Gender Fluidity in a Binary System - Transgender Students and Title IX
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I. Transgender in relation to other GLBT classifications¹:
a. **Transgender**: of, relating to, or being a person whose gender identity differs from the sex the person had or was identified as having at birth; especially :of, relating to, or being a person whose gender identity is opposite the sex the person had or was identified as having at birth
b. **Transgender Male**: Male whose sex assigned at birth was female
c. **Transgender Female**: Female whose sex assigned at birth was male
d. **Gender-Fluid** (Fluidity): of, relating to, or being a person whose gender identity is not fixed
e. **Cisgender**: of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth
f. **Gender Identity**: a person's internal sense of being male, female, some combination of male and female, or neither male nor female
g. **Homosexual** (includes Gay and Lesbian): 1:of, relating to, or characterized by a tendency to direct sexual desire toward another of the same sex 2:of, relating to, or involving sexual activity between persons of the same sex
h. **Bisexual**: of, relating to, or characterized by sexual or romantic attraction to members of both sexes; also :engaging in sexual activity with partners of more than one gender
i. **Sexual Orientation**: a person's sexual preference or identity as bisexual, heterosexual, or homosexual :the state of being bisexual, heterosexual, or homosexual
j. **IMPORTANT**: Gender Identity and Sexual Orientation are two different things. Many educational institutions and professionals have found themselves in trouble because they have conflated gender identity with sexual orientation. Orientation and identity are not the same and the two categories should not be assumed to be the same or treated similarly. Someone who is transgender may not be homosexual, and vice versa.

¹ Definitions from Merriam-Webster online dictionary. https://www.merriam-webster.com/
II. Transgender Statistics:\(^2\):

a. 90% of transgender students heard derogatory remarks, such as “dyke” or “faggot,” sometimes, often, or frequently in school.

b. 90% of transgender students heard negative remarks about someone’s gender expression sometimes, often, or frequently in school. Remarks about students not acting “masculine” enough were more common than remarks about students not acting “feminine” enough (82% vs. 77% hearing remarks sometimes, often, or frequently).

c. 75% of transgender youth feel unsafe at school.

d. 59% of trans students have been denied access to restrooms consistent with their gender identity.

e. A third of transgender students heard school staff make homophobic (32%) remarks, sexist (39%) remarks, and negative comments about someone’s gender expression (39%) sometimes, often, or frequently in the past year.

f. Less than a fifth of transgender students said that school staff intervened most of the time or always when hearing homophobic remarks (16%) or negative remarks about someone’s gender expression (11%).

g. Almost all transgender students had been verbally harassed (e.g., called names or threatened) in the past year at school because of their sexual orientation (89%) and their gender expression (87%).

h. Over half of all transgender students have reported being physically harassed (e.g., pushed or shoved) in school in the past year because of their sexual orientation (55%) and their gender expression (53%).

i. Transgender students have reported being physically assaulted (e.g., punched, kicked, or injured with a weapon) in school in the past year because of their sexual orientation (28%) and their gender expression (26%).

III. Title IX:

a. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

b. 34 C.F.R. Part 106.33

1. 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.

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\(^2\) Numbers provided by the National Center for Transgender Equality (NCTE) and Gay, Lesbian, & Straight Education Network (GLSEN). [https://www.glsen.org/sites/default/files/Harsh%20Realities.pdf](https://www.glsen.org/sites/default/files/Harsh%20Realities.pdf)
IV. Title VII and Applicable Case Law

a. Employer practices: It shall be an unlawful employment practice for an employer:

1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.


1. The Supreme Court held that discrimination on the basis of gender stereotype is sex-based discrimination under Title VII.

2. The U.S. Supreme Court considered allegations that a senior manager at Price Waterhouse was denied partnership in the firm because she was considered “macho,” and “overcompensated for being a woman.”

3. Supreme Court agreed that such comments were indicative of gender discrimination and held that Title VII barred not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender.

