear to be at least open to claims of sex discrimination involving misgendering in the Title VII context. There have been cases in which repeated misgendering, combined with other harassing conduct, have given rise to employment discrimination and equal protection claims. *See, e.g., Monegain v. Dep't of Motor Vehicles*, 491 F.Supp.3d 11 (2020). Despite this, it is unclear whether misgendering alone – even if repeated and intentional – can give rise to either Title VII or a Title IX claim.

***Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).**

At issue in this case is a professor's decision to refuse to refer to by their preferred pronouns. After misgendering a student, that student approached the professor and told him that she used feminine pronouns. In response, the professor noted that his religious prevented him from communicating messages about gender identity that he believes are false. He also explained that he wasn't sure if he could comply with Doe's demands. After a Title IX investigation, the university dean said she would bring a formal charge against him under the university's collective bargaining agreement. He feared would be fired if he didn't comply with university policy on gender identity. He then brought several claims against the school, alleging that the university violated his rights under: (1) the Free Speech and Free Exercise Clauses of the First Amendment; (2) the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (3) the Ohio Constitution; and (4) his contract with the university.

In response, intervenors from the university argued that the professor's conduct was violative of Title IX. The requirement "that the discrimination occur 'under any education program or activity' suggests that the behavior [must] be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 652, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999); *see Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 362 (6th Cir. 2012). The court noted that failure to use the student using feminine pronouns did not have that effect. There was no indication at that the professor's speech inhibited the student's education or ability to succeed in the classroom. The court also did not find that his conduct was so severe and pervasive that it created a hostile educational environment. In so finding, the court held that Title IX was not implicated.

***Kluge v. Brownsburg Community Sch. Corp.*, 2021 WL 2915023 (S.D. Ind. 2021).**

The court in *Kluge* reached a different result, though it involved a claim of religious discrimination rather than sex discrimination. Here, the school implemented a policy which required all staff to address students by the name that appeared in a database that the school used to record and store student information. Transgender students could change their first names in the database if they presented a letter from a parent and a letter from a healthcare professional regarding the need for a name change.

One teacher objected to referring to students by their preferred pronouns on religious grounds. He compromised by proposing to only refer to students by their last names and signed a document to that effect. Several students found this practice insulting, disrespectful, and alienating. Because he refused to change this practice, the administration suggested he resign, and he eventually agreed. He then brought a Title VII claim against the school arguing that he was discriminated based on his religious beliefs.

The court held that his Title VII claim was ultimately without merit. The public school's duty to accommodate a teacher's sincerely held religious beliefs was overcome by the policy that requires staff to use transgender students' preferred names when supported by a parent and health care provider. Because the school did not coerce his resignation by misrepresentation and could not accommodate his religious beliefs without sustaining undue hardship, and because he failed to

make a meaningful argument or adduce evidence in support of a claim for retaliation, the court granted the school's cross-motion for summary judgment.

***Eller v. Prince George's Cty. Pub. Sch.*, 2022 WL 170792 (D. Md. 2022).**

This case involves a much different situation than *Meriwether* and *Kluge* – one in which the court found that misgendering could be used to support a claim of sexual harassment. Jennifer Eller, a transgender woman who was assigned the sex of male at birth, was employed as a teacher within the PGCPS from 2008 to 2017. After transitioning, she was subjected to insults, threats, and physical assaults. The harassment included frequent misgendering—being referred to with names, pronouns, or terms associated with a different gender identity.

The court made two important findings in considering her Title VII claim relating to the hostile work environment. First, it noted that misgendering and sexually degrading epithets specifically targeting transgender people are sufficient to establish discrimination based on sex. Second, the repeated misgendering and targeted, transgender-specific slurs helped establish that the harassment was severe and pervasive. This suggests that repeated, intentional misgendering can, at the very least, provide support for a Title VII claim for sexual harassment.

v. Bullying

While it may not directly implicate Title VII or IX, Congress recently attempted to pass the Safe Schools Improvement Act. The SSIA, which was introduced in the House on July 9, 2021, and in the Senate on July 21, 2021, would amend Title IV of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7101 et seq.). It would require that school districts in states that receive ESEA funds to adopt codes of conduct specifically prohibiting bullying and harassment, including on the basis of race, color, national origin, sex, disability, sexual orientation, gender identity, and religion. It would further require that states report data on bullying to the DOE, which would in turn be reported to Congress every two years. In addition to the SSIA, 21 states, Washington D.C., and Puerto Rico have passed enumerated anti-bullying laws that protect LGBTQ+ students. *See Enumerated Anti-Bullying and Harassment Laws by State*, GLSEN, https://www.glsen.org/policy-maps.

Conclusion

Bostock has already had a profound impact on Title VII and IX jurisprudence. While *Bostock* was itself a Title VII decision, its arguments have been increasingly extended to the Title IX context. Given its recentness, it is unsurprising that there have not been any earth-shattering developments across the education law landscape. With that said, however, it is almost certain that K-12 education will see significant changes in the coming years as courts continue to hear more Title VII and Title IX challenges relating to sexual orientation and gender identity discrimination cases. School districts should be stay abreast of these developments, as they will likely require school districts to reevaluate and update school policies, procedures, practices to ensure compliance with Title VII and IX.