Title: Which Bathroom? Legal Challenges to Transgender Rights in North Carolina and the Rest of the US

Date: Friday, Sept. 9, 2016

Time: 3:45 PM

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Tab 1 – Biographies or CVs
Crispin Torres is a Community Educator for Lambda Legal, the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and people with HIV through impact litigation, education and public policy work.

Based in Lambda Legal’s Midwest Regional Office, Crispin travels the country building coalitions and helping mobilize LGBT people around legal, policy and educational efforts.

Crispin has spent the last 15 years working in LGBTQ advocacy, organizing, and education. Prior to joining Lambda Legal, he worked at Chicago Women in Trades, Girls Rock! Camp Chicago, and the Young Women’s Leadership Charter School. He has worked with the U.S. Department of Justice, the U.S. Department of Housing and Urban Development, and the Illinois Department of Human Rights on educational trainings & policy reform.

Crispin was born in Mexico City and raised in Chicago. He attended DePaul University, where he received an undergraduate degree in Gender Studies, a Master of Education in Public Policy and Higher Education, and a secondary master’s degree in Media Studies. He also served as Director of LGBTQA Student Services at DePaul.

Crispin was an organizer with the Chicago Dyke March Collective, is a founding board member of Trans Tech Social Enterprises, and is a 2013 honoree of Windy City Times’ 30 Under 30 Award. He served as the 2015 Co-Director of the Trans 100, sits on the Cabinet for Chicago’s Pride Action Tank, and is the founder and lead organizer of Chicago’s Trans Pride Beach Party.
Beyond his advocacy roles, Crispin is a musician, performer and recording artist. He toured and played guitar for the now defunct Chicago Punk Rock quartet the Recruitment at South by Southwest in 2014. He is also the founder and lead organizer of Queer Amp, an LGBTQ+ performance showcase for rock and alternative musicians. His work with LGBTQ people in music and art informs his advocacy work by offering creative and collaborative approaches to organizing across movements.
David Lopez was sworn in as General Counsel of the U.S. Equal Employment Opportunity Commission (EEOC) on April 8, 2010. He was nominated twice by President Barack Obama and confirmed by the Senate in 2010 and 2014. Mr. Lopez is the first EEOC field trial attorney to be appointed as the agency’s General Counsel. He has served at the Commission in various capacities for the past 25 years, including as Supervisory Trial Attorney in the Phoenix District Office and Special Assistant to then-Chairman Gilbert F. Casellas.

As General Counsel, Mr. Lopez runs the Commission’s litigation program, overseeing the agency’s 15 Regional Attorneys and a staff of more than 325 lawyers and legal professionals who conduct or support Commission litigation in district and appellate courts across the country. During his tenure, Mr. Lopez has cultivated “one national law enforcement agency,” encouraging the EEOC’s litigators nationwide to operate more collaboratively and cohesively with each other and other internal partners.

Under his leadership, the EEOC’s trial program has been extremely successful. Among the notable victories is the $240 million jury verdict - the Commission’s largest award ever - in *Henry’s Turkey Service*, a case brought on behalf of over thirty intellectually disabled men; a $17 million jury verdict for farmworker women victims of sexual harassment and retaliation in *Moreno Farms, Inc.*; and a $1.5 million sexual harassment and retaliation verdict affirmed by the 6th Circuit Court of Appeals in *New Breed Logistics*.

In June 2015, the Supreme Court ruled 8-1 in favor of the Commission in *EEOC v. Abercrombie & Fitch Stores, Inc.*, holding that an employer may not refuse to hire an applicant if the employer was motivated by avoiding the need to accommodate a religious practice. In this case, Samantha Elauf was denied hire because she wore a headscarf or hijab and thus failed to conform to the companies “look policy.”

Other significant appellate victories, during his tenure, include *The Geo Group, Inc.* (class sexual harassment and retaliation lawsuit reinstated after finding EEOC met its pre-suit requirements); *EEOC v. Sterling Jewelers, Inc.* (nationwide sex discrimination case reinstated after appeals court held that sole question for judicial review is whether EEOC conducted an investigation not sufficiency of investigation); *Baltimore County* (making older workers contribute more to pensions violates the Age Discrimination in Employment Act); *Bob Brothers* (plaintiffs can prove same-sex harassment under Title VII of the Civil Rights Act with “gender stereotyping” evidence); *Houston Funding* ("lactation" discrimination violates Title VII as amended by the Pregnancy Discrimination Act); *United Airlines* (employers may have to reassign disabled employees non-competitively as a reasonable accommodation under the ADA); and *Serrano & EEOC v. Cintas* (Commission can bring "pattern or practice" suit under section 706 of Title VII).

Mr. Lopez has also served as Co-Chair of the committee that developed the Commission’s *Strategic Enforcement Plan* for 2013 to 2016. He is the Chair of the Commission’s Immigrant Worker Team, a group tasked with strengthening and coordinating EEOC’s enforcement and outreach on employment discrimination issues affecting immigrant and other vulnerable workers. He also convened a work group focused on discrimination issues affecting the LGBT community. Through his leadership on these issues, EEOC filed and settled its first cases alleging sex discrimination on the basis of transgender status and sex stereotyping against *Lakeland Eye Clinic* and *Deluxe Financial*. Notable cases involving immigrant and vulnerable workers include *Vail Run Resort* (over $1 million for Latina workers subjected to egregious sexual harassment and retaliation); *Mesa Systems, Inc.* ($450,000 for Hispanic workers subjected to derogatory slurs and discriminatory application of Speak-English Only policy); and *ABM Industries, Inc.* ($5.8 million settlement for Latina janitorial workers subjected to rape, unwelcome groping and explicit sexual comments).
Mr. Lopez has been recognized by various organizations for his extensive civil rights work. In 2016, Mr. Lopez received the National Religious Freedom Award from the International Religious Liberty Association (IRLA), Liberty Magazine, and North American Religious Liberty Association (NARLA) for his advocacy of civil, religious, and employment rights throughout his government career. In 2014, the National Law Journal named Mr. Lopez one of "America's 50 Outstanding General Counsels," and the magazine, Diversity and the Bar, recognized Mr. Lopez as a "Latino Luminary" for his work as a civil rights attorney and as General Counsel. In 2012, he was awarded the Friend in Government Award from the American-Arab Anti-Discrimination. In 2011, Hispanic Business named Mr. Lopez to its list of 100 Influentials in the Hispanic community.

Prior to joining the EEOC, Mr. Lopez was a Senior Trial Attorney with the Civil Rights Division, Employment Litigation Section, of the U.S. Department of Justice in Washington, D.C. Between 1988 and 1991, Mr. Lopez was an Associate with Spiegel and McDiarmid in Washington, D.C.

Mr. Lopez obtained his J.D. from Harvard Law School in 1988 and graduated magna cum laude from Arizona State University in 1985, with a B.S. in Political Science.
Moses has a strong sense of public service. He became an attorney to speak for all organizations, large and small, in need of a zealous advocate. Moses is most passionate about defense theory in the area of medicine. Formerly a nursing assistant and pharmacy technician, Moses has a deep understanding of the health care and dental industries and focuses his work in medical malpractice litigation, health care compliance and probate matters. Moses typically handles claims arising from complex medical issues, including adverse maternal and fetal outcomes, as well as complex vascular injuries.

Outside the office, Moses is engaged in a constant discussion of national and global economic and political issues. Prior to attending law school, Moses served in a variety of government-related positions, including as chief of staff to a Texas county commissioner. He is fluent in Spanish.

HONORS

- Selected by the Leading Lawyers Network as an “Emerging Lawyer” in medical malpractice defense

MEMBERSHIPS & INVOLVEMENT

- Board Member: Lesbian and Gay Bar Association of Chicago
- Committee Member: Chicago Healthcare Risk Management Society (CHRMS)
- Member: Chicago Bar Association; American Bar Association; American Society of Healthcare Risk Management
- Member: SmithAmundsen Diversity Committee
- Steering Committee Member: Professional Liability Underwriting Society (PLUS)
Moses Suarez

NEWS & PRESS RELEASES

SmithAmundsen Promotes Six to Partner
March 10, 2016

Celebrate PRIDE Week With SmithAmundsen
June 25, 2014

ALERTS

Meaningful Use: An Update on the Recent Health IT Policy Committee Findings
August 26, 2014

Meaningful Use Stage 3 Recommendations Advance to CMS Where Public and Provider Input is Welcome Now, Before Becoming Regulations In Fall 2014
May 7, 2014

Voucher Advertising, like Groupon, Permissible by the IDFPR, Not Fee Splitting
May 9, 2013

Reduced IDFPR Staff Leads to Increased Wait for Physician License Requests and Risk to Public
February 26, 2013

Supreme Court Upholds Asymmetry between Medicare Providers and Fiscal Intermediaries
January 2013

PUBLICATIONS

ACOs in Public and Private Markets
August 1, 2013

PRESENTATIONS & EVENTS

Warnings and Termination of Patients: To Dismiss or Not to Dismiss?
Advocate Medical Group, Webinar, August 3, 2016

Celebrate PRIDE With SmithAmundsen
June 23, 2016

Litigating Legal Issues Common to Assisted Living Facilities
Webinar, June 3, 2016

SmithAmundsen Hosts Third Annual Black History Month Event
Park Hyatt, Chicago, IL, February 18, 2016
Moses Suarez

Informed Consent: A Patient’s Right of Self Decision
Chicago, IL, June 2015

Celebrate PRIDE Week With SmithAmundsen
Chicago, IL, June 25, 2015

Clients & Colleagues Celebrate Black History Month
150 N. Michigan Ave, Suite 3300, Chicago IL, 60601, February 19, 2015

Discovery: Avoiding Costly Disputes – Perspectives from Risk and Counsel
CHRMS Law Day Seminar, Chicago, IL, November 14, 2014

2014 Black History Month Celebration
SmithAmundsen's Chicago Office, February 27, 2014
Mona Noriega
City of Chicago- Commission on Human Relations
Chairman and Commissioner

Mona Noriega has over 30 years of experience committed to social change on behalf of diverse community groups. She co-founded and served on the Board of Directors of Amigas Latinas, an organization committed to the empowerment and education of Latina LBT women in Chicago. Most recently she organized the 2014 Hate Crime Summit hosted at the University of Illinois at Chicago and annually serves as an Honorary Co-Chair of Chicago Build the Peace Committee. She earned an MBA and an MPA from the University of Illinois at Chicago and her BA from Northeastern Illinois University.

Omar Gonzalez-Pagan is a Staff Attorney in the National Headquarters Office of Lambda Legal, the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and individuals living with HIV. His work spans all aspects of Lambda Legal’s impact litigation, policy advocacy and public education efforts, with particular emphasis on relationship recognition, LGBT youth, transition-related health care, and issues affecting Spanish-speaking LGBT and HIV-affected communities.

Gonzalez-Pagan has been actively involved in implementing Lambda Legal’s strategy for winning the freedom to marry. He is counsel in Conde-Vidal v. Rius-Armendariz, a challenge to Puerto Rico’s marriage ban in which he represents four same-sex couples and Puerto Rico Para Tod@s, a Puerto Rico-based LGBT advocacy organization, currently pending before the Court of Appeals for the First Circuit. He also serves as co-counsel in Robicheaux v. Caldwell, a challenge to Louisiana’s marriage ban brought by eleven same-sex couples and the Forum for Equality, a Louisiana-based LGBT advocacy organization, currently pending before the Court of Appeals for the Fifth Circuit, and in Henry v. Hodges, a challenge to Ohio’s marriage recognition ban currently pending before the U.S. Supreme Court.

Prior to joining Lambda Legal, Gonzalez-Pagan worked for the Commonwealth of Massachusetts as an Assistant Attorney General, a Special Assistant District Attorney, and an Associate General Counsel to the Massachusetts Inspector General. As an Assistant Attorney General, Gonzalez-Pagan was part of the team that represented the Commonwealth in Massachusetts v. HHS, Massachusetts’s successful challenge to the Defense of Marriage Act (DOMA) before the Court of Appeals for the First Circuit. He also successfully obtained injunctive relief for victims of hate crimes that were targeted based on their sexual orientation and civilly prosecuted housing discrimination cases.

In 2012, Gonzalez-Pagan was recognized as a Public Interest Leader by the Boston Bar Association. That same year he was selected as a Fellow by the New Leaders
Council, a non-profit organization that seeks to recruit, train and promote the next generation of progressive leaders.

Gonzalez-Pagan received his law degree from the University of Pennsylvania Law School, where he served on the boards of the *University of Pennsylvania Journal of Constitutional Law* and Lambda Law, Penn Law’s LGBT group. He also possesses a Master’s in Environmental Studies from the University of Pennsylvania and a Bachelor of Science in Biology from Cornell University. Gonzalez-Pagan was born and raised in San Juan, Puerto Rico. He is fluent in Spanish.

Gonzalez-Pagan is a member of the bars of Massachusetts and New York.

Tab 2 – Course Materials (articles, publications, other materials)
No. 15-2056

In the
United States Court of Appeals
for the
Fourth Circuit

G.G., by his next friend and mother, DEIDRE GRIMM,

Plaintiff - Appellant

– v. –

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, NEWPORT NEWS DIVISION

AMICI CURIAE BRIEF OF SCHOOL ADMINISTRATORS FROM
CALIFORNIA, DISTRICT OF COLUMBIA, FLORIDA, ILLINOIS,
KENTUCKY, MASSACHUSETTS, MINNESOTA, NEW YORK, OREGON,
WASHINGTON, AND WISCONSIN
IN SUPPORT OF PLAINTIFF-APPELLANT

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Counsel for Amici Curiae
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<td>LAUSD’s Judy Chiasson’s Testimony on AB 1266, YouTube (Oct. 19, 2013),</td>
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<td>Massachusetts Department of Elementary and Secondary Education, <em>Guidance for Massachusetts Public Schools – Creating A Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity</em>,</td>
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<td><a href="http://www.doe.mass.edu/ssce/GenderIdentity.pdf">http://www.doe.mass.edu/ssce/GenderIdentity.pdf</a></td>
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<td>U.S. Department of Justice, Office of Civil Rights Case No. 09-12-1020 (July 24, 2013),</td>
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<td><a href="http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf">http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf</a> (Resolution Agreement)</td>
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STATEMENT REGARDING PARTICIPATION BY PARTIES

No counsel for a party authored this brief, in whole or in part, and no person other than amici curiae and their counsel made any monetary contribution to fund the preparation or submission of this brief.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

*Amici curiae* are superintendents, principals, school board members, general counsel, social workers, and other officials from schools and school districts that have adopted, or are in the process of adopting, formal inclusive policies for their transgender students. They represent a broad cross-section of schools and districts from across the country, collectively responsible for the education of more than 1.2 million students annually. *Amici curiae* offer valuable perspectives on a number of the issues in this case, based on their broad collective experience with adopting, implementing, and enforcing such policies. Pillsbury and Lambda Legal, counsel for amici, conducted telephone interviews with individual amici in September and October 2015 to obtain their input for this brief, as cited herein. Synopses of all amici interviews are on file with Pillsbury.

**Judy Chiasson**, Ph.D., is the Program Coordinator for the Office of Human Relations, Diversity and Equity in the Los Angeles Unified School District ("LAUSD"), Los Angeles, California. LAUSD is the second-largest school district in the country, with more than 732,000 students in more than 1,200 schools,
spanning 745 square miles. Dr. Chiasson helped author LAUSD’s guidance documents on transgender students, and has overseen the implementation of LAUSD’s policy since it was adopted a decade ago. Dr. Chiasson has given legislative testimony based on LAUSD’s approximately ten years of experience with its policies¹, and has consulted with other school administrators across the country on transgender and other diversity issues.

David Vannasdall has worked in the education field for twenty-two years, and been Superintendent for Arcadia Unified School District (“Arcadia”) in Arcadia, California since July 2014, having previously served as Arcadia’s Deputy Superintendent for two years and principal of Arcadia High School for eight years. He developed Arcadia’s policy for supporting transgender students. Mr. Vannasdall has consulted with school officials nationally on the issues, and has presented on Arcadia’s policy to other superintendents. Arcadia has approximately 10,000 students, and has two years of experience with inclusive policies for transgender students.

Diana K. Bruce is the Director of Health and Wellness for the District of Columbia Public Schools (“DCPS”), a district that educates approximately 46,500 students spanning 745 square miles. Dr. Chiasson helped author LAUSD’s guidance documents on transgender students, and has overseen the implementation of LAUSD’s policy since it was adopted a decade ago. Dr. Chiasson has given legislative testimony based on LAUSD’s approximately ten years of experience with its policies¹, and has consulted with other school administrators across the country on transgender and other diversity issues.

David Vannasdall has worked in the education field for twenty-two years, and been Superintendent for Arcadia Unified School District (“Arcadia”) in Arcadia, California since July 2014, having previously served as Arcadia’s Deputy Superintendent for two years and principal of Arcadia High School for eight years. He developed Arcadia’s policy for supporting transgender students. Mr. Vannasdall has consulted with school officials nationally on the issues, and has presented on Arcadia’s policy to other superintendents. Arcadia has approximately 10,000 students, and has two years of experience with inclusive policies for transgender students.

Diana K. Bruce is the Director of Health and Wellness for the District of Columbia Public Schools (“DCPS”), a district that educates approximately 46,500

¹ A video recording of Dr. Chiasson’s June 12, 2013 testimony to the California Senate Education Committee (“2013 Chiasson Testimony”) is available at: LAUSD’s Judy Chiasson’s Testimony on AB 1266, YouTube (Oct. 19, 2013), https://www.youtube.com/watch?v=Xmq9dIQdsNE. An unofficial transcript is on file with Pillsbury.
students across 111 schools. DCPS has provided transgender students access to facilities in accordance with their gender identity since 2006, and Ms. Bruce led the effort surrounding the school district’s adoption of a policy providing in-depth guidance in June 2015. Ms. Bruce consults with administrators across the country about DC’s nearly decade-long experience with inclusive policies for transgender students.

Denise Palazzo is an Instructional Facilitator and Diversity and LGBTQ² Coordinator for Broward County Public Schools (“BCPS”), where she previously taught for 14 years. BCPS is the sixth-largest public school system in the United States and the second-largest in the state of Florida, with more than 265,000 students. Ms. Palazzo has spearheaded BCPS’s effort to adopt a formal policy allowing transgender students access to programs and facilities in accordance with gender identity, which is being finalized now. The new policy enhances the recommendations and guidance that BCPS adopted in 2012. Ms. Palazzo also advises officials throughout the country about inclusive policies for transgender students.

Jeremy Majeski is the Principal of Komensky Elementary School (“Komensky”), in Berwyn, Illinois. He has been an educator for 13 years and Komensky’s principal for four years. Mr. Majeski directed the development and

² The acronym “LGBTQ” stands for lesbian, gay, bisexual, transgender, and questioning.
implementation of an inclusive policy at Komensky after a transgender student requested support, and is now helping to direct implementation of the policy throughout Berwyn South School District 100 (“Berwyn”). Berwyn includes six elementary and two middle schools, and educates approximately 4,000 students. Berwyn was recently honored by the Illinois Safe Schools Alliance as the Ally of the Year for 2015.

Thomas A. Aberli, Ed.D., is the Principal of J.M. Atherton High School (“Atherton”), which educates approximately 1,300 students in Louisville, Kentucky. Atherton has had a formal policy of respecting students’ gender identity since June 2014. Dr. Aberli oversaw the adoption of this anti-discrimination policy through a thoughtful process that engaged the public, a 12-member decision-making council, and the superintendent. Dr. Aberli also recently testified about Atherton’s policy before the Kentucky Senate Education Committee.³

Robert Bourgeois is the Superintendent-Director of Greater Lowell Technical Regional School District, a single-school district that educates approximately 2,200 students in Massachusetts. Mr. Bourgeois has eight years of experience as a superintendent with schools that allow students to access facilities

and programs in accordance with their gender identity. Mr. Bourgeois serves by appointment of the governor on the Massachusetts Commission on LGBTQ Youth, for which he currently serves on the Safe Schools Committee. He also participates in school trainings through the Massachusetts Department of Education’s Safe Schools Program, and has testified at state legislative hearings involving transgender youth issues.

Mary Doran is the chair of the Saint Paul Public Schools Board of Education. She has served on the Board of Education for four years, including the last two years as chair. She led the effort to craft, pass, and implement the Saint Paul Public Schools’ (“SPPS”) Gender Inclusion Policy, which passed with unanimous support from Board of Education members in March 2015 and was implemented at the start of the 2015-16 academic year. Valeria Silva has been the Superintendent of SPPS since 2010, after more than two decades as a teacher, principal, and administrator. SPPS is one of Minnesota’s largest school districts, with more than 39,000 students, over 58 schools, and more than 5,300 full-time staff members, including over 3,100 teachers.

Rudy Rudolph is a longtime administrator for the Portland Public Schools (“PPS”), Portland, Oregon, the largest school district in the state with 85 schools and approximately 49,000 students within the district. Ms. Rudolph is currently a Project Manager for the Equity Department for PPS. She has spearheaded a group
of administrators and allies in the district to facilitate the full inclusion of LGBTQ students, and continues to work closely with schools throughout PPS in supporting the inclusion and success of all students, including transgender students. Ms. Rudolph is also involved in the ongoing development, implementation, and improvement of support for transgender students, staff, and families.

**John O’Reilly** is the Principal of the Academy of Arts and Letters, Public School/Middle School 492 (“A&L”) in Brooklyn, New York. A&L educates students from kindergarten through the eighth grade, and adopted an inclusive policy for transgender students four years ago. After Mr. O’Reilly implemented A&L’s policy, the New York City (“NYC”) Department of Education issued similar guidelines requiring equal opportunity and access for transgender students. A&L is part of the NYC Department of Education, which is the largest school district in the nation, serving 1.1 million students in over 1,800 schools.