4. The Court noted that “[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group....”

c. Smith v. City of Salem, 378 F.3d 566 (6th Cir.2004): The Sixth Circuit recognized that discrimination against a transgender individual because of his or her gender non-conformity is gender stereotyping prohibited by Title VII and the Equal Protection Clause.

d. EEOC –

1. Lusardi v. Dep't of the Army: EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015)(that intentional misuse of a transgender employee's new name and pronoun may constitute sex-based discrimination and/or harassment).

V. Section 1983 and the Fourteenth Amendment

a. Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011):
   1. Vandy Beth Glenn worked for two years in the General Assembly’s Office of Legislative Counsel as an editor and proofreader of bill language. She was diagnosed with Gender Identity Disorder (GID) and she prepared to undergo a course of professionally guided treatment that included gender transition.3
   2. In 2007, Glenn informed her immediate supervisor, Beth Yinger, that she planned to proceed with her transition from male to female. Yinger passed the information on to the General Assembly’s Legislative Counsel, Sewell Brumby, who is the head of the office in which Glenn worked. After confirming that Glenn intended to transition, Brumby fired her on the spot.
   3. Federal lawsuit was brought against Georgia General Assembly officials on behalf of Glenn, asserting that her firing violated the Constitution’s equal protection guarantee because it treated her differently due to the nonconformity with gender stereotypes that she evidenced by her determination to live in accordance with her female gender identity. In addition, General Assembly officials disregarded Glenn’s GID and her needed treatment—also an equal protection violation.
   4. Specifically, Glenn cites Price WaterHouse v. Hopkins and Smith v. City of Salem as support for the reasoning in its decision.

VI. OCR guidance under the Obama Administration:

a. Dear Colleague Letter, May 13, 2016:
   1. Title IX prohibits “discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.” As such, educational institutions must provide transgender students equal access to educational programs and activities.
   2. A “school’s failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX.”
   3. A student being targeted by other students, school employees, or third parties on school property, based on that student’s transgender status is harassment that violates Title IX, and schools should investigate it as such and take effective steps to stop it.
   4. Schools must treat transgender students consistent with their gender identities even if their education records or identification documents

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3 Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA) expressly except gender identity and sexual orientation as “conditions” protected as a disability.
indicate that the student’s sex assigned at birth is different from the student’s gender identity. This specifically includes using pronouns and names consistent with the student’s gender identity.

5. Transgender students must be permitted access to restrooms and locker rooms that coincide with their gender identities. Schools must review whether or not a transgender student can play on sport teams that are in line with that student’s gender identity.

VII. Case Law during Obama Administration and Existing OCR Guidance:
      1. Transgender male student in Virginia requested that the school accommodate the student’s gender identity.
      2. School worked with the student based on previous OCR guidance, including permitting the student to use the male restrooms.
      3. In reaction to the school's actions, the school board passed policy requiring students to use restrooms of their sex assigned at birth.
      4. The court ruled that the OCR’s interpretation of Title IX was within its powers and scope and that, because it has jurisdiction over Title IX, its guidance on Title IX and transgender students was applicable under current law.
      5. School was required to permit the transgender male to use male facilities at the school. The school district appealed the Court's decision and asked the U.S. Supreme Court to stay the lower court's decision. The Supreme Court granted the stay.
      6. Much of the decision in Grimm was based on the existing OCR guidance, so the Supreme Court remanded the decision of the Appeals Court to review in light of the fact that the guidance had been rescinded under the Trump Administration. See below.
      1. Male transgender student prevented from using male restroom in school district. School district permitted student to use neutral bathroom in the school’s office.
      2. In fall 2015, student began using male restrooms. School district did not catch him until February 2016.
      3. School district had no policy regarding sex/gender oriented bathroom usage.
      4. School district required that the student provide documentation that he was transgender and showing that he had completed his transition from female to male.
5. Parent informed the school district that student was too young to have the surgery. However, Parent provided documentation from pediatrician that said the student should be permitted to use male restrooms.

6. Judge granted injunction requiring school district to allow student to use male restroom. Judge found that there was relevant case law, including OCR guidance, supporting the student’s argument. Judge also found that sufficient facts that the student equal protection rights had been violated.

7. “[T]he court finds that Ash has suffered harm.”