**Lisa Love** is the Manager of Health Education for Seattle Public Schools (“SPS”), a school district which educates approximately 53,000 students in 97 schools. Ms. Love’s position with SPS includes providing technical assistance to families and staff seeking support for LGBT students, training staff on LGBT issues, and developing district policies and procedures. Ms. Love has been in the field of education for almost 20 years, and directed the efforts that led to SPS’s adoption in 2012 of a formal superintendent procedure that respects students’
gender identity.

**Dylan Pauly** is General Counsel for Madison Metropolitan School District ("MMSD") in Madison, Wisconsin, the second largest school district in the state with more than 27,000 students. Ms. Pauly drafted MMSD’s policy for transgender students, and has presented the policy to the Wisconsin Association of School Boards and the National School Boards Association. Ms. Pauly also supervises the district’s Title IX investigator. **Sherie Hohs** is a Social Worker with MMSD with twelve years of experience in the district. Her work focuses on supporting the needs of LGBTQ students, providing professional development trainings to staff, and working with parents and community partners. Ms. Pauly and Ms. Hohs both consult with administrators across the state and from other parts of the country about inclusive policies for transgender students.

**INTRODUCTION TO ARGUMENT**

*Students in schools just want to have an environment that is safe and affirming. They want to grow, and learn, and have fun. Research points to the fact that they must feel safe and affirmed to do that. If there’s bias in the school, it makes them less able to learn. But an affirming policy has a positive effect on other students as well. If everyone is taken care of, students see that and they value that.*

Interview with Denise Palazzo, October 3, 2015 ("Palazzo Interview")

(emphasis added).
Collectively, *amici* are responsible for the education, safety, and wellbeing of **more than 1.2 million students across the country**, and have extensive experience in the development, implementation, administration and enforcement of inclusive policies for transgender students in a school setting. Some, such as Dr. Chiasson, Ms. Bruce, and Mr. Bourgeois, have many years of experience applying inclusive policies in their schools; others, such as Mr. Majeski, Ms. Palazzo, and Ms. Doran are implementing such policies now to meet the needs of their schools’ transgender students.

Many *amici* have, in their role as educators, supported students like G. in their process of gender transition. G. is in many ways typical of the thousands of transgender students who attend American schools every day, and who have come forward to request from their schools the same support and respect for their gender identity that all other students receive as a matter of course. In *amici*’s view, it is both the legal and professional obligation of all educators to provide that support and respect to all students.

While the legal arguments will be ably covered by G.’s counsel, and medical experts are better qualified to explain the treatment of Gender Dysphoria, *amici* have experiences that shed light on the hypothetical concerns raised here by the Appellee, Gloucester County School Board (“Board”) – and credited by the district court – that respecting G.’s gender identity by allowing him to use the boys’
restroom would lead to general disruption in the school, violate the privacy and/or “comfort” of other students, and/or lead to the abolition of gender-segregated facilities such as restrooms and locker rooms. These same hypothetical concerns have also been raised in some amici’s schools. Although amici have addressed – and in some cases personally grappled with – many of the same fears and concerns the Board raises, in their experience, none of those fears and concerns have materialized in the form of actual problems in their schools. Instead, inclusive policies for transgender students have had the effect of not only fully supporting the humanity of their transgender students, but also fostering a safer and more welcoming learning environment for all students.

ARGUMENT

I. POLICIES RESPECTFUL OF EVERY STUDENT’S GENDER IDENTITY MINIMIZE DISRUPTIONS AND HELP CREATE A SAFE, WELCOMING, AND PRODUCTIVE LEARNING ENVIRONMENT FOR ALL

Our [gender identity] policy was both simple and profound: all students shall be able to attend school, learn, and participate in school activities, all the while having their gender identity affirmed and respected regardless of their assigned birth sex. . . This was fairly straightforward. Our policy addresses sports, restrooms, locker rooms.

At first, we had our concerns -- would letting students participate in activities and facilities that were consistent with their gender identity create problems? What would happen? Ultimately, we decided that we as the adults needed to manage our fears, and give students the respect and dignity that they deserved.
And I’m pleased to say that none of our fears have been materialized.

2013 Chiasson Testimony (see fn.1).

As educators who have devoted much of their lives to young people, amici recognize that all students deserve equal respect and treatment by their educators. For that reason, the schools and districts with which amici are associated have adopted, or are in the process of adopting or refining, formal policies that enable transgender students to have access to the same facilities and opportunities as other students. Amici’s collective experience is that adoption and enforcement of inclusive policies contributes to a learning environment that is safe and welcoming, which in turn enhances the educational experience for all students.

Despite their positive experiences, and similar experiences reported to amici by educators across the country, for some school districts, like the Appellee here, there is still great – albeit unfounded – fear of integrating transgender students into the school community and creating a safe, inclusive space for them to learn. Although the district court credited the Board’s fears, the policies in place in amici’s schools – some for a decade, or nearly so – simply have not resulted in the “hardship” for cisgender students that the district court imagined in its opinion. See JA-162.

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4 Cisgender is a term used to describe a person whose self-identity conforms with the sex he or she was assigned at birth – i.e., someone who is not transgender.
Rather, amici’s experiences have been overwhelmingly positive. Far from being disruptive or potentially unsafe, as the Board has speculated without any support, such policies have minimized disruption and safety concerns.\(^5\) Respecting students’ gender identity eliminates the disruption that results from singling out and stigmatizing transgender students, and avoids disrupting the normal social interactions involved in use of communal school bathrooms and other gendered spaces and activities. In amici’s experience, the only disruption is caused by a lack of clarity about how to support transgender students. Ms. Bruce, for example, observes that “[a] policy that requires equal treatment is not difficult to implement. Beyond sorting it out at the beginning, it’s not an ongoing, lingering issue that requires additional levels of decision-making.” Interview with Diana Bruce, October 5, 2015 (“Bruce Interview”).

As with all school policies, “[o]ur goal is to make sure that every young person is as present, and as able to engage in academic work as possible. Promoting a safe and welcoming environment is a way to promote education.” Bruce Interview (emphasis added). This has been a positive thing, not only for

\(^5\) For students who transition while remaining in the same school district, the administration’s respect for their gender identity sets a critical example for their fellow students. For students who have transitioned elsewhere, treating them equally allows them to blend more seamlessly into the student body while protecting their privacy, and minimizes the chances that they will be singled out for harassment and bullying.
transgender students, but for all students, faculty, administrators, and communities as a whole.

A. Amici’s Schools and Students Have Thrived After Adoption of Respectful Policies for Transgender Students

In the professional experiences of amici, fears and concerns about inclusive policies are almost completely held by adults – administrators, teachers, parents, and community members.6 Many of the amici have themselves wrestled with the very same concerns in their own schools when awareness of the need for an inclusive policy first arose. The students, by contrast, have often set a leading example in respectful treatment of transgender students – using the appropriate name and pronouns, and recognizing their rightful place in school facilities that match their gender identity. Dr. Chiasson, based on her more than ten years’ experience working with the inclusive policies in place at LAUSD, the second-largest school district in the country, recounts that:

Our experience has been that the fears of the adults are rarely played out. The students are very affirming and respectful of their classmates. Most of the reaction that I’ve ever encountered has been in response to people’s fears, not the students’ experiences. The students’ experiences have been overwhelmingly positive.

6 E.g., Interview with Sherie Hohs, October 15, 2015 (“This isn’t a kid issue. It’s an adult issue.”); Interview with Roger Bourgeois, October 8, 2015 (“Bourgeois Interview”) (“Most of the problem is with the adults; the students are pretty accepting of these issues.”).
I have yet to be called into a situation to respond to an actual incident; I’ve only had to respond to fears, and the fears are unfounded.

Interview with Dr. Judy Chiasson, September 23, 2015 (“Chiasson Interview”).

Some *amici* have faced those fears head-on, while others have traveled a more circuitous road. For example, Mr. Vannasdall recounts that his district’s initial experience with a transgender student, much like the Board’s here, resulted in litigation due to the concerns of administrators and others that respecting a transgender student’s gender identity would be disruptive and burdensome.

Interview with David Vannasdall, September 23, 2015 (“Vannasdall Interview”).

But Mr. Vannasdall and his colleagues experienced a change of heart that began with a simple, open conversation between Arcadia’s administrators and the student and his family. *Id.* Mr. Vannasdall recalls that it became “obvious that this student had no intentions of creating a disruption – he just wanted a home and a place to learn, and not worry about which restroom to use.” *Id.* Once administrators understood that the student was simply asking – like G. – to be treated like any other boy, their obligation as educators became clear:

> What turned for us was getting away from the focus on [the litigation] and back to the idea that our job as educators is to help students learn – help students come to school ready to learn. If they’re worrying about the restroom, they’re not fully there to learn, but instead just trying to navigate their day. Give students the opportunity to just be a kid, to use the bathroom, and know that it’s not a disruption, it just makes sense.
Vannasdall Interview. Ultimately, the Arcadia legal action was resolved by a voluntary resolution agreement with the U.S. Department of Justice\(^7\), which included adoption of a comprehensive policy respecting students’ gender identity. The outcome has been “very positive for the school, the district, and the students,” according to Mr. Vannasdall, who now regularly consults with educators across the country, giving informal advice and guidance on inclusive policies for transgender students. *Id.* The “game-changer” for Arcadia and for other districts he has consulted with, is when educators “remember what we are here to do.” *Id.*

Dr. Aberli’s first experience with transgender youth also arose out of a student request. Like Mr. Vannasdall, he was unfamiliar with this issue, and had concerns about possible disruptions or privacy issues. He tried to understand the student’s request on both a personal level, and in terms of the legal obligations of the schools. Interview with Dr. Thomas Aberli, October 7, 2015 (“Aberli Interview”). Atherton’s policy was developed through an extensive collaborative effort by Dr. Aberli and a panel of school administrators, teachers and parents, in which “[w]e considered the issue very carefully and thoughtfully, and posted all of

the evidence we reviewed online.” 2015 Aberli Testimony (see fn. 3); Aberli Interview. Atherton’s policy is based on LAUSD’s policy, which has worked well for a decade, without any complaints. Id. Although there were some comments to the effect that, if the people in his district wanted California policies, they would move to California, Dr. Aberli stated unequivocally that empathy and equality do not stop at state borders:

The value of human life is the same in Kentucky as it is anywhere else in this nation. And when we’re talking about an issue of civil rights, we’re talking about the value we put on human individuals.

2015 Aberli Testimony. Understanding that the policy is about protecting students’ basic civil rights, rather than granting some esoteric request – as the district court seemed to believe here, JA162 – has helped the clarify the issue.

It also helped people to understand that this wasn’t about providing a special accommodation or “special rights”; this is about eliminating discrimination. When you tell a person you will do something that makes them stand out from everyone else, that’s when you start discriminating against them.

Historically we’ve had this discussion with regard to race, gender, and sexual orientation. And now this issue is extending to gender identity. I think that helped several of my colleagues who were having to deal with it, understanding that this wasn’t a special accommodation or perk, this was about eliminating discrimination.

Aberli Interview.

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8 Available at www.jefferson.kyschools.us/schools/high/atherton/SBDMDocuments.html.
Dr. Aberli acknowledges that, at the outset, in addition to a number of adults in his district, a handful of students also questioned Atherton’s new policy.

We had students that opposed the policy originally, and they’re still with us. I respect that some people may disagree or even feel uncomfortable with the policy, because honestly, for many people – including myself until a few months ago – they simply weren’t knowledgeable, or it wasn’t a close enough personal issue in terms of interacting with openly LGBT people to have a comfort level.

I acknowledge and respect that. But I also am not going to use someone’s discomfort as a means for discriminating against a protected population.

Id. Ultimately, despite the initial opposition he received from students and others, Dr. Aberli reports that in practice he has “received zero complaints regarding a specific incident of concern for a violation of privacy. The concerns raised by individuals have all been philosophical.”  Id.

B. In Amici’s Experience, Frequently Raised Areas of Concern, Such as Inappropriate Student Behavior in Restrooms and Locker Rooms, Have Not Been an Issue

There have not been any issues, regarding this policy in locker rooms or bathrooms. But it has brought greater awareness of how we can increase privacy for all students.

Aberli Interview.

As educators and administrators who have been at the forefront of responding to issues similar to those raised by the Appellee in the instant case, amici are well-situated to provide the Court with experience-based information about some of the hypothetical fears and concerns that are commonly raised when
schools integrate transgender students into gender-specific restrooms and locker rooms, including the fear that some individuals might use an inclusive policy to gain access to the facilities of another gender for an improper purpose. *Amici* have found such fears and concerns to be wholly unfounded in practice.

1. **Restrooms**

   “Questions about bathrooms come up in every staff training, and it’s an important thing that school staff want to understand. I think there’s an assumption that there will be disruption around restrooms.” Bruce Interview. But, as Ms. Bruce observes, all schools routinely “deal[] with many more adolescent behavior issues than who’s using the bathroom based on gender identity,” and are very experienced with and adept at addressing them. *Id.* As with any behavior issue, “oftentimes disruption in our experience has been around inconsistency by staff – and that’s why clear guidance for schools is important; our staff tell us they want to know what they should do, and what they shouldn’t do. Our transgender students just want to use the restroom and be safe when they do it, and that’s all they’re trying to do.” *Id.*

Dr. Aberli similarly reports that Atherton has multiple transgender individuals in our school, and restroom access has not been an issue. . . . [T]here has not been any issue at all with respect to the implementation. It’s not a big deal when you look at it from a standpoint of, we’re dealing with real people, we’re dealing with children. Even at the high school level we’re dealing with people who have had a hard
enough time as it is, and they’re just looking for reasonable support from the school in a very challenging social context, or during a very difficult process, as it is for many of them.

Aberi Interview. In short,

[t]here’s been no pandemonium. There are no transgender students who are sexual predators, or who are “switching gender” to peek at others. None of those irrational fears have been realized at all. I supervise our Title IX investigator, and there have been no issues with our policy there. I also supervise the general complaint process. Nothing has come through either of those two processes on this issue.

Interview with Dylan Pauly, October 15, 2015 (“Pauly Interview”).

2. **Locker Rooms**

Although G. has not requested to use the boys’ locker room, no student should be denied access to any gender-specific facilities that are available to other students of the same gender identity solely because of their transgender status. As with restrooms, *amici* have not experienced issues with locker rooms due to transgender-inclusive policies. Such policies generally allow students access to locker rooms in accordance with gender identity, and in *amici*’s experience, have not resulted in student attempts to exploit the policy or to break the rules in any way. Ms. Bruce explains that “[o]ur transgender students are not interested in walking around the locker rooms and checking out anatomy. They’re just trying to get through P.E. safely.” Bruce Interview. Ms. Doran concurs. “[W]hen the coaches tell me ‘this [transgender policy] isn’t an issue, isn’t a big deal,’ that really says something.” Interview with Mary Doran, October 16, 2015.
Indeed, in the rare instances that amici have needed to address locker room issues, it has been to ensure the safety of the transgender students. And even there, “[l]ocker rooms aren’t a [special] concern because we are already accustomed to dealing with students who have unique or special needs in the locker room context. This is just one more type of student that may need additional support in that space.” Palazzo Interview.

3. Concerns About Possible Nefarious Purposes, and/or Inconsistency on the Part of the Transgender Student in Gaining Access to Restrooms and Locker Rooms

Amici have also frequently addressed the concern that transgender students might just be “confused,” or are likely to change their minds often about their gender identity, and/or might be falsely claiming to be transgender for some nefarious purpose. None of these concerns have materialized for amici. Moreover, amici’s policies allow schools to make reasonable assessments of individual requests for accommodation. As Dr. Chiasson explained in a letter to Dr. Aberli,

[i]t is reasonable to expect that a student will exercise consistency with respect to their identity and access to facilities. Students cannot switch their identity arbitrarily or opportunistically. For example, a student cannot be transgender only during physical education.

If the school strongly suspects that the request is not legitimate, they should provide accommodation for the student while continuing the conversation to better understand the student’s motivation for the request. Being transgender is a deeply rooted identity different from one’s natal sex. It is not subject to arbitrary whims.
Chiasson Letter to Aberli dated May 29, 2014 (“Chiasson Letter”), on file with Pillsbury. Similarly, Mr. Bourgeois explains that

[a] student can’t just show up on our doorstep and say, “I’m a male, but I want to start using the girls’ locker room today.” People worry some football player will show up and want to get into the girls locker room, but that’s not what we would allow. There’s a process we go through to work with them and their families, and verify their identity. Far from being disruptive, our experience has been that those students just want to blend in; they don’t want anyone to notice they’re there.

Bourgeois Interview.

All amici’s schools follow a similar policy, and as a general matter, it is easy to identify genuine requests.

Some people fear someone will masquerade people as transgender to be predatory. But being transgender is persistent and consistent throughout the day: all classes; all relationships; in and out of the classroom. That’s what I say to assuage students’ fears. And, I’ve never had that happen, where someone has pretended to be transgender for nefarious reasons. It’s just plain silly to think that [a male student] is going to come to school for months on end, wear female attire, present as female to all of his friends and teachers, just so he can go into the female locker room. It’s just silly to think that anyone would do that.

Chiasson Interview. Indeed, schools are “very adept” at dealing with instances of misbehavior in restrooms and locker rooms precisely because it is not particularly

9 A copy of Dr. Chiasson’s letter to Dr. Aberli is also included among the materials posted by Atherton, as referenced at footnote 8. See http://www.jefferson.kyschools.us/schools/high/atherton/SBDMDocuments/Letter%20from%20LA%20Unified%20School%20District%20Asst%20Supt.pdf.
difficult for a student to gain access to another gender’s facilities.

Adolescents can be impulsive, and we have had boys and girls dart into the other bathroom. We find them and deal with them. They certainly don’t need to masquerade as transgender to engage in that conduct.

_Id._ While parents, teachers and administrators alike are always looking out for the safety of all students, a policy respecting transgender students is more likely to thwart misbehavior in these spaces than be a cause of it.

II. SCHOOL POLICIES THAT RESPECT THE GENDER IDENTITY OF ALL STUDENTS RESPECT THE PRIVACY CONCERNS OF ALL STUDENTS

Many of the concerns that have been raised with inclusive policies for transgender students involve perceived threats to the privacy or “comfort” of other students. The Board argues that granting a preliminary injunction here “would endanger the safety and privacy of other students.” _See_ JA-158. The district court credited those (purely hypothetical) concerns, _see_ JA-163, and characterized G.’s request as a “hardship” to other students that would result in “any number of students us[ing] the unisex restrooms . . . while this Court resolves his novel constitutional challenge.” JA-162. The court also refused to credit G.’s uncontested testimony regarding his distress at being barred from the boys’ restrooms. JA-163. These conclusions are completely at odds with _amici’s_ experience as educators.
First, G.’s restroom dilemma, recounted in his testimony, is a common experience for transgender students. JA-32-33 (describing female students’ confusion and distress when G. tried to use the female restroom that the school suggests is appropriate for him, and G.’s feelings of stigmatization and isolation associated with the separate, single-stall restrooms). Having to navigate this problem daily seriously interferes with transgender students’ education. Ms. Bruce, for example, explains that when transgender students like G.

have reported worrying about whether they can use the restroom that matches their gender identity, they have said they just don’t go to the bathroom at school. That can’t possibly help them learn. We don’t want them preoccupied with trying not to use the bathroom, when they’re supposed to pay attention to trigonometry. That can’t possibly advance their education.

We want them to know where they can use the restroom, so they can feel more like anyone else in their school and not like an outsider. We want to make sure that all of our students have an opportunity to participate in everything a school has to offer, including social opportunities that happen throughout the campus. When transgender students don’t use the restroom at all, they’re missing an opportunity to socialize with their peers.

Bruce Interview. So, while the district court found no special hardship to G. in forcing him to use a segregated facility (or alternatively, to make himself and female students equally uncomfortable by using the girls’ restroom), the fact is that such a discriminatory policy singles students out and invades their privacy by requiring transgender students to use a different restroom simply because they are
transgender\textsuperscript{10}, or puts them at risk of harassment or bullying by forcing them to use facilities patently mismatched with their gender, as occurred when G. had to use the girls’ restroom.

Moreover, \textit{amici} strongly disagree that a school may discriminate against transgender students in order to accommodate complaints that other students are “uncomfortable” with sharing a restroom with a transgender person (although in \textit{amici}’s experience those are rare or nonexistent). Over and above the fact that the law prohibits such discrimination, that is simply not how educators deal with students’ discomfort with others or with themselves. Rather, to the extent that a student has concerns about sharing facilities with transgender students, schools must help the student deal with that discomfort in a way that does not impinge upon others’ civil rights.

One solution is to offer private facilities to the student who does not want to use the same facilities as a transgender student, and most of the schools \textit{amici} work within offer private facilities that may be used by persons of either gender, in addition to gender-segregated restrooms. Indeed, some students prefer to use these private facilities for any number of reasons, and are permitted to do so without the

\textsuperscript{10} \textit{See} JA-32 at ¶ 27 (“[T]he separate single-stall restrooms . . . make me feel even more stigmatized and isolated than when I use the restroom in the nurse’s office. They designate me as some type of ‘other’ or ‘third’ sex that is treated differently than everyone else. Everyone knows that they were installed for me in particular so that other boys would not have to share the same restroom as me.”).
need to provide any explanation – including in the rare circumstance that a student might not want to use the same facility as a transgender student. Dr. Chiasson, for example, explains that in LAUSD,

any student who, for whatever reason, feels uncomfortable in a communal setting – whether because of weight or other reasons – we will accommodate that without the need for explanation, and they can use private setting such as a nurse’s room. The sad truth is that our transgender children are significantly more likely to be the targets of student misconduct, rather than the perpetrators of it.

Chiasson Interview. Ms. Bruce similarly recounts that in DCPS,

[a]ccording to our policy guidance, if a student has a problem, we can make another bathroom available to that student. I haven’t heard from our schools, however, of students that have asked to use a different restroom in that circumstance. When I train our school staff, some want to ask hypotheticals, but in our experience, this has not been an issue. Young people are pretty savvy and comfortable, and can understand and empathize with someone who just wants to use the bathroom.

Bruce Interview. While the district court accepted the Board’s framing that the offer of private facilities to any students uncomfortable with G.’s presence in the boys’ room is a “hardship” to them (and presumed that it is not a hardship for G. to be excluded), amici point out that the solution cannot be to segregate the transgender students:

It’s our goal to have every student comfortable in their learning environment. [But if] we had a student with a health condition that wasn’t comfortable changing in a locker room with everyone else, we wouldn’t have a “health condition locker room” and a “non-health condition locker room.” This is the
same thing. This allows us to offer the same accommodation to every student to allow them to be comfortable.

Pauly Interview. Dr. Aberli agrees that “making transgender students use the nurse’s room” is no answer:

Tell me what we would say to that child – that there’s something so freakish about you, and so many people are uncomfortable with you, that you have to use a completely separate restroom than the one you feel like you should be using?

Instead, the school allows any student who wants to use a private restroom to do so. What I have clearly communicated in public, was that any student may use the front office restroom. We don’t ask why. There’s a thousand reasons that a student needs privacy, so it’s our responsibility to accommodate any student for any reason. It could be shyness, or trauma.

Aberli Interview. In other words, although the schools should accommodate requests for extra privacy when they can, no student should ever be forced to use separate facilities – as the Board is effectively forcing G. to do here – to accommodate the anticipated discomfort of other students.

With regard to specific concerns about “privacy,” Mr. Bourgeois points out that in his eight-year tenure at Lowell, no one has ever raised a specific “privacy” concern related to the school’s transgender policy. Rather,

[i]f folks raise concerns, it’s more about whether others will be “comfortable.” When they raise it as a comfort issue, we say that there are alternative facilities where your child can go. But we’re not going to tell the transgender student they can’t go where they’re comfortable.
I can still remember the remnants of white people being uncomfortable with black people being in same locker rooms and restrooms, so it’s not about whether everyone is “comfortable.” Just because some people were uncomfortable didn’t mean you treated people as second-class citizens.

Bourgeois Interview.\textsuperscript{11}

III. GENDER-SEGREGATED SPACES AND ACTIVITIES ARE FULLY CONSISTENT WITH SCHOOL POLICIES RESPECTING EVERY STUDENT’S GENDER IDENTITY

Another argument Appellee has made is that permitting G. to use the boys’ restroom at school could lead to the abolition of gendered restrooms and locker rooms. Contrary to that “slippery slope” argument, however, all \textit{amici} continue to maintain gender-segregated restroom and locker room facilities. And in fact, respecting the gender identity of transgender students equally reinforces, rather than undermines, the concept of separate facilities for girls and boys. By contrast, requiring a transgender boy like G. to use the girl’s restroom undermines the notion of gender-specific spaces.

\textsuperscript{11} This follows Massachusetts state guidance that student discomfort with a transgender student using the same gender-segregated restroom, locker room or changing facility “is not a reason to deny access to the transgender student.” Massachusetts Department of Elementary and Secondary Education, \textit{Guidance for Massachusetts Public Schools – Creating A Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity}. Available at http://www.doe.mass.edu/ssce/GenderIdentity.pdf.
Echoing G.’s testimony that female students reacted negatively when he tried using the girls’ restroom, JA-32 at ¶ 25, Dr. Chiasson offers an example from her own district:

We had a new student who was a transgender male. He was using the female facilities, incorrectly assuming that because he was a natal female, that he would be required to do so. It was equally uncomfortable for him to use the girls’ facilities as it was for the girls themselves. When the administration learned of the situation, they told the young man that he could use the boys’ facilities. Everyone was relieved.

Chiasson Letter. Mr. O’Reilly similarly commented that, until he considered the effect of forcing a transgender student to use a restroom inconsistent with gender identity, he “hadn’t really understood the literal meaning of the word ‘misfit.’ When forced to use the restroom for the gender they do not associate with, a student literally becomes a misfit: someone being forced into a place they don’t belong.” Interview with John O’Reilly, September 20, 2015. Notably, transgender students like G. have not sought to eliminate gender-specific facilities, but instead merely want to use the facilities that correspond with their gender identity.

Because respecting transgender students’ gender identity solves the “misfit” problem in gender-segregated spaces, “[t]ransgender-affirming policies solve problems, not create them. Even if the law allowed it, forcing a transgender boy to use the female facilities would be extremely uncomfortable for all parties involved.” Chiasson Interview.
CONCLUSION

Although Appellees and their proponents will argue that policies respectful of all students’ gender identity are disruptive and impinge upon the rights and well-being of cisgender students, our experience as school administrators has shown otherwise: respect for a transgender student’s gender identity supports the dignity and worth of all students by affording them equal opportunities to participate and learn. Moreover, such policies have not been disruptive – either to the academic climate or to the maintenance of gender-specific facilities, and instead foster the safety and privacy of all youth.

While *amici* agree with Appellant that the District’s position is contrary to the law, on a more fundamental level it is contrary to the District’s duty as educators, and is simply bad public policy. All students inhabit a world – both inside and outside of school – that includes transgender individuals. Pretending that this is not so for the sake of concerns that – in *amici*’s extensive experience, and in the experience of other school districts around the country with similarly inclusive policies – have been shown to be entirely unfounded, is harmful to transgender students like G., to his fellow students, and to the community at large.

Based on the foregoing, *amici* urge this Court to reverse the District Court’s decision.
Dated: October 28, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE


2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman style, with 14-point font.

DATED: October 28, 2015 /s/ Cynthia Cook Robertson
Cynthia Cook Robertson
CERTIFICATE OF SERVICE

I hereby certify that, on October 28, 2015, I filed the foregoing Amici Curiae Brief of School Administrators from California, District of Columbia, Florida, Illinois, Kentucky, Massachusetts, Minnesota, New York, Oregon, Washington, and Wisconsin in Support of Plaintiff-Appellant with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

/s/ Cynthia Cook Robertson
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Counsel for Amici Curiae
PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2056

G. G., by his next friend and mother, Deirdre Grimm,
Plaintiff - Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,
Defendant - Appellee.

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JUDY CHIASSON, Ph. D., School Administrator California; DAVID VANNASDALL, School Administrator California; DIANA K. BRUCE, School Administrator District of Columbia; DENISE PALAZZO, School Administrator Florida; JEREMY MAJESKI, School Administrator Illinois; THOMAS A ABERLI, School Administrator Kentucky; ROBERT BOURgeois, School Administrator Massachusetts; MARY DORAN, School Administrator Minnesota; VALERIA SILVA, School Administrator Minnesota; RUDY RUDOLPH, School Administrator Oregon; JOHN O'REILLY, School Administrator New York; LISA LOVE, School Administrator Washington; DYLan PAULy, School Administrator Wisconsin; SHERIE HOHS, School Administrator Wisconsin; THE NATIONAL WOMEN'S LAW CENTER; LEGAL MOMENTUM; THE ASSOCIATION OF TITLE IV ADMINISTRATORS; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; THE WOMEN'S LAW PROJECT; LEGAL VOICE; LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; PEDIATRIC ENDOCRINE SOCIETY; CHILD AND ADOLESCENT GENDER CENTER CLINIC AT UCSF BENIOFF CHILDREN'S HOSPITAL; CENTER FOR TRANSYOUTH HEALTH AND DEVELOPMENT AT CHILDREN'S HOSPITAL LOS ANGELES; GENDER & SEX DEVELOPMENT PROGRAM AT ANN & ROBERT H. LURIE CHILDREN'S HOSPITAL OF CHICAGO; FAN FREE CLINIC; WHITMAN-WALKER CLINIC, INC., d/b/a Whitman-Walker Health; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; TRANSGENDER LAW & POLICY INSTITUTE; GENDER BENDERS; GAY, LESBIAN &
STRAIGHT EDUCATION NETWORK; GAY-STRAIGHT ALLIANCE NETWORK; INSIDEOUT; EVIE PRIESTMAN; ROSMY; TIME OUT YOUTH; WE ARE FAMILY; UNITED STATES OF AMERICA; MICHELLE FORCIER, M.D.; NORMAN SPACK, M.D.,

Amici Supporting Appellant,

STATE OF SOUTH CAROLINA; PAUL R. LEPAGE, In his official capacity as Governor State of Maine; STATE OF ARIZONA; THE FAMILY FOUNDATION OF VIRGINIA; STATE OF MISSISSIPPI; JOHN WALSH; STATE OF WEST VIRGINIA; LORRAINE WALSH; PATRICK L. MCCRARY, In his official capacity as Governor State of North Carolina; MARK FRECHETTE; JUDITH REISMAN, Ph.D.; JON LYNISKY; LIBERTY CENTER FOR CHILD PROTECTION; BRADLY FRIEDLIN; LISA TERRY; LEE TERRY; DONALD CAULDER; WENDY CAULDER; KIM WARD; ALICE MAY; JIM RUTAN; ISSAC RUTAN; DORETHA GUJU; DOCTOR RODNEY AUTRY; PASTOR JAMES LARSEN; DAVID THORNTON; KATHY THORNTON; JOSHUA CUBA; CLAUDIA CLIFTON; ILONA GAMBILL; TIM BYRD; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND,

Amici Supporting Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News.  Robert G. Doumar, Senior District Judge.  (4:15-cv-00054-RGD-DEM)

Argued:  January 27, 2016  Decided:  April 19, 2016

Before NIEMEYER and FLOYD, Circuit Judges, and DAVIS, Senior Circuit Judge.

Reversed in part, vacated in part, and remanded by published opinion.  Judge Floyd wrote the opinion, in which Senior Judge Davis joined.  Senior Judge Davis wrote a separate concurring opinion.  Judge Niemeyer wrote a separate opinion concurring in part and dissenting in part.

ARGUED: Joshua A. Block, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellant.  David Patrick Corrigan, HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee.  ON BRIEF: Rebecca K. Glenberg, Gail
FLOYD, Circuit Judge:

G.G., a transgender boy, seeks to use the boys’ restrooms at his high school. After G.G. began to use the boys’ restrooms with the approval of the school administration, the local school board passed a policy banning G.G. from the boys’ restroom. G.G. alleges that the school board impermissibly discriminated against him in violation of Title IX and the Equal Protection Clause of the Constitution. The district court dismissed G.G.’s Title IX claim and denied his request for a preliminary injunction. This appeal followed. Because we conclude the district court did not accord appropriate deference to the relevant Department of Education regulations, we reverse its dismissal of G.G.’s Title IX claim. Because we conclude that the district court used the wrong evidentiary standard in assessing G.G.’s motion for a preliminary injunction, we vacate its denial and remand for consideration under the correct standard. We therefore reverse in part, vacate in part, and remand the case for further proceedings consistent with this opinion.

I.

At the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity. Title IX provides: “[n]o
person . . . 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.” 20 U.S.C. § 1681(a). The Department of Education’s (the Department) regulations implementing Title IX permit the provision of “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 for students of the other sex.” 34 C.F.R. § 106.33. In an opinion letter dated January 7, 2015, the Department’s Office for Civil Rights (OCR) interpreted how this regulation should apply to transgender individuals: “When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.” J.A. 55. Because this case comes to us after dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), the facts below are generally as stated in G.G.’s complaint.

A.

G.G. is a transgender boy now in his junior year at Gloucester High School. G.G.’s birth-assigned sex, or so-called “biological sex,” is female, but G.G.’s gender identity is male. G.G. has been diagnosed with gender dysphoria, a medical
condition characterized by clinically significant distress caused by an incongruence between a person’s gender identity and the person’s birth-assigned sex. Since the end of his freshman year, G.G. has undergone hormone therapy and has legally changed his name to G., a traditionally male name. G.G. lives all aspects of his life as a boy. G.G. has not, however, had sex reassignment surgery.¹

Before beginning his sophomore year, G.G. and his mother told school officials that G.G. was a transgender boy. The officials were supportive and took steps to ensure that he would be treated as a boy by teachers and staff. Later, at G.G.’s request, school officials allowed G.G. to use the boys’ restroom.² G.G. used this restroom without incident for about seven weeks. G.G.’s use of the boys’ restroom, however, excited the interest of others in the community, some of whom contacted

¹ The World Professional Association for Transgender Health (WPATH) has established Standards of Care for individuals with gender dysphoria. J.A. 37. These Standards of Care are accepted as authoritative by organizations such as the American Medical Association and the American Psychological Association. Id. The WPATH Standards of Care do not permit sex reassignment surgery for persons who are under the legal age of majority. J.A. 38.

² G.G. does not participate in the school’s physical education programs. He does not seek here, and never has sought, use of the boys’ locker room. Only restroom use is at issue in this case.
the Gloucester County School Board (the Board) seeking to bar G.G. from continuing to use the boys’ restroom.

Board Member Carla B. Hook (Hook) added an item to the agenda for the November 11, 2014 board meeting titled “Discussion of Use of Restrooms/Locker Room Facilities.” J.A. 15. Hook proposed the following resolution (hereinafter the “transgender restroom policy” or “the policy”):

Whereas the GCPS [i.e., Gloucester County Public Schools] recognizes that some students question their gender identities, and

Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and

Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore

It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

J.A. 15-16; 58.

At the November 11, 2014 meeting twenty-seven people spoke during the Citizens’ Comment Period, a majority of whom supported Hook’s proposed resolution. Many of the speakers displayed hostility to G.G., including by referring pointedly to
him as a “young lady.” J.A. 16. Others claimed that permitting G.G. to use the boys’ restroom would violate the privacy of other students and would lead to sexual assault in restrooms. One commenter suggested that if the proposed policy were not adopted, non-transgender boys would come to school wearing dresses in order to gain access to the girls’ restrooms. G.G. and his parents spoke against the proposed policy. Ultimately, the Board postponed a vote on the policy until its next meeting on December 9, 2014.

At the December 9 meeting, approximately thirty-seven people spoke during the Citizens’ Comment Period. Again, most of those who spoke were in favor of the proposed resolution. Some speakers threatened to vote the Board members out of office if the Board members voted against the proposed policy. Speakers again referred to G.G. as a “girl” or “young lady.” J.A. 18. One speaker called G.G. a “freak” and compared him to a person who thinks he is a “dog” and wants to urinate on fire hydrants. Id. Following this second comment period, the Board voted 6-1 to adopt the proposed policy, thereby barring G.G. from using the boys’ restroom at school.

G.G. alleges that he cannot use the girls’ restroom because women and girls in those facilities “react[] negatively because they perceive[] G.G. to be a boy.” Id. Further, using the girls’ restroom would “cause severe psychological distress” to
G.G. and would be incompatible with his treatment for gender dysphoria. J.A. 19. As a corollary to the policy, the Board announced a series of updates to the school’s restrooms to improve general privacy for all students, including adding or expanding partitions between urinals in male restrooms, adding privacy strips to the doors of stalls in all restrooms, and constructing single-stall unisex restrooms available to all students. G.G. alleges that he cannot use these new unisex restrooms because they “make him feel even more stigmatized . . . . Being required to use the separate restrooms sets him apart from his peers, and serves as a daily reminder that the school views him as ‘different.’” Id. G.G. further alleges that, because of this stigma and exclusion, his social transition is undermined and he experiences “severe and persistent emotional and social harms.” Id. G.G. avoids using the restroom while at school and has, as a result of this avoidance, developed multiple urinary tract infections.

B.

G.G. sued the Board on June 11, 2015. G.G. seeks an injunction allowing him to use the boys’ restroom and brings underlying claims that the Board impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution.
On July 27, 2015, the district court held a hearing on G.G.’s motion for a preliminary injunction and on the Board’s motion to dismiss G.G.’s lawsuit. At the hearing, the district court orally dismissed G.G.’s Title IX claim and denied his request for a preliminary injunction, but withheld ruling on the motion to dismiss G.G.’s equal protection claim. The district court followed its ruling from the bench with a written order dated September 4, 2015 denying the injunction and a second written order dated September 17, 2015 dismissing G.G.’s Title IX claim and expanding on its rationale for denying the injunction.

In its September 17, 2015 order, the district court reasoned that Title IX prohibits discrimination on the basis of sex and not on the basis of other concepts such as gender, gender identity, or sexual orientation. The district court observed that the regulations implementing Title IX specifically allow schools to provide separate restrooms on the basis of sex. The district court concluded that G.G.’s sex was female and that requiring him to use the female restroom facilities did not impermissibly discriminate against him on the basis of sex in violation of Title IX. With respect to G.G.’s request for an injunction, the district court found that G.G. had not made the required showing that the balance of equities was in his favor. The district court found that requiring G.G. to use the unisex restrooms during the pendency of this lawsuit was not unduly
burdensome and would result in less hardship than requiring other students made uncomfortable by G.G.’s presence in the boys’ restroom to themselves use the unisex restrooms.

This appeal followed. G.G. asks us to reverse the district court’s dismissal of his Title IX claim, grant the injunction he seeks, and, because of comments made by the district judge during the motion hearing, to assign the case to a different district judge on remand. The Board, on the other hand, asks us to affirm the district court’s rulings and also asks us to dismiss G.G.’s equal protection claim—on which the district court has yet to rule—as without merit. The United States, as it did below, has filed an amicus brief supporting G.G.’s Title IX claim in order to defend the government’s interpretation of Title IX as requiring schools to provide transgender students access to restrooms congruent with their gender identity.

II.

We turn first to the district court’s dismissal of G.G.’s Title IX claim.\(^3\) We review de novo the district court’s grant of

\(^3\) We decline the Board’s invitation to preemptively dismiss G.G.’s equal protection claim before it has been fully considered by the district court. “[W]e are a court of review, not of first view.” Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1335 (2013) (citation and quotation marks omitted). We will not proceed to the merits of G.G.’s equal protection claim (Continued)
a motion to dismiss. Cruz v. Maypa, 773 F.3d 138, 143 (4th Cir. 2014). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations and quotations omitted).

As noted earlier, Title IX provides: “[n]o person . . . 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.” 20 U.S.C. § 1681(a). To allege a violation of Title IX, G.G. must allege (1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused G.G. harm. See Preston v.

on appeal without the benefit of the district court’s prior consideration.

The Board suggests that a restroom may not be educational in nature and thus is not an educational program covered by Title IX. Appellee’s Br. 35 (quoting Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657, 682 (W.D. Pa. 2015)). The Department’s regulation pertaining to “Education programs or activities” provides:

Except as provided in this subpart, in providing any aid, benefit, or service to a
Virginia ex rel. New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir. 1994) (citing Cannon v. Univ. of Chi., 441 U.S. 677, 680 (1979)). We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX. Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007).

Not all distinctions on the basis of sex are impermissible under Title IX. For example, Title IX permits the provision of

student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

. . .

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31(b). We have little difficulty concluding that access to a restroom at a school, under this regulation, can be considered either an “aid, benefit, or service” or a “right, privilege, advantage, or opportunity,” which, when offered by a recipient institution, falls within the meaning of “educational program” as used in Title IX and defined by the Department’s implementing regulations.
separate living facilities on the basis of sex: “nothing contained [in Title IX] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.” 20 U.S.C. § 1686. The Department’s regulations implementing Title IX permit the provision of “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.” 34 C.F.R. § 106.33. The Department recently delineated how this regulation should be applied to transgender individuals. In an opinion letter dated January 7, 2015, the Department’s Office for Civil Rights (OCR) wrote: “When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”

The opinion letter cites to OCR’s December 2014 “Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities.” This document, denoted a “significant guidance document” per Office of Management and Budget regulations, states: “All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based 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.” Office of Civil Rights, Dept. of Educ., Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014) (Continued)
A.

G.G., and the United States as amicus curiae, ask us to give the Department’s interpretation of its own regulation controlling weight pursuant to Auer v. Robbins, 519 U.S. 452 (1997). Auer requires that an agency’s interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. Id. at 461. Agency interpretations need not be well-settled or long-standing to be entitled to deference. They must, however, “reflect the agency’s fair and considered judgment on the matter in question.” Id. at 462. An interpretation may not be the result of the agency’s fair and considered judgment, and will not be accorded Auer deference, when the interpretation conflicts with a prior interpretation, when it appears that the interpretation is no more than a


The dissent suggests that we ignore the part of OCR’s opinion letter in which the agency “also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities,” as the Board did here. Post at 66. However, because G.G. does want to use shared sex-segregated facilities, the agency’s suggestion regarding students who do not want to use such shared sex-segregated facilities is immaterial to the resolution of G.G.’s claim. Nothing in today’s opinion restricts any school’s ability to provide individual-user facilities.
convenient litigating position, or when the interpretation is a post hoc rationalization. Christopher v. Smithkline Beecham Corp., 132 S. Ct. 2156, 2166 (2012) (citations omitted).

The district court declined to afford deference to the Department’s interpretation of 34 C.F.R. § 106.33. The district court found the regulation to be unambiguous because “[i]t clearly allows the School Board to limit bathroom access ‘on the basis of sex,’ including birth or biological sex.” G.G. v. Gloucester Cty. Sch. Bd., No. 4:15cv54, 2015 WL 5560190, at *8 (E.D. Va. Sept. 17, 2015). The district court also found, alternatively, that the interpretation advanced by the Department was clearly erroneous and inconsistent with the regulation. The district court reasoned that, because “on the basis of sex” means, at most, on the basis of sex and gender together, it cannot mean on the basis of gender alone. Id.

The United States contends that the regulation clarifies statutory ambiguity by making clear that schools may provide separate restrooms for boys and girls “without running afoul of Title IX.” Br. for the United States as Amicus Curiae 24-25 (hereinafter “U.S. Br.”). However, the Department also considers § 106.33 itself to be ambiguous as to transgender students because “the regulation is silent on what the phrases ‘students of one sex’ and ‘students of the other sex’ mean in the context of transgender students.” Id. at 25. The United
States contends that the interpretation contained in OCR’s January 7, 2015 letter resolves the ambiguity in § 106.33 as that regulation applies to transgender individuals.