1. Federal appeals court refused to block a lower court's order requiring an Ohio school district to allow an 11-year-old transgender girl to use the girls' restroom at school.

2. "We are not convinced that Highland has made its required showing of a likelihood of success on appeal."

3. "[S]taying the injunction would disrupt the significant improvement in Doe's health and well-being that has resulted from the injunction, further confuse a young girl with special needs who would no longer be allowed to use the girls' restroom, and subject her to further irreparable harm."

**VIII. OCR guidance under the Trump Administration:**

a. Dear Colleague Letter, February 22, 2017:


2. “These guidance documents take the position that the prohibitions on discrimination ‘on the basis of sex’ in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.”

3. “[T]he withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms.”
OCR Instructions to Field re Complaints Involving Transgender Students, June 6, 2017:

1. “OCR should rely on Title IX and its implementing regulations, as interpreted in decisions of federal courts and OCR guidance documents that remain in effect, in evaluating complaints of sex discrimination against individuals whether or not the individual is transgender.”

2. “OCR may assert subject matter jurisdiction over and open for investigation the following allegations if other jurisdictional requirements have been established (see CPM sections 104-106):
   i. failure to promptly and equitably resolve a transgender student’s complaint of sex discrimination (34 C.F.R. § 106.8(b));
   ii. failure to assess whether sexual harassment (i.e., unwelcome conduct of a sexual nature) or gender-based harassment (i.e., based on sex stereotyping, such as acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, such as refusing to use a transgender student’s preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward people who do not conform to sex stereotypes) of a transgender student created a hostile environment;
   iii. failure to take steps reasonably calculated to address sexual or gender-based harassment that creates a hostile environment;
   iv. retaliation against a transgender student after concerns about possible sex discrimination were brought to the recipient’s attention (34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. §100.7(e))); and,
   v. different treatment based on sex stereotyping (e.g., based on a student’s failure to conform to stereotyped notions of masculinity or femininity) (34 C.F.R. § 106.31(b)).”

IX. Cases decided after the Trump Administration withdrew OCR guidance under Obama Administration:

   1. Decision was issued only five days after the Department of Education rescinded its May 13, 2016, Dear Colleague Letter.
   2. Three transgender students in school district were permitted to use the restroom of their gender identity. This was done for years without incident. School board eventually implemented a new policy that
expressly required all students to use (a) single-user bathrooms or (b) the bathrooms labeled as matching their assigned sexes at birth.

3. The students would likely suffer irreparable harm in absence of preliminary injunction preventing the enforcement of the school district’s policy.

4. **Equal Protection**: “Indeed, the documentary record advanced by the Plaintiffs, and not contested by the District, reveals that, as a class of people, transgender individuals make up a small (according to all parties, less than 1%) proportion of the American population. As to these Plaintiffs, their transgender characteristics are inherent in who they are as people, which is not factually contested by the District. As to these Plaintiffs, and more generally as to transgender individuals as a class, that characteristic bears no relationship to their ability to contribute to our society. More precisely, the record reveals that the Plaintiffs are in all respects productive, engaged, contributing members of the student body at the High School. Thus, all of the indicia for the application of the heightened intermediate scrutiny standard are present here.”

5. **Equal Protection**: “This all leads to the conclusion that under the intermediate scrutiny standard, the Plaintiffs have established a reasonable likelihood of success on their Equal Protection claim. That is because on the facts now present in the record, the District has not demonstrated that there is an exceedingly persuasive justification for applying Resolution 2 to common restroom use by the Plaintiffs that is substantially related to an important government interest, since there is insufficient record evidence of any actual threat to any legitimate privacy interests of any student by the Plaintiffs’ use of such restrooms consistent with their gender identity, or that the set-up of the High School restrooms fails to fully protect the privacy interests of any and every student.”

6. **Title IX**: “Courts have long interpreted ‘sex’ for Title VII purposes to go beyond assigned sex as defined by the respective presence of male or female genitalia. For instance, numerous courts have held that Title VII’s prohibition of discrimination on the basis of ‘sex’ includes discrimination on the basis of among other things transgender status, gender nonconformity, sex stereotyping, and sexual orientation.”