B.

We will not accord an agency’s interpretation of an unambiguous regulation Auer deference. Thus, our analysis begins with a determination of whether 34 C.F.R. § 106.33 contains an ambiguity. Section 106.33 permits schools to provide “separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.” 34 C.F.R. § 106.33.

“[D]etermining whether a regulation or statute is ambiguous presents a legal question, which we determine de novo.” Humanoids Grp. v. Rogan, 375 F.3d 301, 306 (4th Cir. 2004). We determine ambiguity by analyzing the language under the three-part framework set forth in Robinson v. Shell Oil Co., 519 U.S. 337 (1997). The plainness or ambiguity of language is determined by reference to (1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole. Id. at 341.
First, we have little difficulty concluding that the language itself—"of one sex" and "of the other sex"—refers to male and female students. Second, in the specific context of § 106.33, the plain meaning of the regulatory language is best stated by the United States: "the mere act of providing separate restroom facilities for males and females does not violate Title IX . . . ." U.S. Br. 22 n.8. Third, the language "of one sex" and "of the other sex" appears repeatedly in the broader context of 34 C.F.R. § 106 Subpart D, titled "Discrimination on the Basis of Sex in Education Programs or Activities Prohibited."6 This repeated formulation indicates two sexes ("one sex" and "the other sex"), and the only reasonable reading of the language used throughout the relevant regulatory section is that it references male and female. Read plainly then, § 106.33 permits schools to provide separate toilet, locker room, and shower facilities for its male and female students. By

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6 For example, § 106.32(b)(2) provides that "[h]ousing provided . . . to students of one sex, when compared to that provided to students of the other sex, shall be as a whole: proportionate in quantity . . . and [c]omparable in quality and cost to the student"; § 106.37(a)(3) provides that an institution generally cannot "[a]pply any rule . . . concerning eligibility [for financial assistance] which treats persons of one sex differently from persons of the other sex with regard to marital or parental status"; and § 106.41(b) provides that "where [an institution] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex . . . members of the excluded sex must be allowed to try-out for the team offered . . . ."
implication, the regulation also permits schools to exclude males from the female facilities and vice-versa.

Our inquiry is not ended, however, by this straightforward conclusion. Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board’s reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department’s interpretation—determining maleness or femaleness with reference to gender identity. Cf. Dickenson-Russell Coal Co. v. Sec’y of Labor, 747 F.3d 251, 258 (4th Cir. 2014) (refusing to afford Auer deference where the language of the regulation at issue was “not susceptible to more than one plausible reading” (citation and quotation marks omitted)). It is not clear to us how the regulation would apply in a number of situations—even under the Board’s own “biological gender” formulation. For example, which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia in an accident? The Department’s interpretation resolves ambiguity by providing that
in the case of a transgender individual using a sex-segregated facility, the individual’s sex as male or female is to be generally determined by reference to the student’s gender identity.

C.

Because we conclude that the regulation is ambiguous as applied to transgender individuals, the Department’s interpretation is entitled to Auer deference unless the Board demonstrates that the interpretation is plainly erroneous or inconsistent with the regulation or statute. Auer, 519 U.S. at 461. “Our review of the agency’s interpretation in this context is therefore highly deferential.” Dickenson-Russell Coal, 747 F.3d at 257 (citation and quotation marks omitted). “It is well established that an agency’s interpretation need not be the only possible reading of a regulation—or even the best one—to prevail.” Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1337 (2013). An agency’s view need only be reasonable to warrant deference. Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 702 (1991) (“[I]t is axiomatic that the [agency’s] interpretation need not be the best or most natural one by grammatical or other standards. Rather, the [agency’s] view need be only reasonable to warrant deference.”).
Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and were adopted unchanged by the Department in 1980. 45 Fed. Reg. 30802, 30955 (May 9, 1980). Two dictionaries from the drafting era inform our analysis of how the term “sex” was understood at that time. The first defines “sex” as “the character of being either male or female” or “the sum of those anatomical and physiological differences with reference to which the male and female are distinguished . . . .” American College Dictionary 1109 (1970). The second defines “sex” as:

the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usually genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness . . . .

Webster’s Third New International Dictionary 2081 (1971).

Although these definitions suggest that the word “sex” was understood at the time the regulation was adopted to connote male and female and that maleness and femaleness were determined primarily by reference to the factors the district court termed “biological sex,” namely reproductive organs, the definitions also suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not
universally descriptive. The dictionaries, therefore, used qualifiers such as reference to the “sum of” various factors, “typical dichotomous occurrence,” and “typically manifested as maleness and femaleness.” Section 106.33 assumes a student population composed of individuals of what has traditionally been understood as the usual “dichotomous occurrence” of male and female where the various indicators of sex all point in the same direction. It sheds little light on how exactly to determine the “character of being either male or female” where those indicators diverge. We conclude that the Department’s interpretation of how § 106.33 and its underlying assumptions should apply to transgender individuals is not plainly erroneous or inconsistent with the text of the regulation. The regulation is silent as to which restroom transgender individuals are to use when a school elects to provide sex-segregated restrooms, and the Department’s interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects—or, in the words of an older

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7 Modern definitions of “sex” also implicitly recognize the limitations of a nonmalleable, binary conception of sex. For example, Black’s Law Dictionary defines “sex” as “[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender.” Black’s Law Dictionary 1583 (10th ed. 2014). The American Heritage Dictionary includes in the definition of “sex” “[o]ne’s identity as either female or male.” American Heritage Dictionary 1605 (5th ed. 2011).
dictionary, “the morphological, physiological, and behavioral peculiarities”—included in the term “sex.”

D.

Finally, we consider whether the Department’s interpretation of § 106.33 is the result of the agency’s fair and considered judgment. Even a valid interpretation will not be accorded Auer deference where it conflicts with a prior interpretation, where it appears that the interpretation is no more than a convenient litigating position, or where the interpretation is a post hoc rationalization. Christopher, 132 S. Ct. at 2166 (citations omitted).

Although the Department’s interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015, “novelty alone is no reason to refuse deference” and does not render the current interpretation inconsistent with prior agency practice. See Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2263 (2011). As the United States explains, the issue in this case “did not arise until recently,” see id., because schools have only recently begun citing § 106.33 as justification for enacting new policies restricting transgender students’ access to restroom facilities. The Department contends that “[i]t is to those ‘newfound’ policies that [the Department’s]
interpretation of the regulation responds.”  U.S. Br. 29.  We see no reason to doubt this explanation.  See Talk Am., Inc., 131 S. Ct. at 2264.

Nor is the interpretation merely a convenient litigating position.  The Department has consistently enforced this position since 2014.  See J.A. 55 n.5 & n.6 (providing examples of OCR enforcement actions to secure transgender students access to restrooms congruent with their gender identities).  Finally, this interpretation cannot properly be considered a post hoc rationalization because it is in line with the existing guidances and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities.8  U.S. Br. 17 n.5 & n.6 (citing publications by the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the Department of Housing and

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8 We disagree with the dissent’s suggestion that the result we reach today renders the enforcement of separate restroom facilities impossible because it “would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity.”  Post at 65.  Accepting the Board’s position would equally require the school to assume “biological sex” based on “appearances, social expectations, or explicit declarations of [biological sex].”  Certainly, no one is suggesting mandatory verification of the “correct” genitalia before admittance to a restroom.  The Department’s vision of sex-segregated restrooms which takes account of gender identity presents no greater “impossibility of enforcement” problem than does the Board’s “biological gender” vision of sex-segregated restrooms.
Urban Development, and the Office of Personnel Management). None of the Christopher grounds for withholding Auer deference are present in this case.

E.

We conclude that the Department’s interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to Auer deference and is to be accorded controlling weight in this case. We reverse the district court’s contrary conclusion and its resultant dismissal of G.G.’s Title IX claim.

F.

In many respects, we are in agreement with the dissent. We agree that “sex” should be construed uniformly throughout Title IX and its implementing regulations. We agree that it has indeed been commonplace and widely accepted to separate public

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9 The Board urges us to reach a contrary conclusion regarding the validity of the Department’s interpretation, citing Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 657 (W.D. Pa. 2015). Although we recognize that the Johnston court confronted a case similar in most material facts to the one before us, that court did not consider the Department’s interpretation of § 106.33. Because the Johnston court did not grapple with the questions of administrative law implicated here, we find the Title IX analysis in Johnston to be unpersuasive.
restrooms, locker rooms, and shower facilities on the basis of sex. We agree that “an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts” are not involuntarily exposed. Post at 56. It is not apparent to us, however, that the truth of these propositions undermines the conclusion we reach regarding the level of deference due to the Department’s interpretation of its own regulations.

The Supreme Court commands the use of particular analytical frameworks when courts review the actions of the executive agencies. G.G. claims that he is entitled to use the boys’ restroom pursuant to the Department’s interpretation of its regulations implementing Title IX. We have carefully followed the Supreme Court’s guidance in Chevron, Auer, and Christopher and have determined that the interpretation contained in the OCR letter is to be accorded controlling weight. In a case such as

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10 We doubt that G.G.’s use of the communal restroom of his choice threatens the type of constitutional abuses present in the cases cited by the dissent. For example, G.G.’s use—or for that matter any individual’s appropriate use—of a restroom will not involve the type of intrusion present in Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489, 494 (6th Cir. 2008) (involving the videotaping of students dressing and undressing in school locker rooms), Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) (involving the indiscriminate strip searching of twenty male and five female students), or Supelveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 1992) (involving a male parole officer forcibly entering a bathroom stall with a female parolee to supervise the provision of a urine sample).
this, where there is no constitutional challenge to the regulation or agency interpretation, the weighing of privacy interests or safety concerns\textsuperscript{11}—fundamentally questions of policy—is a task committed to the agency, not to the courts.

The Supreme Court’s admonition in \textit{Chevron} points to the balance courts must strike:

\begin{quote}
Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests
\end{quote}

\textsuperscript{11} The dissent accepts the Board’s invocation of amorphous safety concerns as a reason for refusing deference to the Department’s interpretation. We note that the record is devoid of any evidence tending to show that G.G.’s use of the boys’ restroom creates a safety issue. We also note that the Board has been, perhaps deliberately, vague as to the nature of the safety concerns it has—whether it fears that it cannot ensure G.G.’s safety while in the restroom or whether it fears G.G. himself is a threat to the safety of others in the restroom. We are unconvinced of the existence of danger caused by “sexual responses prompted by students' exposure to the private body parts of students of the other biological sex.” Post at 58. The same safety concern would seem to require segregated restrooms for gay boys and girls who would, under the dissent’s formulation, present a safety risk because of the “sexual responses prompted” by their exposure to the private body parts of other students of the same sex in sex-segregated restrooms.
which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984). Not only may a subsequent administration choose to implement a different policy, but Congress may also, of course, revise Title IX explicitly to prohibit or authorize the course charted here by the Department regarding the use of restrooms by transgender students. To the extent the dissent critiques the result we reach today on policy grounds, we reply that, our Auer analysis complete, we leave policy formulation to the political branches.

III.

G.G. also asks us to reverse the district court’s denial of the preliminary injunction he sought which would have allowed him to use the boys’ restroom during the pendency of this lawsuit. “To win such a preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest.” League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 236 (4th
Cir. 2014) (citation omitted). We review a district court’s denial of a preliminary injunction for abuse of discretion. Id. at 235. “A district court has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding.” Morris v. Wachovia Sec., Inc., 448 F.3d 268, 277 (4th Cir. 2006) (citation and quotations omitted). “We do not ask whether we would have come to the same conclusion as the district court if we were examining the matter de novo.” Id. (citation omitted). Instead, “we reverse for abuse of discretion if we form a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.” Id. (citations and quotations omitted).

The district court analyzed G.G.’s request only with reference to the third factor—the balance of hardships—and found that the balance of hardships did not weigh in G.G.’s favor. G.G. submitted two declarations in support of his complaint, one from G.G. himself and one from a medical expert, Dr. Randi Ettner, to explain what harms G.G. will suffer as a result of his exclusion from the boys’ restroom. The district court refused to consider this evidence because it was “replete with inadmissible evidence including thoughts of others, hearsay, and suppositions.” G.G., 2015 WL 5560190, at *11.
The district court misstated the evidentiary standard governing preliminary injunction hearings. The district court stated: “The complaint is no longer the deciding factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence.” Id. at *9. Preliminary injunctions, however, are governed by less strict rules of evidence:

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981); see also Elrod v. Burns, 427 U.S. 347, 350 n.1 (1976) (taking as true the “well-pleaded allegations of respondents’ complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction”); compare Fed. R. Civ. P. 56 (requiring affidavits supporting summary judgment to be “made on personal knowledge, [and to] set out facts that would be admissible in evidence), with Fed R. Civ. P. 65 (providing no such requirement in the preliminary injunction context). Thus, although admissible evidence may be more persuasive than inadmissible evidence in the preliminary injunction context, it was error for
the district court to summarily reject G.G.’s proffered evidence because it may have been inadmissible at a subsequent trial.

Additionally, the district court completely excluded some of G.G.’s proffered evidence on hearsay grounds. The seven of our sister circuits to have considered the admissibility of hearsay in preliminary injunction proceedings have decided that the nature of evidence as hearsay goes to “weight, not preclusion” and have permitted district courts to “rely on hearsay evidence for the limited purpose of determining whether to award a preliminary injunction.” Mullins v. City of New York, 626 F.3d 47, 52 (2d Cir. 2010); see also Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 718 (3d Cir. 2004); Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997); Levi Strauss & Co. v. Sunrise Int’l Trading, Inc., 51 F.3d 982, 985 (11th Cir. 1995) (“At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding.” (citation and internal quotations omitted)); Sierra Club, Lone Star Chapter v. FDIC, 992 F.2d 545, 551 (5th Cir. 1993) (“[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence.”); Asseo v.
Pan Am. Grain Co., Inc., 805 F.2d 23, 26 (1st Cir. 1986); Flynt Distrib. Co., Inc. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984). We see no reason for a different rule to govern in this Circuit. Because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted.

Because the district court evaluated G.G.’s proffered evidence against a stricter evidentiary standard than is warranted by the nature and purpose of preliminary injunction proceedings to prevent irreparable harm before a full trial on the merits, the district court was “guided by erroneous legal principles.” We therefore conclude that the district court abused its discretion when it denied G.G.’s request for a preliminary injunction without considering G.G.’s proffered evidence. We vacate the district court’s denial of G.G.’s motion for a preliminary injunction and remand the case to the district court for consideration of G.G.’s evidence in light of the evidentiary standards set forth herein.
IV.

Finally, G.G. requests that we reassign this case to a different district judge on remand. G.G. does not explicitly claim that the district judge is biased. Absent such a claim, reassignment is only appropriate in "unusual circumstances where both for the judge’s sake and the appearance of justice an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality." United States v. Guglielmi, 929 F.2d 1001, 1007 (4th Cir. 1991) (citation and internal quotation marks omitted). In determining whether such circumstances exist, a court should consider: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. Id. (citation omitted).

G.G. argues that both the first and second Guglielmi factors are satisfied. He contends that the district court has pre-existing views which it would be unwilling to put aside in the face of contrary evidence about medical science generally and about "gender and sexuality in particular." Appellant’s Br.
53. For example, the court accepted the Board’s “mating” concern by noting:

There are only two instincts—two. Everything else is acquired—everything. That is, the brain only has two instincts. One is called self-preservation, and the other is procreation. And procreation is the highest instinct in individuals who are in the latter part of their teen-age years. All of that is accepted by all medical science, as far as I can determine in reading information.

J.A. 85-86.

The district court also expressed skepticism that medical science supported the proposition that one could develop a urinary tract infection from withholding urine for too long. J.A. 111-12. The district court characterized gender dysphoria as a “mental disorder” and resisted several attempts by counsel for G.G. to clarify that it only becomes a disorder when left untreated. See J.A. 88-91; 101-02. The district court also seemed to reject G.G.’s representation of what it meant to be transgender, repeatedly noting that G.G. “wants” to be a boy and not a girl, but that “he is biologically a female.” J.A. 103-04; see also J.A. 104 (“It’s his mind. It’s not physical that causes that, it’s what he believes.”). The district court’s memorandum opinion, however, included none of the extraneous remarks or suppositions that marred the hearing.
Reassignment is an unusual step at this early stage of litigation. Although the district court did express opinions about medical facts and skepticism of G.G.’s claims, the record does not clearly indicate that the district judge would refuse to consider and credit sound contrary evidence. Further, although the district court has a distinct way of proceeding in court, the hearing record and the district court’s written order in the case do not raise in our minds a question about the fundamental fairness of the proceedings, however idiosyncratic. The conduct of the district judge does not at this point satisfy the Guglielmi standard. We deny G.G.’s request for reassignment to a different district judge on remand.

V.

For the foregoing reasons, the judgment of the district court is

REVERSED IN PART, VACATED IN PART, AND REMANDED.
DAVIS, Senior Circuit Judge, concurring:

    I concur in Judge Floyd’s fine opinion. I write separately, however, to note that while I am happy to join in the remand of this matter to the district court so that it may consider G.G.’s evidence under proper legal standards in the first instance, this Court would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record.

I.

In order to obtain a preliminary injunction, G.G. must demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of an injunction, (3) the balance of hardships tips in his favor, and (4) the requested injunction is in the public interest. Pashby v. Delia, 709 F.3d 307, 320 (4th Cir. 2013) (citing Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008)). The record before us establishes that G.G. has done so.

A.

G.G. alleges that by singling him out for different treatment because he is transgender, the Board’s restroom policy discriminates against him “on the basis of sex” in violation of Title IX. In light of the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination “on the basis of sex” in the context
of analogous statutes and our holding here that the Department’s interpretation of 34 C.F.R. § 106.33 is to be given controlling weight, G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim. See Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989); see also Glenn v. Brumby, 663 F.3d 1312, 1316-19 (11th Cir. 2011); Smith v. City of Salem, 378 F.3d 566, 573-75 (6th Cir. 2004); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000).

B.

In support of his claim of irreparable harm, G.G. submitted an affidavit to the district court describing the psychological distress he experiences when he is forced to use the single-stall restrooms or the restroom in the nurse’s office. See J.A. 32-33. His affidavit also indicates that he has “repeatedly developed painful urinary tract infections” as a result of holding his urine in order to avoid using the restroom at school. Id.

An expert declaration by Dr. Randi Ettner, a psychologist specializing in working with children and adolescents with gender dysphoria, provides further support for G.G.’s claim of irreparable harm. In her affidavit, Dr. Ettner indicates that treating a transgender boy as male in some situations but not in others is “inconsistent with evidence-based medical practice and
detrimental to the health and well-being of the child” and explains why access to a restroom appropriate to one’s gender identity is important for transgender youth. J.A. 39. With respect to G.G. in particular, Dr. Ettner states that in her professional opinion, the Board’s restroom policy “is currently causing emotional distress to an extremely vulnerable youth and placing G.G. at risk for accruing lifelong psychological harm.” J.A. 41. In particular, Dr. Ettner opines that

[a]s a result of the School Board’s restroom policy, . . . G.G. is put in the humiliating position of having to use a separate facility, thereby accentuating his ‘otherness,’ undermining his identity formation, and impeding his medically necessary social transition process. The shame of being singled out and stigmatized in his daily life every time he needs to use the restroom is a devastating blow to G.G. and places him at extreme risk for immediate and long-term psychological harm.

J.A. 42.

The Board offers nothing to contradict any of the assertions concerning irreparable harm in G.G.’s or Dr. Ettner’s affidavits. Instead, its arguments focus on what is purportedly lacking from G.G.’s presentation in support of his claim of irreparable harm, such as “evidence that [his feelings of dysphoria, anxiety, and distress] would be lessened by using the boy[s’] restroom,” evidence from his treating psychologist, medical evidence, and an opinion from Dr. Ettner “differentiating between the distress that G.G. may suffer by
not using the boy[s’s] bathroom during the course of this litigation and the distress that he has apparently been living with since age 12.” Br. Appellee 42-43. As to the alleged deficiency concerning Dr. Ettner’s opinion, the Board’s argument is belied by Dr. Ettner’s affidavit itself, which, as quoted above, provides her opinion about the psychological harm that G.G. is experiencing “[a]s a result of the School Board’s restroom policy.” J.A. 42. With respect to the other purported inadequacies, the absence of such evidence does nothing to undermine the uncontroverted statements concerning the daily psychological harm G.G. experiences as a result of the Board’s policy or Dr. Ettner’s unchallenged opinion concerning the significant long-term consequences of that harm. Moreover, the Board offers no argument to counter G.G.’s averment that he has repeatedly contracted a urinary tract infection as a result of holding his urine to avoid using the restroom at school.

The uncontroverted facts before the district court demonstrate that as a result of the Board’s restroom policy, G.G. experiences daily psychological harm that puts him at risk for long-term psychological harm, and his avoidance of the restroom as a result of the Board’s policy puts him at risk for developing a urinary tract infection as he has repeatedly in the past. G.G. has thus demonstrated that he will suffer irreparable harm in the absence of an injunction.
C.

Turning to the balance of the hardships, G.G. has shown that he will suffer irreparable harm without the requested injunction. On the other end of the scale, the Board contends that other students’ constitutional right to privacy will be imperiled by G.G.’s presence in the boys’ restroom.

As the majority opinion points out, G.G.’s use of the restroom does not implicate the unconstitutional actions involved in the cases cited by the dissent. Moreover, students’ unintentional exposure of their genitals to others using the restroom has already been largely, if not entirely, remedied by the alterations to the school’s restrooms already undertaken by the Board. To the extent that a student simply objects to using the restroom in the presence of a transgender student even where there is no possibility that either student’s genitals will be exposed, all students have access to the single-stall restrooms. For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students. The minimal or non-existent hardship to other students of using the single-stall restrooms if they object to G.G.’s presence in the communal restroom thus does not tip the scale in the Board’s favor. The balance of hardships weighs heavily toward G.G.
D.

Finally, consideration of the public interest in granting or denying the preliminary injunction favors G.G. Having concluded that G.G. has demonstrated a likelihood of success on the merits of his Title IX claim, denying the requested injunction would permit the Board to continue violating G.G.’s rights under Title IX for the pendency of this case. Enforcing G.G.’s right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest. Cf. Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002) (citation omitted) (observing that upholding constitutional rights is in the public interest).

The Board contends that the public interest lies in allowing this issue to be determined by the legislature, citing pending legislation before Congress addressing the issue before the Court. But, as discussed above, the weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes, as interpreted by the Supreme Court. The existence of proposed legislation that, if passed, would address the question before us does not justify forcing G.G. to suffer irreparable harm when he has demonstrated that he is likely to succeed on the merits of his claims under current federal law.
II.

Based on the evidence presented to the district court, G.G. has satisfied all four prongs of the preliminary injunction inquiry. When the record before us supports entry of a preliminary injunction—as it amply does here—we have not hesitated to act to prevent irreparable injury to a litigant before us. See, e.g., League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 248 (4th Cir. 2014) (expressly observing that appellate courts have the power to vacate a denial of a preliminary injunction and direct entry of an injunction); Eisenberg ex rel. Eisenberg v. Montgomery Cty. Pub. Schs., 197 F.3d 123, 134 (4th Cir. 1999) (directing entry of injunction “because the record clearly establishes the plaintiff’s right to an injunction and [an evidentiary] hearing would not have altered the result”).

Nevertheless, it is right and proper that we defer to the district court in this instance. It is to be hoped that the district court will turn its attention to this matter with the urgency the case poses. Under the circumstances here, the appropriateness and necessity of such prompt action is plain. By the time the district court issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year.
With these additional observations, I concur fully in Judge Floyd’s thoughtful and thorough opinion for the panel.
NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in Part IV of the court’s opinion. With respect to whether G.G. stated a claim under Title IX and whether the district court abused its discretion in denying G.G.’s motion for a preliminary injunction, I would affirm the ruling of the district court dismissing G.G.’s Title IX claim and denying his motion for a preliminary injunction. I therefore dissent from the majority’s decision on those issues.

G.G., a transgender boy who is 16, challenges as discriminatory, under the Equal Protection Clause and Title IX of the Education Amendments of 1972, his high school’s policy for assigning students to restrooms and locker rooms based on biological sex. The school’s policy provides: (1) that the girls’ restrooms and locker rooms are designated for use by students who are biologically female; (2) that the boys’ restrooms and locker rooms are designated for use by students who are biologically male; and (3) that all students, regardless of their sex, are authorized to use the school’s three single-stall unisex restrooms, which the school created to accommodate transgender students. Under this policy, G.G., who is biologically female but who identifies as male, is authorized to use the girls’ restrooms and locker rooms and the unisex restrooms. He contends, however, that the policy discriminates
against him because it denies him, as one who identifies as male, the use of the boys’ restrooms, and he seeks an injunction compelling the high school to allow him to use the boys’ restrooms.

The district court dismissed G.G.’s Title IX claim, explaining that the school complied with Title IX and its regulations, which permit schools to provide separate living facilities, restrooms, locker rooms, and shower facilities “on the basis of sex,” so long as the facilities are “comparable.” 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33.

Strikingly, the majority now reverses the district court’s ruling, without any supporting case law, and concludes that when Title IX and its regulations provide for separate living facilities, restrooms, locker rooms, and shower facilities on the basis of sex, the statute’s and regulations’ use of the term “sex” means a person’s gender identity, not the person’s biological status as male or female. To accomplish its goal, the majority relies entirely on a 2015 letter sent by the Department of Education’s Office for Civil Rights to G.G., in which the Office for Civil Rights stated, “When a school elects to separate or treat students differently on the basis of sex [when providing restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes], a school generally must treat transgender students consistent with their
gender identity.” (Emphasis added). Accepting that new definition of the statutory term “sex,” the majority’s opinion, for the first time ever, holds that a public high school may not provide separate restrooms and locker rooms on the basis of biological sex. Rather, it must now allow a biological male student who identifies as female to use the girls’ restrooms and locker rooms and, likewise, must allow a biological female student who identifies as male to use the boys’ restrooms and locker rooms. This holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes. And, unwittingly, it also tramples on the very concerns expressed by G.G., who said that he should not be forced to go to the girls’ restrooms because of the “severe psychological distress” it would inflict on him and because female students had “reacted negatively” to his presence in girls’ restrooms. Surely biological males who identify as females would encounter similar reactions in the girls’ restroom, just as students physically exposed to students of the opposite biological sex would be likely to experience psychological distress. As a result, schools would no longer be able to protect physiological privacy as between students of the opposite biological sex.

This unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and
safety, which the separation of such facilities is designed to protect. More particularly, it also misconstrues the clear language of Title IX and its regulations. And finally, it reaches an unworkable and illogical result.

The recent Office for Civil Rights letter, moreover, which is not law but which is the only authority on which the majority relies, states more than the majority acknowledges. In the sentence following the sentence on which the majority relies, the letter states that, to accommodate transgender students, schools are encouraged “to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities [as permitted by Title IX’s regulations].” This appears to approve the course that G.G.’s school followed when it created unisex restrooms in addition to the boys’ and girls’ restrooms it already had.

Title IX and its implementing regulations are not ambiguous. In recognition of physiological privacy and safety concerns, they allow schools to provide “separate living facilities for the different sexes,” 20 U.S.C. § 1686, provided that the facilities are “proportionate” and “comparable,” 34 C.F.R. § 106.32(b), and to provide “separate toilet, locker room, and shower facilities on the basis of sex,” again provided that the facilities are “comparable,” 34 C.F.R. § 106.33. Because the school’s policy that G.G. challenges in this action
comports with Title IX and its regulations, I would affirm the district court’s dismissal of G.G.’s Title IX claim.

I

The relevant facts are not in dispute. G.G. is a 16 year-old who attends Gloucester High School in Gloucester County, Virginia. He is biologically female, but “did not feel like a girl” from an early age. Still, he enrolled at Gloucester High School for his freshman year as a female.

During his freshman year, however, G.G. told his parents that he considered himself to be transgender, and shortly thereafter, at his request, he began therapy with a psychologist, who diagnosed him with gender dysphoria, a condition of distress brought about by the incongruence of one’s biological sex and gender identity.

In August 2014, before beginning his sophomore year, G.G. and his mother met with the principal and guidance counselor at Gloucester High School to discuss his need, as part of his treatment, to socially transition at school. The school accommodated all of his requests. Officials changed school records to reflect G.G.’s new male name; the guidance counselor supported G.G.’s sending an email to teachers explaining that he was to be addressed using his new name and to be referred to using male pronouns; G.G. was permitted to fulfill his physical
education requirement through a home-bound program, as he preferred not to use the school’s locker rooms; and the school allowed G.G. to use a restroom in the nurse’s office “because [he] was unsure how other students would react to [his] transition.” G.G. was grateful for the school’s “welcoming environment.” As he stated, “no teachers, administrators, or staff at Gloucester High School expressed any resistance to calling [him] by [his] legal name or referring to [him] using male pronouns.” And he was “pleased to discover that [his] teachers and the vast majority of [his] peers respected the fact that [he is] a boy.”

As the school year began, however, G.G. found it “stigmatizing” to continue using the nurse’s restroom, and he requested to use the boys’ restrooms. The principal also accommodated this request. But the very next day, the School Board began receiving “numerous complaints from parents and students about [G.G.’s] use of the boys’ restrooms.” The School Board thus faced a dilemma. It recognized G.G.’s feelings, as he expressed them, that “[u]sing the girls’ restroom[s] [was] not possible” because of the “severe psychological distress” it would inflict on him and because female students had previously “reacted negatively” to his presence in the girls’ restrooms. It now also had to recognize that boys had similar feelings caused by G.G.’s use of the boys’ restrooms, although G.G.
stated that he continued using the boys’ restrooms for some seven weeks without personally receiving complaints from fellow students.

The Gloucester County School Board considered the problem and, after two public meetings, adopted a compromise policy, as follows:

Whereas the GCPS recognizes that some students question their gender identities, and

Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and

Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore

It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Gloucester High School promptly implemented the policy and created three single-stall unisex restrooms for use by all students, regardless of their biological sex or gender identity.

In December 2014, G.G. sought an opinion letter about his situation from the U.S. Department of Education’s Office for Civil Rights, and on January 15, 2015, the Office responded, stating, as relevant here:

The Department’s Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When
a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity. [The Office for Civil Rights] also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

G.G. commenced this action in June 2015, alleging that the Gloucester County School Board’s policy was discriminatory, in violation of the U.S. Constitution’s Equal Protection Clause and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. He sought declaratory relief, injunctive relief, and damages. With his complaint, G.G. also filed a motion for a preliminary injunction “requiring the School Board to allow [him] to use the boys’ restrooms at school.”

The district court dismissed G.G.’s Title IX claim because Title IX’s implementing regulations permit schools to provide separate restrooms “on the basis of sex.” The court also denied G.G.’s motion for a preliminary injunction. As to the Equal Protection claim, the court has not yet ruled on whether G.G. failed to state a claim, but, at the hearing on the motion for a preliminary injunction, it indicated that it “will hear evidence” and “get a date set” for trial to better assess the claim.

From the district court’s order denying G.G.’s motion for a preliminary injunction, G.G. filed this appeal, in which he also
challenges the district court’s Title IX ruling as inextricably intertwined with the district court’s denial of the motion for a preliminary injunction.

II

G.G. recognizes that persons who are born biologically female “typically” identify psychologically as female, and likewise, that persons who are born biologically male “typically” identify as male. Because G.G. was born biologically female but identifies as male, he characterizes himself as a transgender male. He contends that because he is transgender, the School Board singled him out for “different and unequal treatment,” “discriminat[ing] against him based on sex [by denying him use of the boys’ restrooms], in violation of Title IX.” He argues, “discrimination against transgender people is necessarily discrimination based on sex because it is impossible to treat people differently based on their transgender status without taking their sex into account.” He concludes that the School Board’s policy addressing restrooms and locker rooms thus illegally fails to include transgender persons on the basis of their gender identity. In particular, he concludes that he is “prevent[ed] . . . from using the same restrooms as other students and relegat[ed] . . . to separate, single-stall facilities.”
As noted, the School Board’s policy designates the use of restrooms and locker rooms based on the student’s biological sex -- biological females are assigned to the girls’ restrooms and unisex restrooms; biological males are assigned to the boys’ restrooms and unisex restrooms. G.G. is thus assigned to the girls’ restrooms and the unisex restrooms, but is denied the use of the boys’ restrooms. He asserts, however, that because neither he nor the girls would accept his use of the girls’ restroom, he is relegated to the unisex restrooms, which is stigmatizing.

The School Board contends that it is treating all students the same way, as it explains:

The School Board’s policy does not discriminate against any class of students. Instead, the policy was developed to treat all students and situations the same. To respect the safety and privacy of all students, the School Board has had a long-standing practice of limiting the use of restroom and locker room facilities to the corresponding biological sex of the students. The School Board also provides three single-stall bathrooms for any student to use regardless of his or her biological sex. Under the School Board’s restroom policy, G.G. is being treated like every other student in the Gloucester Schools. All students have two choices. Every student can use a restroom associated with their anatomical sex, whether they are boys or girls. If students choose not to use the restroom associated with their anatomical sex, the students can use a private, single-stall restroom. No student is permitted to use the restroom of the opposite sex. As a result, all students, including female to male transgender and male to female transgender students, are treated the same.
While G.G. has pending a claim under the Equal Protection Clause (on which the district court has not yet ruled), only his preliminary injunction challenge and Title IX claim are before us at this time.

Title IX provides:

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 . . . .

20 U.S.C. § 1681(a) (emphasis added). The Act, however, provides, “Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.” Id. § 1686 (emphasis added); see also 34 C.F.R. § 106.32(b) (permitting schools to provide “separate housing on the basis of sex” as long as the housing is “proportionate” and “comparable” (emphasis added)). Similarly, implementing Regulation 106.33 provides for particular separate facilities, as follows:

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.

34 C.F.R. § 106.33 (emphasis added). Thus, although Title IX and its regulations provide generally that a school receiving
federal funds may not discriminate on the basis of sex, they also specify that a school does not violate the Act by providing, on the basis of sex, separate living facilities, restrooms, locker rooms, and shower facilities.

While G.G. only challenges the definition and application of the term “sex” with respect to separate restrooms, acceptance of his argument would necessarily change the definition of “sex” for purposes of assigning separate living facilities, locker rooms, and shower facilities as well. All are based on “sex,” a term that must be construed uniformly throughout Title IX and its implementing regulations. See Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (“[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning” (internal quotation marks and citations omitted)); In re Total Realty Mgmt., LLC, 706 F.3d 245, 251 (4th Cir. 2013) (“Canons of construction . . . require that, to the extent possible, identical terms or phrases used in different parts of the same statute be interpreted as having the same meaning. This presumption of consistent usage . . . ensure[s] that the statutory scheme is coherent and consistent” (alterations in original) (internal quotation marks and citations omitted)); see also Kentuckians for Commonwealth Inc. v. Riverburgh, 317 F.3d 425, 440 (4th Cir. 2003) (“[B]ecause a regulation must be consistent with the statute it
implements, any interpretation of a regulation naturally must accord with the statute as well” (quoting John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 627 n.78 (1996))).

Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females. An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind. See, e.g., Doe v. Luzerne Cnty., 660 F.3d 169, 176-77 (3d Cir. 2011) (recognizing that an individual has “a constitutionally protected privacy interest in his or her partially clothed body” and that this “reasonable expectation of privacy” exists “particularly while in the presence of members of the opposite sex”); Brannum v. Overton Cnty. Sch. Bd., 516 F.3d 489, 494 (6th Cir. 2008) (explaining that “the constitutional right to privacy . . . includes the right to shield one’s body from exposure to
viewing by the opposite sex”); Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) (“Students of course have a significant privacy interest in their unclothed bodies”); Sepulveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 1992) (explaining that “[t]he right to bodily privacy is fundamental” and that “common sense, decency, and [state] regulations” require recognizing it in a parolee’s right not to be observed by an officer of the opposite sex while producing a urine sample); Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1989) (recognizing that, even though inmates in prison “surrender many rights of privacy,” their “special sense of privacy in their genitals” should not be violated through exposure unless “reasonably necessary” and explaining that the “involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating”).

Moreover, we have explained that separating restrooms based on “acknowledged differences” between the biological sexes serves to protect this important privacy interest. See Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993) (noting “society’s undisputed approval of separate public rest rooms for men and women based on privacy concerns”). Indeed, the Supreme Court recognized, when ordering an all-male Virginia college to admit female students, that such a remedy “would undoubtedly require alterations necessary to afford members of each sex privacy from
the other sex.” United States v. Virginia, 518 U.S. 515, 550 n.19 (1996). Such privacy was and remains necessary because of the inherent “[p]hysical differences between men and women,” which, as the Supreme Court explained, are “enduring” and render “the two sexes . . . not fungible,” id. at 533 (distinguishing sex from race and national origin), not because of “one’s sense of oneself as belonging to a particular gender,” as G.G. and the government as amicus contend.

Thus, Title IX’s allowance for the separation, based on sex, of living facilities, restrooms, locker rooms, and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes. This privacy concern is also linked to safety concerns that could arise from sexual responses prompted by students’ exposure to the private body parts of students of the other biological sex. Indeed, the School Board cited these very reasons for its adoption of the policy, explaining that it separates restrooms and locker rooms to promote the privacy and safety of minor children, pursuant to its “responsibility to its students to ensure their privacy while engaging in personal bathroom functions, disrobing, dressing, and showering outside of the presence of members of the opposite sex. [That the school has this responsibility] is particularly true in an
environment where children are still developing, both emotionally and physically.”

The need to protect privacy and safety between the sexes based on physical exposure would not be present in the same quality and degree if the term “sex” were to encompass only a person’s gender identity. Indeed, separation on this basis would function nonsensically. A biological male identifying as female could hardly live in a girls’ dorm or shower in a girls’ shower without invading physiological privacy needs, and the same would hold true for a biological female identifying as male in a boys’ dorm or shower. G.G.’s answer, of course, is that he is not challenging the separation, on the basis of sex, of living facilities, locker rooms, and shower facilities, but only of restrooms, where the risks to privacy and safety are far reduced. This effort to limit the scope of the issue apparently sways the majority, as it cabins its entire discussion to “restroom access by transgender individuals.” Ante at 26. But this effort to restrict the effect of G.G.’s argument hardly matters when the term “sex” would have to be applied uniformly throughout the statute and regulations, as noted above and, indeed, as agreed to by the majority. See ante at 26.

The realities underpinning Title IX’s recognition of separate living facilities, restrooms, locker rooms, and shower facilities are reflected in the plain language of the statute
and regulations, which is not ambiguous. The text of Title IX and its regulations allowing for separation of each facility “on the basis of sex” employs the term “sex” as was generally understood at the time of enactment. See Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (explaining that courts should not defer to an agency’s interpretation of its own regulation if an “alternative reading is compelled by the regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation” (emphasis added) (internal quotation marks and citation omitted)); see also Auer v. Robbins, 519 U.S. 452, 461 (1997) (discussing dictionary definitions of the regulation’s “critical phrase” to help determine whether the agency’s interpretation was “plainly erroneous or inconsistent with the regulation” (internal quotation marks and citation omitted)). Title IX was enacted in 1972 and the regulations were promulgated in 1975 and readopted in 1980, and during that time period, virtually every dictionary definition of “sex” referred to the physiological distinctions between males and females, particularly with respect to their reproductive functions. See, e.g., The Random House College Dictionary 1206 (rev. ed. 1980) (“either the male or female division of a species, esp. as differentiated with reference to the reproductive functions”); Webster’s New Collegiate Dictionary 1054 (1979) (“the sum of the structural,
functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females”); American Heritage Dictionary 1187 (1976) (“The property or quality by which organisms are classified according to their reproductive functions”); Webster’s Third New International Dictionary 2081 (1971) (“the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . .”); The American College Dictionary 1109 (1970) (“the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished . . . ”). Indeed, although the contemporaneous meaning controls our analysis, it is notable that, even today, the term “sex” continues to be defined based on the physiological distinctions between males and females. See, e.g., Webster’s New World College Dictionary 1331 (5th ed. 2014) (“either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions”); The American Heritage Dictionary 1605 (5th ed. 2011) (“Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions”); Merriam-Webster’s Collegiate Dictionary 1140 (11th
ed. 2011) (“either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures”). Any new definition of sex that excludes reference to physiological differences, as the majority now attempts to introduce, is simply an unsupported reach to rationalize a desired outcome.

Thus, when the School Board assigned restrooms and locker rooms on the basis of biological sex, it was clearly complying precisely with the unambiguous language of Title IX and its regulations.

Despite the fact that the majority offers no case to support the definition of “sex” as advanced by G.G. and supported by the government as amicus, the majority nonetheless accepts that the meaning of the term “sex” in Title IX and its regulations refers to a person’s “gender identity” simply to accommodate G.G.’s wish to use the boys’ restrooms. But, it is not immediately apparent whether G.G., the government, and the majority contend that the term “sex” as used in Title IX and its regulations refers (1) to both biological sex and gender identity; (2) to either biological sex or gender identity; or (3) to only “gender identity.” In his brief, G.G. seems to take the position that the term “sex” at least includes a reference to gender identity. This is the position taken in his complaint
when he alleges, “Under Title IX, discrimination ‘on the basis of sex’ encompasses both discrimination based on biological differences between men and women and discrimination based on gender nonconformity.” The government seems to be taking the same position, contending that the term “sex” “encompasses both sex -- that is, the biological differences between men and women -- and gender [identity].” (Emphasis in original). The majority, however, seems to suggest that the term “sex” refers only to gender identity, as it relies solely on the statement in the Office for Civil Rights’ letter of January 7, 2015, which said, “When a school elects to separate or treat students differently on the basis of sex [for the purpose of providing restrooms, locker rooms, and other facilities], a school generally must treat transgender students consistent with their gender identity.” (Emphasis added). But, regardless of where G.G., the government, and the majority purport to stand on this question, the clear effect of their new definition of sex not only tramples the relevant statutory and regulatory language and disregards the privacy concerns animating that text, it is also illogical and unworkable.

If the term “sex” as used in the statute and regulations refers to both biological sex and gender identity, then, while the School Board’s policy is in compliance with respect to most students, whose biological sex aligns with their gender
identity, for students whose biological sex and gender identity do not align, no restroom or locker room separation could ever be accomplished consistent with the regulation because a transgender student’s use of a boys’ or girls’ restroom or locker room could not satisfy the conjunctive criteria. Given that G.G. and the government do not challenge schools’ ability to separate restrooms and locker rooms for male and female students, surely they cannot be advocating an interpretation that places schools in an impossible position. Moreover, such an interpretation would deny G.G. the right to use either the boys’ or girls’ restrooms, a position that G.G. does not advocate.

If the position of G.G., the government, and the majority is that the term “sex” means either biological sex or gender identity, then the School Board’s policy is in compliance because it segregates the facilities on the basis of biological sex, a satisfactory component of the disjunctive.

Therefore, when asserting that G.G. must be allowed to use the boys’ restrooms and locker rooms as consistent with his gender identity, G.G., the government, and the majority must be arguing that “sex” as used in Title IX and its regulations means only gender identity. But this construction would, in the end, mean that a school could never meaningfully provide separate restrooms and locker rooms on the basis of sex. Biological
males and females whose gender identity aligned would be required to use the same restrooms and locker rooms as persons of the opposite biological sex whose gender identity did not align. With such mixed use of separate facilities, no purpose would be gained by designating a separate use “on the basis of sex,” and privacy concerns would be left unaddressed.