7. **Title IX**: “Put plainly, the law surrounding the Regulation and its interpretation and application to Title IX claims relative to the use of common restrooms by transgender students, including the impact of the 2017 Guidance, is at this moment so clouded with uncertainty that this
Court is not in a position to conclude which party in this case has the likelihood of success on the merits of that statutory claim.”

8. Instead of appealing its case to the Sixth Circuit Court of Appeals, the District settled its case with the Plaintiffs, agreeing to the following:
   i. Each plaintiff received $20,000, and their attorneys received $75,000.
   ii. The District is blocked from enforcing, “any policy, practice, or custom of the Pine-Richland School District and/or Pine-Richland High School that denies transgender students access and use of restrooms that match a student’s consistently and uniformly asserted gender.”
   iii. The District is blocked from taking disciplinary action against trans students for using bathrooms consistent with their asserted gender.

   1. This was an appeal of the District Court decision in 2016. This case was decided on May 31, 2017, three months after the May 2016 Dear Colleague Letter had been rescinded.
   2. The student demonstrated that he would likely suffer from irreparable harm absent obtaining preliminary injunctive relief.
   3. **Title IX:** “Rather, Ash can demonstrate a likelihood of success on the merits of his claim because he has alleged that the School District has denied him access to the boys' restroom because he is transgender. 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 non-conformance, which in turn violates Title IX.”
   4. **Title IX:** “Rather, Ash has a medically diagnosed and documented condition. Since his diagnosis, he has consistently lived in accordance with his gender identity. This law suit demonstrates that the decision to do so was not without cost or pain. Therefore, we find that Ash has sufficiently established a probability of success on the merits of his Title IX claim.”
   5. **Equal Protection:** “This policy is inherently based upon a sex-classification and heightened review applies. Further, the School District argues that since it treats all boys and girls the same, it does not violate the Equal Protection Clause. This is untrue. Rather, the School District treats transgender students like Ash, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. These students are disciplined under the School District's bathroom policy if they choose to use a bathroom that conforms to their gender
identity. This places the burden on the School District to demonstrate that its justification for its bathroom policy is not only genuine, but also ‘exceedingly persuasive.’”

6. **Equal Protection:** “A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions.”

7. **Equal Protection:** “Further, it is unclear that the sex marker on a birth certificate can even be used as a true proxy for an individual's biological sex. The marker does not take into account an individual's chromosomal makeup, which is also a key component of one's biological sex. Therefore, one's birth certificate could reflect a male sex, while the individual's chromosomal makeup reflects another. It is also unclear what would happen if an individual is born with the external genitalia of two sexes, or genitalia that is ambiguous in nature. In those cases, it is clear that the marker on the birth certificate would not adequately account for or reflect one's biological sex, which would have to be determined by considering more than what was listed on the paper.”

c. **Other existing federal cases:**

1. **Adams v. The School Board of St. Johns County, Florida:**
   i. Student living as boy since 2015. He used the boys’ restroom when he started his freshman year without any incident.
   ii. After someone anonymously reported he was using the boys’ restroom, he was told he could only use the gender-neutral restrooms.

2. **Kenosha Unified School District No. 1 Board of Education, Et al., v. Whitaker.** U.S. Supreme Court.
   i. Petition for Writ of Certiorari filed by school district appealing the Seventh Circuit Court of Appeals decision. See above.
   ii. Multiple Amicus Briefs have been filed.
X. Younger persons generally appear be more supportive of transgender issues than older persons⁴:
   b. Transgender people should be allowed to use the public restrooms of the gender with which they currently identify:
      1. Agree:
         i. Ages 18-29 – 67%
         ii. Ages 30-49 – 49%
         iii. Ages 50-64 – 44%
         iv. Ages 65+ – 45%
         v. Women – 55%
         vi. Men – 45%
      2. Did not Agree:
         i. Ages 18-29 – 32%
         ii. Ages 30-49 – 49%
         iii. Ages 50-64 – 52%
         iv. Ages 65+ – 48%
         v. Women – 40%
         vi. Men – 52%

XI. Possible Solutions and Best Practices:
   a. Facilities Funding:
      1. Under Title IX, OCR institutes strict standards on funding for comparable facilities for both genders.
      2. OCR and some courts only permit a one percent differential between funding spent on facilities regarding percentages of female students compared to male students.
      3. One solution to possibly avoid transgender issues and Title IX violations would be to focus on more common areas and unisex areas.
      4. Some restaurants and other public places now use personal toilet stalls that are shared with common sink areas.
         i. In use, men and women use the individual toilet stalls, which are unisex, and then use common sinks, which are located in a more public space, usually in the middle of the room or in another room just outside of the toilet area.