Moreover, enforcement of any separation would be virtually impossible. Basing restroom access on gender identity would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity, which the government concedes would render Title IX and its regulations nonsensical:

Certainly a school that has created separate restrooms for boys and girls could not decide that only students who dress, speak, and act sufficiently masculine count as boys entitled to use the boys’ restroom, or that only students who wear dresses, have long hair, and act sufficiently feminine may use the girls’ restroom.

Yet, by interpreting Title IX and the regulations as “requiring schools to treat students consistent with their gender identity,” and by disallowing schools from treating students based on their biological sex, the government’s position would have precisely the effect the government finds to be at odds with common sense.

Finally, in arguing that he should not be assigned to the girls’ restrooms, G.G. states that “it makes no sense to place a
transgender boy in the girls’ restroom in the name of protecting student privacy” because “girls objected to his presence in the girls’ restrooms because they perceived him as male.” But the same argument applies to his use of the boys’ restrooms, where boys felt uncomfortable because they perceived him as female. In any scenario based on gender identity, moreover, there would be no accommodation for the recognized need for physiological privacy.

In short, it is impossible to determine how G.G., the government, and the majority would apply the provisions of Title IX and the implementing regulations that allow for the separation of living facilities, restrooms, locker rooms, and shower facilities “on the basis of sex” if “sex” means gender identity.

The Office for Civil Rights letter, on which the majority exclusively relies, hardly provides an answer. In one sentence it states that schools “generally must treat transgender students consistent with their gender identity,” whatever that means, and in the next sentence, it encourages schools to provide “gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.” While the first sentence might be impossible to enforce without destroying all privacy-serving separation, the second sentence encourages schools, such as Gloucester High
School, to provide unisex single-stall restrooms for any students who are uncomfortable with sex-separated facilities, as the school in fact provided.

As it stands, Title IX and its implementing regulations authorize schools to separate, on the basis of sex, living facilities, restrooms, locker rooms, and shower facilities, which must allow for separation on the basis of biological sex. Gloucester High School thus clearly complied with the statute and regulations. But, as it did so, it was nonetheless sensitive to G.G.’s gender transition, accommodating virtually every wish that he had. Indeed, he initially requested and was granted the use of the nurse’s restroom. And, after both girls and boys objected to his using the girls’ and boys’ restrooms, the school provided individual unisex restrooms, as encouraged by the letter from the Office for Civil Rights. Thus, while Gloucester High School made a good-faith effort to accommodate G.G. and help him in his transition, balancing its concern for him with its responsibilities to all students, it still acted legally in maintaining a policy that provided all students with physiological privacy and safety in restrooms and locker rooms.

Because the Gloucester County School Board did not violate Title IX and Regulation 106.33 in adopting the policy for separate restrooms and locker rooms, I would affirm the district
court’s decision dismissing G.G.’s Title IX claim and therefore dissent.

I also dissent from the majority’s decision to vacate the district court’s denial of G.G.’s motion for a preliminary injunction. As the Supreme Court has consistently explained, “[a] preliminary injunction is an extraordinary remedy” that “may only be awarded upon a clear showing that the plaintiff is entitled to such relief,” and “‘[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy.’” Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22-24 (2008) (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)). Given the facts that the district court fully and fairly summarized in its opinion, including the hardships expressed both by G.G. and by other students, I cannot conclude that we can “form a definite and firm conviction that the court below committed a clear error of judgment,” Morris v. Wachovia Sec., Inc., 448 F.3d 268, 277 (4th Cir. 2006) (quotation marks and citation omitted), particularly when we are only now expressing as binding law an evidentiary standard that the majority asserts the district court violated.

As noted, however, I concur in Part IV of the court’s opinion.
INTRODUCTION

1. This lawsuit challenges a sweeping North Carolina law, House Bill 2 (“H.B. 2”), which bans transgender people from accessing restrooms and other facilities consistent with their gender identity and blocks local governments from protecting lesbian, gay, bisexual, and transgender (“LGBT”) people against discrimination in a wide
variety of settings. By singling out LGBT people for disfavored treatment and explicitly writing discrimination against transgender people into state law, H.B. 2 violates the most basic guarantees of equal treatment and the U.S. Constitution.

2. In February 2016, the City of Charlotte enacted an ordinance (the “Ordinance”) that extended existing municipal anti-discrimination protections to LGBT people. In light of the pervasive discrimination faced by LGBT people—and particularly transgender people—advocates had long pressed the Charlotte City Council for these protections. Because North Carolina state law does not expressly prohibit discrimination based on sexual orientation or gender identity, many LGBT residents of Charlotte—as well as LGBT residents throughout the state—are exposed to invidious discrimination in their day-to-day lives simply for being themselves. After two hours-long hearings, in which there was extensive public comment on both sides of the issue, the Charlotte City Council voted to adopt the Ordinance.

3. Before the Ordinance could take effect, the North Carolina General Assembly rushed to convene a special session with the express purpose of passing a statewide law that would preempt Charlotte’s “radical” move to protect its residents from discrimination. In a process rife with procedural irregularities, the legislature introduced and passed H.B. 2 in a matter of hours, and the Governor signed the bill into law that same day. Lawmakers made no attempt to cloak their actions in a veneer of neutrality, instead openly and virulently attacking transgender people, who were falsely portrayed as predatory and dangerous to others. While the discriminatory, stated focus of the
legislature in passing H.B. 2—the use of restrooms by transgender people—is on its own illegal and unconstitutional, H.B. 2 in fact wreaks far greater damage by also prohibiting local governments in North Carolina from enacting express anti-discrimination protections based on sexual orientation and gender identity.

4. Plaintiffs are individuals and a nonprofit organization whose members and constituents will be directly impacted by H.B. 2. Like the three transgender plaintiffs in the case, transgender people around the state of North Carolina immediately suffered harm under H.B. 2 in that they are not able to access public restrooms and other single-sex facilities that accord with their gender identity. Additionally, all LGBT people are harmed by H.B. 2 in that it strips them of, or bars them from, anti-discrimination protections under local law. Plaintiffs seek a declaratory judgment that H.B. 2 violates their or their members’ constitutional and statutory rights to equal protection, liberty, dignity, autonomy, and privacy, as well as an injunction preliminarily and permanently enjoining enforcement by of H.B. 2 by Defendants.

PARTIES

A. Plaintiffs.

5. Plaintiff Joaquín Carcaño (“Mr. Carcaño”) is a 27-year-old man who resides in Carrboro, North Carolina. Mr. Carcaño is employed by the University of North Carolina, and he works at the University of North Carolina at Chapel Hill (“UNC-Chapel Hill”). He is transgender.
6. Plaintiff Payton Grey McGarry (“Mr. McGarry”) is a 20-year-old man who resides in Greensboro, North Carolina. Mr. McGarry is a full-time student at the University of North Carolina at Greensboro (“UNC-Greensboro”). He is transgender.

7. Plaintiff H.S. is a 17-year-old young woman from Raleigh, North Carolina who attends school and resides in Winston-Salem, North Carolina. Plaintiff H.S. is a student at the University of North Carolina School of the Arts High School (“UNCSA-HS”). She is transgender.

8. Plaintiff Angela Gilmore (“Ms. Gilmore”) is a 52-year-old woman who resides in Durham, North Carolina and is an Associate Dean and Professor at North Carolina Central University School of Law. Ms. Gilmore is a lesbian.


10. Plaintiff American Civil Liberties Union of North Carolina (“ACLU of NC”) is a private, non-profit membership organization with its principal office in Raleigh, North Carolina. It has approximately 8,500 members in the State of North Carolina, including LGBT members. The mission of the ACLU of NC is to defend and advance the individual freedoms embodied in the United States Constitution, including the rights of LGBT people to be free from invidious discrimination and infringements on their liberty interests. The ACLU of NC sues on behalf of its members, some of whom are transgender individuals who are barred by H.B. 2 from using restrooms and other
facilities in accordance with their gender identity in schools (including those subject to N.C. Gen. Stat. § 115C-521.2) and government buildings, and some of whom are lesbian, gay, bisexual, or transgender individuals who have been stripped of or barred from local non-discrimination protections based on their sexual orientation and sex, including gender identity.

B. Defendants.

11. Defendant Patrick McCrory (“Defendant McCrory” or “Governor McCrory” or “the Governor”) is sued in his official capacity as the Governor of North Carolina. Pursuant to Article III, Section 1 of the State Constitution, “the executive power of the State” is vested in Defendant McCrory in his capacity as Governor. Article III, Section 5(4) also provides that it is the duty of Defendant McCrory in his capacity as Governor to “take care that the laws be faithfully executed.” Governor McCrory is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint.

12. Defendant University of North Carolina is an education program or activity receiving federal financial assistance. Defendant University of North Carolina includes its constituent institutions, the University of North Carolina at Chapel Hill, the University of North Carolina at Greensboro, and the University of North Carolina School of the Arts High School.

13. Defendant Board of Governors of the University of North Carolina (“the Board”) is a corporate body charged with the general control, supervision, and
governance of the University of North Carolina’s constituent institutions. The Board is capable of being sued in “all courts whatsoever” pursuant to N.C. Gen. Stat. § 116-3.

14. Defendant W. Louis Bissette, Jr. (“Defendant Bissette” or “Mr. Bissette”) is sued in his official capacity as the Chairman of the Board of Governors of the University of North Carolina and has the power to ensure the Board’s compliance with any injunctive relief.

15. Defendants, through their respective duties and obligations, are responsible for enforcing H.B. 2. Each Defendant, and those subject to their direction, supervision, or control, has or intentionally will perform, participate in, aide and/or abet in some manner the acts alleged in this complaint, has or will proximately cause the harm alleged herein, and has or will continue to injure Plaintiffs irreparably if not enjoined. Accordingly, the relief requested herein is sought against each Defendant, as well as all persons under their supervision, direction, or control, including, but not limited to, their officers, employees, and agents.

JURISDICTION AND VENUE


17. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under laws of the United States and the United States Constitution.
18. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) because Defendant University of North Carolina resides within the District, and all Defendants reside within the State of North Carolina; and because a substantial part of the events that gave rise to the Plaintiffs’ claims took place within the District.

19. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 2201 and 2202.

20. This Court has personal jurisdiction over Defendants because they are domiciled in North Carolina.

FACTUAL ALLEGATIONS

A. Plaintiffs.

21. Plaintiff Joaquín Carcaño works for the University of North Carolina at Chapel Hill (“UNC-Chapel Hill”) Institute for Global Health and Infectious Disease as a Project Coordinator. The project that he coordinates provides medical education and services such as HIV testing to the Latino/a population.

22. Mr. Carcaño is a man.

23. Until the passage of H.B. 2, Mr. Carcaño was recognized and treated like all other men at his job at UNC-Chapel Hill.

24. Mr. Carcaño is transgender. What that means is that his sex assigned at birth was female, as his birth certificate reflects, but that designation does not accurately reflect his gender identity, which is male.
25. A person’s gender identity refers to the person’s internal sense of belonging to a particular gender. There is a medical consensus that gender identity is innate and that efforts to change a person’s gender identity are unethical and harmful to a person’s health and well-being.

26. The gender marker on a birth certificate is designated at the time of birth generally based upon the appearance of external genitalia. However, determinations of sex can involve multiple factors, such as chromosomes, hormone levels, internal and external reproductive organs, and gender identity.

27. Gender identity is the primary determinant of sex.

28. Mr. Carcaño was diagnosed with gender dysphoria, the medical diagnosis for the clinically significant distress that individuals whose gender identity differs from the sex they were assigned at birth can experience.

29. Gender dysphoria is a serious medical condition that, if left untreated, can lead to clinical distress, debilitating depression, and even suicidal thoughts and acts.

30. Gender dysphoria is a condition recognized in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, Fifth ed. (2013) (DSM-V), and by the other leading medical and mental health professional groups, including the American Medical Association and the American Psychological Association.

31. Medical treatment for gender dysphoria must be individualized for the medical needs of each patient.
32. Treatment for gender dysphoria includes living one’s life consistent with one’s gender identity, including when accessing single-sex spaces such as restrooms and locker rooms.

33. Forcing a transgender person to use single-sex spaces that do not match the person’s gender identity is inconsistent with medical protocols and can cause anxiety and distress to the transgender person and result in harassment of and violence against them.

34. Mr. Carcaño was born and raised in South Texas. Since a very young age, around 7 or 8 years old, Mr. Carcaño was aware that he did not feel like a girl, but he did not know how to express how he felt.

35. Mr. Carcaño ultimately acknowledged his male gender identity to himself later in his adult life.

36. Since 2013, Mr. Carcaño has been in the continuous care of a licensed mental health clinician, who diagnosed Mr. Carcaño with gender dysphoria. Mr. Carcaño initially sought treatment for depression, which was caused in part by his gender dysphoria.

37. Mental health and medical professionals worldwide recognize and follow the evidence-based standards of care for the treatment of gender dysphoria developed by the World Professional Association for Transgender Health (“WPATH”). After diagnosing Mr. Carcaño with gender dysphoria, his therapist developed a course of treatment consistent with those standards. The goal of such treatment is to alleviate distress by helping a person live congruently with the person’s gender identity, the
primary determinant of sex. Consistent with that treatment and his identity, in January 2015, Mr. Carcaño explained to his family and friends that he is a man.

38. A critical component of the WPATH Standards of Care is a social transition to living full-time consistently with the individual’s gender identity. For Mr. Carcaño, that includes living in accordance with his gender identity in all respects, including the use of a male name and pronouns and use of the men’s restrooms.

39. For transgender people, it is critical that social transition include transition in the workplace, including with respect to restrooms. Excluding a transgender man from the restroom that corresponds to his gender identity, or forcing him to use a separate facility from other men, communicates to the entire workplace that he should not be recognized as a man and undermines the social transition process.

40. Mr. Carcaño also began using Joaquín as his first name in January 2015. His friends, family, and coworkers now recognize him as a man, and they refer to him using his male name and male pronouns.

41. Also consistent with the WPATH Standards of Care, Mr. Carcaño’s physician recommended and prescribed hormone treatment, which Mr. Carcaño has received since May 2015. For both hormone therapy and surgical treatment, the WPATH Standards of Care require persistent, well-documented gender dysphoria, which is a criterion that Mr. Carcaño satisfied. Among other therapeutic benefits, the hormone treatment has deepened Mr. Carcaño’s voice, increased his growth of facial hair, and given him a more masculine appearance. This treatment helped alleviate the distress Mr.
Carcaño experienced due to the discordance between his birth-assigned sex and his identity and helped him to feel more comfortable with who he is.

42. As part of the treatment for his gender dysphoria, Mr. Carcaño also obtained a bilateral mastectomy and nipple reconstruction (also known as “top surgery”) in January 2016. Consistent with WPATH Standards of Care, Mr. Carcaño satisfied the requirement of having a referral from a qualified mental health professional in order to obtain the surgical treatment.

43. As part of his social transition, Mr. Carcaño began using the men’s restroom at work and elsewhere in late 2015, which occurred without incident for the five months or so before H.B. 2’s enactment. Mr. Carcaño’s therapist had also specifically recommended that he use only the men’s restroom. She was concerned that using the women’s restroom could compromise his mental health, well-being, and safety. By late 2015, Mr. Carcaño had facial hair facilitated by hormone treatment, and his therapist indicated that others would recognize Mr. Carcaño as a man based on his physical appearance.

44. Mr. Carcaño is now comfortable with the status of his treatment and, with the exception of the distress now caused by the passage of H.B. 2, his distress has been managed through the clinically recommended treatment he has received. He plans to continue treatment under the supervision of medical professionals and based on his medical needs.
45. Apart from the building where he works, Mr. Carcaño also used other men’s restrooms on the UNC-Chapel Hill campus without incident for approximately five months prior to H.B. 2’s passage. In addition, when out in public, such as at restaurants and stores, Mr. Carcaño uses the men’s restroom.

46. The only restrooms on the floor where Mr. Carcaño works at UNC-Chapel Hill are designated either for men or for women. H.B. 2 thus excludes him from using the same restrooms that his coworkers typically use. This exclusion is stigmatizing and marks him as different and lesser than other men.

47. Using the women’s restroom is not a viable option for Mr. Carcaño, just as it would not be a viable option for non-transgender men to be forced to use the women’s restroom. Forcing Mr. Carcaño to use the women’s restroom would also cause substantial harm to his mental health and well-being. It would also force him to disclose to others the fact that he is transgender, which itself could lead to violence and harassment.

48. The idea of being forced into the women’s restroom causes Mr. Carcaño to experience significant anxiety, as he knows that it would be distressing for him and uncomfortable for others. He fears for his safety because of the passage of H.B. 2.

49. In the initial period after H.B. 2’s passage, Mr. Carcaño generally used a single-occupancy restroom not designated either for men or for women in another building on campus, which was approximately a 10-15 minute walk away from his building each way.
50. Mr. Carcaño was subsequently informed by administrative staff in the building where he works that they had learned of a single-occupancy restroom based on building floor plans. It is accessible using a special service elevator, and the restroom is tucked away in a cubby down a hallway in a part of the building used for housekeeping.

51. Mr. Carcaño is not only humiliated by being singled out and forced to use a separate restroom from his colleagues and all other men that he works with, but also burdened by having to use a separate restroom on a different floor, which increases the likelihood that he will delay or avoid going to the restroom.

52. Mr. Carcaño also visits public agencies as defined by N.C. Gen. Stat. § 143-760(4), and intends to and will do so in the future. For example, as part of his job at UNC-Chapel Hill, Mr. Carcaño has had to visit the offices of the North Carolina Department of Health and Human Services many times in the past, and he will continue to need to do so in the future. Prior to the passage of H.B. 2, he used the men’s restroom while at their office, but he will be banned from doing so in the future under H.B. 2.

53. Similarly, Mr. Carcaño has visited state courthouses in Chapel Hill as part of a process to obtain a name change from his current legal name, which includes a traditionally feminine first name, to the name he currently uses. Because that name change process is ongoing, Mr. Carcaño will continue to visit state courthouses in the future, but he will be banned from using the men’s restroom there under H.B. 2.

54. Mr. Carcaño has also visited the Division of Motor Vehicles under the North Carolina Department of Transportation on prior occasions (e.g., to obtain a driver’s
license) and anticipates doing so again in the future, where he will be banned from using the men’s restroom under H.B. 2.

55. Mr. Carcaño also regularly uses the North Carolina Rest Area System, which maintains public restrooms along highways and is operated by the North Carolina Department of Transportation. For example, he uses the restrooms provided by that system when he travels approximately once a month to visit his brother in Atlanta, and when he visits Washington, D.C. periodically. He will need to continue to use those restrooms in the future, but he will be banned from using the men’s restroom under H.B. 2.

56. There have been no incidents or, to the best of Mr. Carcaño’s knowledge, complaints related to his use of the restrooms designated for men.

57. Mr. Carcaño is currently in the process of pursuing and exhausting administrative remedies before the Equal Employment Opportunity Commission with respect to his rights under Title VII of the Civil Rights Act of 1964.

58. Mr. Carcaño is a member of the ACLU of NC.

59. **Plaintiff Payton Grey McGarry** is a full-time student at the University of North Carolina at Greensboro (“UNC-Greensboro”), where he is double majoring in Business Administration and Accounting. He is also a skilled musician and has played trumpet in many ensembles at UNC-Greensboro. He plays the guitar, baritone, clarinet, and saxophone.
60. Mr. McGarry is close to his family and has a younger brother who is also a member of the LGBT community. Mr. McGarry hopes to use his education to eventually go to law school and work to defend people’s civil rights.

61. Mr. McGarry is a man.

62. Mr. McGarry is transgender. As is true for Mr. Carcaño, Mr. McGarry’s sex assigned at birth was female, as his birth certificate reflects, but that designation does not conform to his gender identity, which is male.

63. Mr. McGarry was diagnosed with gender dysphoria.

64. Mr. McGarry was born and raised in Wilson, North Carolina. Throughout his childhood, Mr. McGarry felt like a boy and never really thought of himself as a girl. It was not until he started to go through puberty that he began to wrestle with the disconnect between his identity as a boy and his assigned birth sex.

65. Mr. McGarry realized while he was in high school that he is transgender.

66. In October 2013, during his senior year in high school, Mr. McGarry began mental health treatment with a licensed clinical social worker who diagnosed him with gender dysphoria.

67. After diagnosing Mr. McGarry with gender dysphoria, his therapist developed a course of treatment in accordance with medical standards for treating the condition.
68. Consistent with that treatment and his identity, in the fall and winter of 2013, Mr. McGarry explained to his friends and family that he is male and began to use male pronouns.

69. In April 2014, under the care of an endocrinologist, Mr. McGarry began hormone therapy. This treatment helped alleviate the distress that Mr. McGarry experienced due to the discordance between his birth-assigned sex and his identity and helped him to feel more comfortable with who he is.

70. By the time he graduated high school in June 2014, Mr. McGarry used the name Payton and male pronouns in all aspects of his life. He is known as Payton McGarry to his family, friends, and peers, although he has not yet changed his legal first name to Payton.

71. In the fall of 2014, Mr. McGarry enrolled as a freshman at UNC-Greensboro as Payton McGarry and as male.

72. Since arriving at UNC-Greensboro, Mr. McGarry has identified and has been known to others as male for all purposes.

73. Mr. McGarry is a member of Phi Mu Alpha Sinfonia, a music fraternity, and is the Vice President of the Iota Epsilon Chapter of that fraternity. His fraternity brothers are aware that he is transgender and have no concerns with his use of men’s restrooms and locker rooms.
74. Though Mr. McGarry currently lives off campus, he is on campus six or seven days per week and always uses the restroom designed for men in on-campus buildings.

75. Mr. McGarry regularly uses the locker room facilities at UNC-Greensboro and always uses the facilities designed for men.

76. For the past year and a half since he enrolled at UNC-Greensboro, Mr. McGarry has used the men’s restrooms and locker rooms on-campus without incident. Mr. McGarry is unaware of any instance in which any person has complained about his use of the men’s restroom or locker room.

77. Mr. McGarry works part-time as a visual technician for marching bands at different high schools around the state and regularly uses the bathroom for men when working as a visual technician. There have been no incidents or, to the best of Mr. McGarry’s knowledge, complaints related to his use of the restrooms designated for men.

78. In addition, when out in public, such as at restaurants and stores, Mr. McGarry always uses the men’s restroom.

79. To Mr. McGarry’s knowledge, there are very few single-user restrooms on the UNC-Greensboro campus, and there are no single-user bathrooms in many buildings where he has classes.

80. If Mr. McGarry could not use the men’s restroom at UNC-Greensboro, he would have to search for single-user restrooms outside of the buildings where his classes are held every time he had to use the restroom. This would disrupt his ability to attend
class and would interfere with his educational opportunities. Expelling him from the multiple occupancy restrooms and locker rooms available to all other male students is stigmatizing and marks him as different and lesser than other men.

81. Since he started testosterone two years ago, Mr. McGarry’s voice has deepened and his face and body have become more traditionally masculine in appearance.

82. Using the women’s restroom is not a viable option for Mr. McGarry, just as it would not be a viable option for non-transgender men to be forced to use the women’s restroom. Forcing Mr. McGarry to use the women’s restroom would also cause substantial harm to his mental health and well-being. It would also force him to disclose to others the fact that he is transgender, which itself could lead to violence and harassment.

83. The idea of being forced into the women’s restroom causes Mr. McGarry to experience significant anxiety, as he knows that it would be distressing for him and uncomfortable for others. He fears for his safety because of the passage of H.B. 2.

84. Since the passage of H.B. 2, Mr. McGarry has been barred from using the men’s restrooms on campus. Given that he cannot use the women’s restroom and there are only a few available single-user restrooms, he often avoids going to the restroom all day.

85. Mr. McGarry has also visited public agencies as defined by N.C. Gen. Stat. § 143-760(4), and intends to and will do so in the future. For example, Mr. McGarry has
visited the Division of Motor Vehicles under the North Carolina Department of Transportation on prior occasions (e.g., to obtain a driver’s license) and anticipates doing so again in the future, where he will be banned from using the men’s restroom under H.B. 2.

86. Mr. McGarry also has used and will continue to use the North Carolina Rest Area System, which maintains public restrooms along highways and is operated by the North Carolina Department of Transportation. He will need to continue to use those restrooms in the future, but he will be banned from using the men’s restroom under H.B. 2.

87. **Plaintiff H.S.** is a junior at the University of North Carolina School of the Arts High School (“UNCSA-HS”). The oldest of four children, she is close to her family, who love and support her. She is an accomplished artist and studies visual arts at UNCSA-HS.

88. H.S. is a girl.

89. Until the passage of H.B. 2, H.S. was recognized as a girl at school and when out in public.

90. H.S. is transgender. She was assigned the sex of male at birth, as her birth certificate reflects, but that designation does not accurately reflect her gender identity, which is female.

91. H.S. has been diagnosed with gender dysphoria.
92. H.S. was born in New Jersey but moved to North Carolina when she was 11 years old. From as young an age two or three, H.S. gravitated towards clothing and toys generally associated with girls. Like many other girls, she would always want to wear the pink princess dresses at pre-school and to play with Barbie dolls.

93. After completing pre-school, H.S. did not feel comfortable expressing her identity as a girl and tried to immerse herself in traditionally masculine spaces and activities. She tried to do things that she felt she was supposed to do as a boy. But nothing felt right.

94. Starting in seventh grade, H.S. again began to gravitate toward clothes and activities that were considered more feminine.

95. By eighth grade, H.S. again began to express a more stereotypically feminine gender and at times would wear makeup and high-heel shoes at school.

96. As puberty began to approach in ninth grade, severe gender dysphoria and anxiety began to hit H.S., and she experienced significant distress around her body and identity. She finally went to her parents, who recognized that she was suffering.

97. In ninth grade, H.S. began therapy with an expert on treating transgender young people and was diagnosed with gender dysphoria.

98. In 2013, H.S. started high school at Broughton High School in Raleigh. In the middle of her freshman year, H.S. began hormone blockers to prevent the onset of male puberty and the development of secondary sex characteristics associated with men. This treatment delayed puberty while H.S. continued to understand her female identity.
Though H.S. continued to experience some distress and dysphoria, the hormone blockers greatly reduced her suffering.

99. At the end of ninth grade, H.S. felt fully comfortable embracing her identity as a girl at school and had the full support of her parents. On the last day of school her freshman year, H.S. wore a skirt to school that her mother had purchased for her. It was an important and symbolic turning point in her comfort with and embrace of her identity as a girl.

100. By sophomore year, H.S. was perceived as a girl and began to use the girls’ bathroom at school and in public. She was also known by female pronouns—such as she, her, and hers—by this time.

101. During her sophomore year, H.S. was elected to the Queen’s Court at her school, an honor that had, in the seventy-five years of the tradition, been shared only among non-transgender girls.

102. Under the care of her endocrinologist, during her sophomore year in high school, H.S. continued to assess her medical treatment for gender dysphoria and began to consider hormone replacement therapy. At the end of her sophomore year, in the spring of 2015, H.S. began estrogen therapy to continue her medical transition.

103. An accomplished visual artist, H.S. applied to the UNCSA-HS for her junior year and was accepted.

104. In the fall of 2015, H.S. moved to Winston-Salem to attend UNCSA-HS as a boarding student. She studies visual arts and aspires to a career in fashion.
105. H.S. lives in the girls’ dormitory at UNCSA-HS.

106. Until the passage of H.B. 2, H.S. exclusively used the girls’ restroom at school and could not imagine ever using a restroom designated for boys. H.S. is unaware of any instance in which any person has complained about her use of the girls’ restroom.

107. In addition, when out in public, such as at restaurants and stores, H.S. uses the restrooms designated for women and girls.

108. Outside of H.S.’s dorm room, there are no single-user restrooms available to her at UNCSA-HS and it would be disruptive to H.S.’s education to have to avoid the use of the restroom or to return to her room or locate a single-user restroom off campus every time she needed to go to the restroom.

109. Forcing H.S. out of spaces shared with her female peers is stigmatizing and marks her as different and lesser than other girls at school.

110. Particularly because she never went through puberty as a boy and began estrogen treatment earlier this year, H.S. has a traditionally feminine appearance. She is recognized as female in all aspects of her life.

111. Using the boys’ or men’s restroom is not a viable option for H.S., just as it would not be a viable option for non-transgender women and girls to be forced to use the restrooms designated for men and boys. Forcing H.S. to use the restroom designated for men and boys would also cause substantial harm to her mental health and well-being and would put her in danger of harassment and violence. It would also force her to disclose
to others the fact that she is transgender, which itself could lead to violence and harassment.

112. The idea of being forced into the restroom designated for boys and men at school and in public causes H.S. to experience significant anxiety and brings up painful memories and anxiety from her earlier childhood. She fears for her safety because of the passage of H.B. 2.

113. Since the passage of H.B. 2, H.S. has limited or delayed use of the bathroom because of fear of reprisals if she uses the restroom designated for women and girls and because she fears for her safety if she uses the restroom designated for men and boys, as the law requires.

114. H.S. has also visited public agencies as defined by N.C. Gen. Stat. § 143-760(4), and intends to and will do so in the future. For example, H.S. has visited the Division of Motor Vehicles under the North Carolina Department of Transportation on prior occasions (e.g., to obtain a driver’s license) and anticipates doing so again in the future, where she will be banned from using the women’s restroom under H.B. 2.

115. H.S. has used and will continue to use the North Carolina Rest Area System, which maintains public restrooms along highways and is operated by the North Carolina Department of Transportation. She will need to continue to use those restrooms in the future, but she will be banned from using the women’s restroom under H.B. 2.

116. **Plaintiff Angela Gilmore** is a resident of Durham, North Carolina. Ms. Gilmore has lived in North Carolina since 2011, when she moved from Florida to
take a job at North Carolina Central University. She is currently the Associate Dean for Academic Affairs and Professor of Law at North Carolina Central University.

117. Ms. Gilmore is a lesbian, and has been in a relationship with her wife, Angela Wallace, for almost twenty years. Ms. Gilmore and Ms. Wallace were married in Washington, D.C. in 2014.

118. Ms. Gilmore looked for and accepted a job in North Carolina, after she and her wife fell in love with the state during a visiting teaching job Ms. Gilmore had at Elon University School of Law in Greensboro, North Carolina, in 2010.

119. Both Ms. Gilmore and her wife, African American lesbians, felt that North Carolina, and Durham in particular, was a place where they could be fully themselves, comfortable in terms of both their race and sexual orientation.

120. Ms. Gilmore and her wife love living in Durham—they feel very much part of the community—and prior to the passage of H.B. 2, they had been looking at small towns in North Carolina where they might want to retire.

121. Since moving to North Carolina, Ms. Gilmore has worked towards increasing non-discrimination protections for LGBT people. Ms. Gilmore is a member of the ACLU of NC, and she was on the ACLU of NC board between 2014 and 2015. During that time, the ACLU of NC actively worked to defeat anti-LGBT bills proposed in the state legislature and to pass local ordinances, like the Ordinance, and to protect LGBT people from discrimination at the local level. Ms. Gilmore also has spoken on
panels at her law school and other law schools regarding non-discrimination protections for LGBT people.

122. The passage of H.B. 2 has caused Ms. Gilmore and her wife distress, in that it has significantly undone their sense of belonging and value in the state, which is why they moved to North Carolina. Ms. Gilmore and her wife experience H.B. 2 as sending a clear message to them as lesbians that they are not welcome in North Carolina.

123. Ms. Gilmore and her wife have visited the City of Charlotte and they plan to do so in the future. As two women traveling together with the same first name, they are often asked about the nature of their relationship, and they therefore regularly reveal themselves to be a lesbian couple. Under the Ordinance, Ms. Gilmore and her wife would have been protected from sexual orientation discrimination in public accommodations in the City of Charlotte. With the passage of H.B. 2, Ms. Gilmore worries that she and her wife will now be exposed to discrimination based on their sexual orientation.

124. With the passage of H.B. 2, Ms. Gilmore also is limited in her ability to increase and benefit from non-discrimination protections for LGBT people in North Carolina. Were she able to, Ms. Gilmore would continue to advocate for local ordinances that prohibit discrimination based on sexual orientation and gender identity.

125. As a non-transgender woman who always uses the facilities designated for women in both public and private spaces, Ms. Gilmore does not feel safer in these facilities because of the passage of H.B. 2.
126. **Plaintiffs Kelly Trent and Beverly Newell** are residents of Charlotte, North Carolina. Ms. Trent and Ms. Newell met in 2013, and they were married in Charlotte in December 2014.

127. As a lesbian couple and as residents of Charlotte, Ms. Trent and Ms. Newell would have been protected by the Ordinance from discrimination based on their sexual orientation by public accommodations in Charlotte. With the passage of H.B. 2, public accommodations in Charlotte are now legally permitted to discriminate based on sexual orientation. Ms. Trent and Ms. Newell fear that they are likely to experience discrimination based on their sexual orientation in Charlotte in the future, based on their recent experience of discrimination on that basis.

128. In February 2016, Ms. Trent reached out to a fertility clinic, the website for which listed an office in Charlotte, and made an appointment for an initial consult in early April 2016. Ms. Trent and Ms. Newell are trying to become parents, and they are hoping to have Ms. Trent carry a child. Because they are a lesbian couple, they plan on using donor sperm. At the time of her contact with the clinic, Ms. Trent made it clear that she and Ms. Newell are a same-sex couple seeking fertility services and that they plan on using donor sperm.

129. On April 1, 2016—soon after the passage of H.B. 2—a representative of the clinic called Ms. Trent and cancelled the appointment, claiming that the clinic did not serve “single sex couples” or “same sex couples.” The next week, the clinic’s website was changed to state that the clinic now does not provide services “requiring the use of
donor sperm,” although the clinic does continue to provide services for clients using a “husband’s” sperm. The clinic’s refusal to serve Ms. Trent and Ms. Newell appears to be based on their sexual orientation.

130. The passage of H.B. 2 prevented Ms. Trent and Ms. Newell from being able to file a public accommodations discrimination complaint with the City of Charlotte Community Relations Committee regarding the clinic’s actions, or from having their complaint investigated or conciliated. Had H.B. 2 not passed and preempted the Ordinance, Ms. Trent and Ms. Newell would have filed such a complaint. If Ms. Trent and Ms. Newell suffer future discrimination based on their sexual orientation in a place of public accommodation in Charlotte, they will similarly be denied the ability to avail themselves of the City of Charlotte’s Community Relations Committee procedure for receiving, investigating, or conciliating complaints.

131. With the passage of H.B. 2, Ms. Trent and Ms. Newell are also limited in their ability to increase and benefit from non-discrimination protections for LGBT people in North Carolina. As residents of Charlotte, Ms. Trent and Ms. Newell supported the Ordinance, and were they able to, they would support other local ordinances that prohibit discrimination based on sexual orientation and gender identity.

132. As non-transgender women who always use the facilities designated for women in both public and private spaces, Ms. Trent or Ms. Newell do not feel safer in these facilities because of the passage of H.B. 2.
B. The City of Charlotte’s Enactment of a Non-Discrimination Ordinance.

133. Advocates have long worked for the passage of an ordinance that would ensure that LGBT people were expressly protected from discrimination within the City of Charlotte. Prior to the vote on the Ordinance, there had been an earlier round of intensive public engagement in late 2014 to early 2015, when the Charlotte City Council previously considered expanding non-discrimination protections to include sexual orientation and gender identity and expression.

134. There was again extensive discussion and deliberation leading up to the February 2016 vote on the Ordinance. The Charlotte City Council heard hours of robust public comment in a forum that included hundreds of people—both those who were in support of the Ordinance and those who were in opposition to the Ordinance. The Charlotte City Council also received significant legal analysis from the Office of the City Attorney regarding its authority to enact the Ordinance and the effect of the Ordinance.

135. The impetus for the Ordinance is the reality that LGBT people often face pervasive discrimination. Although same-sex couples may now marry throughout the United States as a result of the U.S. Supreme Court’s 2015 ruling in Obergefell, lesbian, gay, and bisexual people remain vulnerable to discrimination in states like North Carolina where there is no express protection for sexual orientation in state law, making local anti-discrimination protections even more vital. Discrimination is especially pervasive for transgender people, as evidenced by a 2011 national study of transgender Americans,
Injustice at Every Turn, which documented the high levels of harassment, discrimination, and violence that transgender people have faced and continue to face.

136. In the 2011 national report cited above, 90% of respondents reported being harassed at work or taking actions to avoid harassment, while 26% reported being fired because they are transgender. Forty-seven percent reported some form of employment discrimination because they are transgender, including not being hired, not being promoted, or being fired. Fifty-three percent reported being verbally harassed or disrespected in a place of public accommodation, and 22% reported being denied equal treatment by a government agency or official because they are transgender.

137. In 2013, it was estimated that there were more than 250,000 LGBT adults in North Carolina, out of an adult population of approximately eight million people. Among this population of North Carolinians, there are an estimated 37,800 transgender people (of any age), including 15,600 individuals who are 13 to 19 years old. While transgender individuals only make up a small minority of the population, they are disproportionately targeted for hate crimes in the United States.

138. On Monday, February 22, 2016, by a 7-to-4 vote, the Charlotte City Council approved the Ordinance, which, inter alia, amended its existing public accommodations protections by barring discrimination in public accommodations based on “gender identity, gender expression” and “sexual orientation.”

139. The City Council’s vote was met with a firestorm of opposition from vocal opponents of the part of the Ordinance that would have required certain public
accommodations to allow transgender people to use single-sex facilities, such as restrooms and locker rooms, in accordance with their gender identity.

140. Opponents of the Ordinance distorted the truth of what the Ordinance’s non-discrimination requirement would accomplish and formed a vocal campaign decrying a purported attempt to permit “men in women’s restrooms.”

C. The Events Leading to H.B. 2, Contemporary Statements by Decisionmakers, and Departures From the Normal Legislative Process Revealed a Series of Official Actions Taken for Invidious Purposes.

141. The State of North Carolina has rarely, if ever, exercised authority to preempt local ordinances providing broader protections than under state law. For example, in 1968 Charlotte adopted an ordinance prohibiting discrimination in public accommodations on the basis of race, color, religion, and national origin. In 1972, the Council amended the ordinance to prohibit discrimination based on sex, which the Council further modified in 1985.

142. Even though all of these protections extended beyond the reach of the State’s public accommodations law, which until H.B. 2 prohibited only public accommodations discrimination based on disability, the State allowed Charlotte’s ordinance to stand undisturbed for decades. It was only after Charlotte took steps to protect LGBT people that the State rushed to preempt the ordinance.

143. Even before the Charlotte City Council had cast its vote on the Ordinance, Governor McCrory informed Charlotte City Council members that the State would likely take immediate action to put a halt to the Ordinance—even as Governor McCrory
conceded that was an exceedingly unusual step. In an email to Charlotte City Council members, Governor McCrory noted that he “made a point as the former 14 year Mayor and current Governor to stay out of specific issues being voted on by the Charlotte City Council.” Governor McCrory nonetheless characterized the Ordinance’s non-discrimination protections for LGBT people as “changing basic long-established values and norms” surrounding “public restrooms,” and he ominously warned of “possible danger from deviant actions by individuals taking improper advantage of a bad policy.” Governor McCrory said that the Ordinance would “most likely cause immediate State legislative intervention which I would support as governor.”

144. On Tuesday, February 23, 2016, the Speaker of the North Carolina House of Representatives, Tim Moore (“Speaker Moore”), issued a press release announcing that he would work with fellow Republicans to explore a “legislative intervention to correct [Charlotte’s] radical course.”

145. In North Carolina, it is the state’s Governor who typically calls a special session, but in this case, Governor McCrory refused to call a special session because he was concerned that the legislature would go beyond addressing the Charlotte Ordinance.

146. As a result of the Governor’s refusal to call a special session, legislative leaders opted for a rarely used law that allows special sessions when three-fifths of legislators in both chambers support the call. That provision in the state constitution had not been used since 1981, according to Lt. Governor Dan Forest’s chief of staff, Hal Weatherman. The special session cost approximately $42,000 to convene.
147. The text of H.B. 2, which was named the “Public Facilities Privacy and Security Act,” was not shared with most legislators until they arrived to debate the bill.

148. North Carolina House of Representatives Minority Leader Larry Hall (“Minority Leader Hall”) stated “We don’t know what we’re discussing here, we don’t know what we’re voting on. What we’re doing is a perversion of the process.”

149. Minority Leader Hall said that Democrats were initially told that the special session would take place on Thursday, March 24, 2016, when instead the special session was held on March 23, 2016. Minority Leader Hall stated that, as a result, a number of legislators were “caught off guard” and were “scrambling to try to come back” for the session.

150. The special session, which lasted a single day, was substantially shorter than previous special sessions. Before H.B. 2 had been filed, Speaker Moore announced that the committee hearing for the bill would begin five minutes after introduction of the bill and adjournment of the morning session. Shortly thereafter, approximately twelve minutes after the House came to order, H.B. 2 was filed—the first time it was officially made available to the public or the legislators.

151. Approximately three minutes after H.B. 2 was filed, the chairman of the House Judiciary IV Committee—the committee to which H.B. 2 was assigned—stated, in response to a fellow member’s question, that it was his “intention” to permit time for public comment on the bill during the committee hearing. Upon information and belief, no prior public notice of the time and place for public comment on H.B. 2 was provided.
152. Only forty-five minutes were allotted for public comment, which was insufficient to permit those who had signed up to speak on H.B. 2 to be heard.

153. In response to complaints during the committee hearing that members had not been given an opportunity to read the text of H.B. 2, the chairman permitted a five-minute break to allow members to read the bill.

154. After a favorable referral from the House Judiciary IV Committee, H.B. 2 received only three hours of debate in the House, after which it was passed and referred to the Senate.

155. The roll call for H.B. 2 in the Senate was called after all Democratic members of the Senate walked out of the chambers in protest, with North Carolina State Senate Democratic Leader Dan Blue calling the special session an “affront to democracy” and stating that the Democratic caucus in the Senate “choose[s] not to participate in this farce.” With every Democratic member absent, the Senate passed H.B. 2 unanimously.