⁴ Americans are divided over which public bathrooms transgender people should use. http://www.pewresearch.org/fact-tank/2016/10/03/americans-are-divided-over-which-public-bathrooms-transgender-people-should-use/
5. Another option employed in public accommodations is fitting multiple unisex toilet stalls with their own sinks for individual use.

6. An option used in previous OCR resolution agreements for restroom use is permitting transgender students to use the restroom of their gender identity while permitting all students who are uncomfortable with using public restrooms to use the school’s more private unisex restrooms.\(^5\)

7. Dorms and Overnight Trips – Many educational institutions work with students and parents to provide an opportunity for students to choose their roommates. In several cases, students and parents can come to a general consensus on appropriate roommates. In everyday practice, many educational institutions have found parents and students who are familiar with one another and are perfectly comfortable with a cisgender student rooming with a transgender student.
   - **REMEMBER:** Younger generations are less likely to be concerned with this issue.

8. Locker rooms – This is more complicated than restrooms since there is usually the need for a full space to shower, store personal items, and change clothes.

b. **Forms and other items seeking personal information:**
   1. Educational institutions generally ask for information on forms that are unnecessary but are viewed as being so basic that they are included anyway.
      i. To the extent institutions ask for information on forms, only ask for information that is legally necessary or necessary to make the decision at hand.
      ii. If it is not required or unnecessary to ask for the sex/gender of a student or employee, avoid including it as information that must be provided.
      iii. For example, some professors or clubs ask for personal information to get to know students. In many instances it is not required that the professor or club document the sex/gender of the student as means to become more familiar with the student. Avoid making sex a mandatory identifier unless it is required.
   2. To the extent possible, if a student is required to document their sex, permit them an opportunity to include what sex they identify as.

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c. **Customs and traditions to review:**
   1. Avoid identifying students by sex in the classroom.
      i. Avoid: “The girl in the blue shirt, you had a question?”
      ii. Use gender-neutral identifiers if not using the person’s name: “You in the blue shirt, in the back by the door, you had a question?”
   2. Avoid events where groups are separated by gender:
      i. Avoid girls v. boys games in the classroom.
      ii. Avoid, unless necessary, separating groups by boys and girls.
      iii. Consider separating groups by the first letters in their last names or using a number count system.

d. **Sports and Athletics:**
   1. This is an issue that still has many unknowns and will need to eventually be addressed by legislation or the courts.
   2. In Texas, based on athletic rules, a transgender male won the state wrestling championship in the female category, although the student wanted to play on the male team.\(^6\) The student, other female students, other male students, and parents were unhappy with the final result. The current process seems untenable.
   3. One of the many purposes of Title IX was to provide female students more opportunities in athletics. There has been general confusion on whether requiring transgender woman to play on the women’s team still adheres to the purpose and original intent of the law.

e. **Harassment and Bullying:**
   1. Under many state laws, schools are required to address reports of bullying. Educational institutions should have policies to address this issue, especially because it may also catch incidents of harassment, which is illegal under federal law.
   2. Under current OCR guidance, it is still illegal to permit harassment of a student based on that student’s sex.
   3. Current guidance includes prohibition of harassment based on a student’s actual or perceived gender identity or actual or perceived sexual orientation.
   4. Educational institutions should be investigating reports of harassment and making an effort to actively prevent future incidents of harassment.
   5. Failure to do so will probably result in action by OCR if the incident is reported to them.

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6. Additionally, the student may still have a private right of action under Title IX and Section 1983 under the Fourteenth Amendment under the U.S. Constitution in federal court.

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