156. Comments made by lawmakers both during the debate, in the press, and through their social media used vitriolic language to make clear their aim at undoing Charlotte’s protections for LGBT people:

   a. North Carolina State Senate President Pro Tempore Phil Berger’s descriptions of the legislature’s work included:

      i. “Senate unanimously votes to stop radical ordinance allowing men into public bathrooms with women and young girls.”
ii. “Lawmakers were forced to come back to session to address the serious safety concerns created by the dangerous ordinance—which violated existing state criminal trespass law, indecent exposure law and building codes and created a loophole that any man with nefarious motives could use to prey on women and young children . . .”

iii. “How many fathers are now going to be forced to go to the ladies’ room to make sure their little girls aren’t molested?”

b. North Carolina State Senator Buck Newton said, “The Charlotte City Council should have never passed this unlawful and reckless bathroom and locker room ordinance. Politics have reached a new extreme when a municipality’s top priority is allowing men into women’s bathrooms and locker rooms. But tens of thousands of our constituents from across the state have called on us to stand up to the political correctness mob, fight for common sense and put a stop to this nonsense once and for all.”

c. North Carolina State Senator David Curtis (“Senator Curtis”) said, “This liberal group is trying to redefine everything about our society. Gender and marriage — just the whole liberal agenda.” Senator Curtis added that while, “We generally don’t get involved in local politics. We need to do what’s right.” Senator Curtis said that H.B. 2 was necessary because, “The gays would go into a business, make some outrageous demand that they know the owner cannot comply with and file a lawsuit against that business owner and put him out of business.” Senator Curtis suggested that H.B. 2 was broadly drafted specifically for the purpose of defending the bathroom
provision it in court: “[w]e feel like we can successfully defend the law and the fact that we made the law much broader,” explaining that “[i]n addition to the bathroom issue we restricted the rights of cities and towns to impose a higher minimum wage. The bill has to do with restricting rights of cities and counties. I suspect we will defend it based on that.”

d. North Carolina State Senator Andrew Brock said, “You know, $42,000 is not going to cover the medical expenses when a pervert walks into a bathroom and my little girls are in there.”

e. Speaker Moore said “They want to protect adults who feel compelled to dress up like the opposite sex. I, on the other hand, oppose the ordinance to protect children, who from the time they’ve been potty trained, know to go into the bathroom of their god given appropriate gender. Honestly, it’s ridiculous we are even having this discussion. I look forward to invalidating this ordinance as soon as possible.”

f. North Carolina State Representative Mark Brody said Charlotte’s ordinance “violates my Christian values and it violates decency values,” adding that he “had to stop it.” Representative Brody further stated that “[t]he homosexual community has just stepped too far and that had to stop and that’s my basic opinion,” noting that “[t]his is driven by the homosexual community and they’re emboldened by their victory in the courts on homosexual marriage.” Brody elaborated further that H.B. 2 “sends a message to these municipalities who have been taken over by the liberal, homosexual,
prohomosexual ideology that we are going to stick up for traditional values and we’ll stick up for them constantly if that’s what we have to do.”

g. North Carolina State Representative John Blust opined that he “think[s] it’s ridiculous that your anatomy isn’t what governs what restroom you use,” adding that he does not “understand why they have to make way for this .0001 percent of the population.”

157. Debate in both chambers of the North Carolina General Assembly focused specifically on reversing the Charlotte Ordinance, with lawmakers in both chambers condemning the anti-discrimination protections for LGBT people, including transgender individuals’ right to use facilities in accordance with their gender identity.

158. Fewer than 10 hours after it was introduced, the bill passed both houses. Governor McCrory signed the bill that same night, issuing a signing statement making clear once again the targets of H.B. 2. His signing statement said, “This radical breach of trust and security under the false argument of equal access not only impacts the citizens of Charlotte but people who come to Charlotte to work, visit or play. This new government regulation defies common sense and basic community norms by allowing, for example, a man to use a woman’s bathroom, shower or locker room.” H.B. 2 took effect immediately.

D. H.B. 2 Harms Transgender People.

159. H.B. 2 amended North Carolina’s General Statutes to mandate that school boards require students to use restrooms and other single-sex facilities in accordance with
their “biological sex” providing that,

Local boards of education shall require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex.

160. H.B. 2 also imposes the same mandate on all executive branch agencies (which are expressly defined to include Defendant University of North Carolina), and all public agencies, providing that they shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex.

161. Each of those provisions defines “biological sex” as follows,

Biological sex. – The physical condition of being male or female, which is stated on a person’s birth certificate.

162. Changing the gender marker on one’s birth certificate is not a viable option for many transgender people, as every jurisdiction has a different set of often onerous and unnecessary requirements for updating the gender listed on a birth certificate.

163. For instance, a person born in North Carolina can only update the gender marker listed on a North Carolina-issued birth certificate with proof of certain surgeries that may not be medically necessary, advisable, or affordable for any given person. Meanwhile, a person born in neighboring Tennessee can never change the gender listed on a Tennessee-issued birth certificate.

164. Medical treatment such as the surgery required to update a person’s North Carolina birth certificate does not alter a person’s gender (or what H.B. 2 calls “biological sex”), but rather merely brings a person’s body into alignment with the
gender they have always been. Gender identity is instead the chief determinant of a person’s gender.

165. H.B. 2’s provisions requiring use of single-sex facilities in accordance with the sex stated on their birth certificate not only disproportionately burdens transgender people, but intentionally targets them for differential treatment. Lawmakers made clear that H.B. 2 was specifically aimed at transgender people. For example, an FAQ released by Governor McCrory after H.B. 2’s enactment states, “Why did North Carolina pass this law in the first place? Answer: The bill was passed after the Charlotte City Council voted to impose a regulation requiring businesses to allow a man into a women’s restroom, shower, or locker room if they choose,” even though it does not do that, but only allows a transgender woman to use a women’s restroom or other multiple user facility for women and a transgender man to use a men’s restroom or other multiple user facility for men.

166. Prior to the passage of H.B. 2, it was already illegal for a person to enter a restroom or locker room to assault or injure another. Moreover, protecting transgender people from discrimination in public accommodations, as has been done in numerous states and hundreds of localities, has resulted in no increase in public safety incidents in any jurisdiction anywhere in the United States, and including transgender people in public life in no way impacts the safety or well-being of non-transgender people.

167. The painful message of stigma sent by H.B. 2 echoes the dehumanizing rhetoric employed by a number of lawmakers, suggesting that transgender people are
somehow predatory or dangerous to others. In fact, it is H.B. 2 that exposes transgender people to harassment and potential violence. Transgender people are already disproportionately targeted for physical violence and harassment in North Carolina and across the country. When a transgender person is forced to disclose their transgender status to strangers, such disclosure puts them at a high risk for violence. H.B. 2’s requirement that transgender people be shunted into single-sex spaces that do not match their gender identity invades their privacy and exposes this vulnerable population to harassment and potential violence by others.

168. Upon information and belief, after the enactment of H.B. 2, some school officials that had been respecting their students’ gender identity without any problem called parents to say that their children would be forced out of the single-sex facilities that match their gender identity.

169. H.B. 2’s broad sweep means that the same result applies to executive and public agencies, including routine places such as libraries, public health centers, airports, and the Division of Motor Vehicles, as well as places where people may turn in times of crisis, such as state hospitals, police departments, and courthouses. Transgender individuals working in such agencies may not be able to safely use any bathroom any longer, threatening their ability to keep their job.

170. Following the enactment of H.B. 2, the City Attorney of the City of Charlotte issued a memorandum dated April 1, 2016 to the Mayor and City Council of the City of Charlotte, regarding the effect of H.B. 2 on the Ordinance and other city laws
or policies. The memorandum noted that H.B. 2 “invalidates . . . the February 22 amendments to the public accommodations ordinance,” and concluded that “[d]ue to the preemption described above, the Community Relations Committee can no longer receive, investigate, and conciliate complaints for violations of the public accommodations ordinance.” The memorandum also expressed uncertainty regarding whether H.B. 2 preempted the city’s non-discrimination protections for city employees.

171. Following the enactment of H.B. 2, the University of North Carolina President issued a memorandum dated April 5, 2016 to chancellors of constituent UNC schools, including UNC-Chapel Hill, UNC-Greensboro, and UNCSA-HS. The memorandum specifically states that “University institutions must require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex.” The memorandum included a copy of H.B. 2, which includes its definition of “biological sex.”

172. Following the enactment of H.B. 2, Governor McCrory issued Executive Order No. 93, dated April 12, 2016. The order affirmed that “[u]nder current law, every multiple occupancy restroom, locker room, or shower facility located in a cabinet agency must be designated for and only used by persons based on their biological sex,” and that “restrooms, locker rooms, and shower facilities in public buildings, including our schools” would be maintained by the State “on the basis of biological sex.” In a press release and video statement accompanying Executive Order No. 93, the governor stated
that the Executive Order “[m]aintains . . . gender-specific restroom and locker room facilities in government buildings and schools.”

173. Executive Order No. 93 required that N.C. Gen. Stat. § 143-760 (H.B. 2, Section 1.3) be interpreted consistent with the following guidance: “[w]hen a private entity leases State real property and the property in the lessee’s exclusive possession includes multiple occupancy restrooms, locker rooms or other like facilities, the private entity will control the signage and use of these facilities.”

174. Executive Order No. 93 also sought to clarify the ambiguity regarding the scope of preemption provision noted by the City Attorney of the City of Charlotte, stating that “N.C. Gen. Stat. § 143-422.2(c) permits local governments or other political subdivisions of the State to set their own employment policies applicable to their own personnel,” and affirming that “local governments may establish their own non-discrimination employment practices.”

175. H.B. 2’s restroom ban also deters transgender people from participating in the state and local democratic process. It bans them from using the restroom consistent with their gender identity when visiting the North Carolina General Assembly, petitioning their legislator, or entering any building operated by the legislative branch. It also bans them from using the restroom consistent with their gender identity at a city council meeting or at a mayor’s office.

176. H.B. 2’s harms extend even farther, creating conflicts between state law and various federal laws. The conflict with Title IX, for example, puts at risk the more
than $4.5 billion in federal education funding that North Carolina is expected to receive in 2016. H.B. 2 also could lead to financial penalties under Executive Order 11246, which prohibits federal contractors (such as the University of North Carolina) from barring transgender employees from the restrooms consistent with their gender identity. In addition, public employers subject to Title VII will violate the U.S. Equal Employment Opportunity Commission’s decree that discriminating against transgender people with respect to restroom use is impermissible sex discrimination. Public hospitals that receive federal funding also will violate Section 1557 of the Affordable Care Act if they comply with H.B. 2.

177. The enactment of H.B. 2 follows a history of discrimination by decision-makers against transgender people, including, for example, Governor McCrory’s participation in a Fourth Circuit *amicus curiae* brief arguing that a transgender student’s request to access restrooms in accordance with his gender identity is “radical.”

E. **H.B. 2 Harms Lesbian, Gay, and Bisexual Individuals, as well as Transgender Individuals.**

178. H.B. 2 also disproportionately burdens lesbian, gay, and bisexual individuals, as well as transgender individuals, by stripping them of or barring them from anti-discrimination projections under local law. H.B. 2 took aim at the Charlotte ordinance in a section providing,

The General Assembly declares that the regulation of discriminatory practices in employment is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or
imposes any requirement upon an employer pertaining to the regulation of discriminatory practices in employment, except such regulations applicable to personnel employed by that body that are not otherwise in conflict with State law.

179. H.B. 2 stripped lesbian, gay, and bisexual individuals of anti-discrimination protections in Charlotte, because no such sexual orientation anti-discrimination protections exist in state law. The preemptive effect of this section did not fall equally on all North Carolinians, however.

180. Recognizing that North Carolina law had no statewide public accommodations protection of any kind except for people with disabilities, H.B. 2 actually enacted a new public accommodations statute—so that the other groups whose protections also would have been preempted under the Charlotte Ordinance were spared that result. The new public accommodations statute prohibits discrimination based on “race, religion, color, national origin, or biological sex”—omitting the sexual orientation protections that had been included in the Charlotte Ordinance.

181. The North Carolina legislature has a history of targeted discrimination toward lesbian, gay, and bisexual people. For example, the legislature approved and referred to voters a constitutional amendment barring access to marriage for same-sex couples. Legislative leaders also intervened in litigation challenging the constitutionality of the exclusion of same-sex couples from marriage pursuant to a statute authorizing them to act on behalf of the General Assembly. In 2015, the legislature also passed a bill that allows county magistrates to recuse themselves from performing civil marriages.
The preemptive effect of H.B. 2 also harmed transgender people. While the Charlotte Ordinance had prohibited discrimination based on sex, gender identity, and gender expression, the new public accommodations statute restricted its protections solely to “biological sex,” which is defined in an effort to deliberately exclude transgender people from protection.

**CLAIMS FOR RELIEF**

**COUNT I**

**Deprivation of Equal Protection**

**U.S. Const. Amend. XIV**

183. Plaintiffs incorporate paragraphs 1 through 182 as though fully set forth herein.

184. Plaintiffs state this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief, and challenge H.B. 2 both facially and as applied to them.

185. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

A. **Discrimination Based on Sex and Transgender Status in Single-Sex Restrooms and Facilities (H.B. 2, Part I)**

186. Section A of Count I is asserted by Plaintiffs Carcaño, McGarry, H.S., and ACLU of NC against Defendants Governor McCrory, Board of Governors, and Bissette.
187. Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on sex is presumptively unconstitutional and subject to heightened scrutiny.

188. H.B. 2 discriminates against transgender people on the basis of sex.

189. Discrimination based on sex includes, but is not limited to, discrimination based on gender nonconformity, gender identity, transgender status, and gender transition.

190. H.B. 2 facially classifies people based on sex, gender identity, and transgender status.

191. Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on transgender status is presumptively unconstitutional and subject to heightened scrutiny.

192. H.B. 2 treats transgender people differently than non-transgender people who are similarly situated.

193. Under H.B. 2, non-transgender people are able to access restrooms and other single-sex facilities consistent with their gender identity, but transgender people are banned from restrooms and other single-sex facilities consistent with their gender identity.

194. H.B. 2 discriminates against transgender people based on gender nonconformity. For example, although Mr. Carcaño and Mr. McGarry are men, are perceived as men in public, and have had medical treatment to bring their body into
alignment with their male gender identity, they have birth certificates with female gender markers that do not conform to H.B. 2’s expectations for men. Furthermore, if transgender men such as Mr. Carcaño and Mr. McGarry had been assigned male at birth, they would not be banned by H.B. 2 from the restrooms and other single-sex facilities consistent with their gender identity. The same is true for H.S., who is a young woman, is perceived as a woman in public, and has had medical treatment to bring her body into alignment with her gender but has a birth certificate that classifies her as male and therefore does not conform to H.B. 2’s expectations for women. Had H.S. been assigned female at birth, she would not be banned by H.B. 2 from restrooms and other single-sex facilities designated for women and girls.

195. No person has any control over the sex that person is assigned at birth. In fact, when a person is born with characteristics associated with both male and female infants, the appropriate course is to assign sex based on likely gender identity and to later re-assign sex based on gender identity once it is known if it conflicts with the original sex assignment.

196. H.B. 2’s discrimination against transgender people based on sex or transgender status is not substantially related to any important government interest. Indeed, it is not even rationally related to any legitimate government interest.

197. H.B. 2 endangers the safety, privacy, security, and well-being of transgender individuals. For example, if a transgender young woman, like H.S., were to use the restroom designated for men and boys, she likely would be harassed and might be
assaulted by men or boys who believed that she should not be in that restroom. Similarly, if a transgender man were to use the women’s restroom, he likely would be harassed and might be assaulted by women who believe he should not be in the women’s restroom.

198. H.B. 2 does not promote the safety, privacy, security, or well-being of non-transgender people.

199. H.B. 2 deprives transgender people of their right to equal dignity, liberty, and autonomy by branding them as second-class citizens.

200. H.B. 2’s discrimination against transgender people based on sex denies them the equal protection of the laws, in violation of the Equal Protection Clause of the Fourteenth Amendment.

B. Discrimination Based on Sex, Transgender Status, and Sexual Orientation in Preemption of Local Non-Discrimination Protections (H.B. 2, Part II, Sections 2.2 & 2.3; H.B. 2, Part III)

201. Section B of Count I is asserted by Plaintiffs Carcaño, McGarry, H.S., Gilmore, Trent, Newell, and ACLU of NC against Defendant Governor McCrory.

202. Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on sex, discrimination based on sexual orientation, and discrimination based on transgender status are presumptively unconstitutional and subject to heightened scrutiny.

203. H.B. 2 deprives LGBT people of protections against discrimination based on sexual orientation, gender identity, and gender expression.
204. H.B. 2 was motivated by an intent to treat LGBT people differently, and worse, than other people, including by stripping them of the protections afforded by the City of Charlotte’s Ordinance and precluding any local government from taking action to protect LGBT people against discrimination.

205. H.B. 2 was enacted for the purpose of disadvantaging LGBT people and is based on animus against LGBT people. H.B. 2 was also enacted because of, and not in spite of, its adverse effects on LGBT people.

206. The justifications cited in H.B. 2 for its enactment, including a purported governmental interest in consistent statewide obligations, are pretext for discrimination and did not reflect the actual motivations for the bill. For example, proposals to add sexual orientation and gender identity and expression protections to the statewide public accommodations law were rejected.

207. By blocking anti-discrimination protections for LGBT people at the local level, H.B. 2 imposes a different and more burdensome political process on LGBT people than on non-LGBT people who have state protection against identity-based discrimination. H.B. 2 accordingly places a special burden on LGBT people within the governmental process with an intent to injure that minority group.

208. H.B. 2 deprives LGBT people of their right to equal dignity, liberty, and autonomy by branding them as second-class citizens.
209. H.B. 2’s discrimination against LGBT people based on sex and sexual orientation denies them the equal protection of the laws, in violation of the Equal Protection Clause of the Fourteenth Amendment.

C. Discrimination Based on Transgender Status Warrants Heightened Scrutiny.

210. Transgender people have suffered a long history of extreme discrimination in North Carolina and across the country, and continue to suffer such discrimination to this day.

211. Transgender people are a discrete and insular group and lack the political power to protect their rights through the legislative process. Transgender people have largely been unable to secure explicit local, state, and federal protections to protect them against discrimination.

212. A person’s gender identity or transgender status bears no relation to a person’s ability to contribute to society.

213. Gender identity is a core, defining trait and is so fundamental to one’s identity and conscience that a person cannot be required to abandon it as a condition of equal treatment.

214. Gender identity generally is fixed at an early age and highly resistant to change through intervention.
D. Discrimination Based on Sexual Orientation Warrants Heightened Scrutiny.

215. Lesbian, gay, and bisexual people have suffered a long history of extreme discrimination in North Carolina and across the country, and continue to suffer such discrimination to this day.

216. Lesbian, gay, and bisexual people are a discrete and insular group and lack the political power to protect their rights through the legislative process. Lesbian, gay, and bisexual people have largely been unable to secure explicit local, state, and federal protections to protect them against discrimination.

217. A person’s sexual orientation bears no relation to a person’s ability to contribute to society.

218. Sexual orientation is a core, defining trait and is so fundamental to one’s identity and conscience that a person cannot be required to abandon it as a condition of equal treatment.

219. Sexual orientation generally is fixed at an early age and highly resistant to change through intervention.

***
COUNT II

Violation of Right to Privacy

U.S. Const. Amend. XIV

Plaintiffs Carcaño, McGarry, H.S., and ACLU of NC against Defendants Governor McCrory, Board of Governors, and Bissette

220. Plaintiffs incorporate paragraphs 1 through 182 as though fully set forth herein.

221. The Due Process Clause of the Fourteenth Amendment places limitations on state action that deprives individuals of life, liberty, or property.

222. Substantive protections of the Due Process Clause include the right to avoid disclosure of sensitive, personal information.

223. There is a fundamental right of privacy in preventing the release of, and in deciding in what circumstances to release: (1) personal information of which the release could subject them to bodily harm; and (2) information of a highly personal and intimate nature.

224. H.B. 2 requires the disclosure of highly personal information regarding transgender people to each person who sees them using a restroom or other facility inconsistent with their gender identity or gender expression. This disclosure places them at risk of bodily harm.

225. There is no compelling state interest that is furthered by H.B. 2, nor is H.B. 2 narrowly tailored or the least restrictive alternative for promoting a state interest. H.B. 2 is not even rationally related to a legitimate state interest.
226. In addition, the privacy interests of transgender people that are invaded outweigh any purported interest the government could assert.

COUNT III

Violation of Liberty and Autonomy in the Right to Refuse Unwanted Medical Treatment

U.S. Const. Amend. XIV

Plaintiffs Carcaño, McGarry, H.S., and ACLU of NC against Defendants Governor McCrory, Board of Governors, and Bissette

227. Plaintiffs incorporate paragraphs 1 through 182 as though fully set forth herein.

228. The Fourteenth Amendment’s Due Process Clause protects individuals’ substantive rights to be free to make certain private decisions without unjustified governmental intrusion.

229. The right to make certain private decisions without unjustified governmental intrusion includes the right to refuse unwanted medical treatment.

230. H.B. 2 forces transgender people to undergo medical procedures that may not be medically appropriate or available in order to access facilities consistent with their gender identity.

231. Not all transgender individuals undergo gender confirmation surgery. For some, the surgery is not medically necessary, while for others it is medically dangerous or impossible. For example, because medical treatment for gender dysphoria is individualized, hormone treatment may be sufficient to manage the distress associated
with gender dysphoria for some individuals. Surgery may be medically necessary for others who do not have health insurance coverage for it and cannot afford to pay for the surgery out-of-pocket.

232. Some states require proof of surgery before they will allow the gender marker on a birth certificate to be changed. For those born in North Carolina, state law requires proof of “sex reassignment surgery.” N.C. Gen. Stat. § 130A-11B.

233. For example, H.S. has not been able to amend her New Jersey birth certificate to accurately reflect her gender because surgery is not medically necessary for her and is generally not available to individuals under 18. Accordingly, H.B. 2 bans her from accessing restrooms and other facilities consistent with her gender identity.

234. There is no compelling state interest that is furthered by H.B. 2, nor is H.B. 2 narrowly tailored or the least restrictive alternative for promoting a state interest. H.B. 2 is not even rationally related to a legitimate state interest.

COUNT IV

Violation of Title IX


Plaintiffs Carcana, McGarry, and H.S.
against Defendant University of North Carolina

235. Plaintiffs incorporate paragraphs 1 through 182 as though fully set forth herein.

236. Title IX 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

237. Under Title IX, discrimination “on the basis of sex” includes discrimination on the basis of gender nonconformity, gender identity, transgender status, and gender transition.

238. Defendant University of North Carolina is an education program receiving federal financial assistance.

239. Defendant University of North Carolina is an executive branch agency as defined by H.B. 2.

240. Pursuant to H.B. 2, Defendant University of North Carolina “shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex.” As set forth in the UNC President’s memorandum dated April 5, 2016, Defendant University of North Carolina has implemented H.B. 2 by issuing guidance that “[u]niversity institutions must require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex.”

241. By requiring Mr. Carcaño—a transgender man—to use a restroom that is inconsistent with his gender identity, Defendant University of North Carolina excludes Mr. Carcaño from participation in, denies him the benefits of, and subjects him to discrimination in educational programs and activities at Defendant’s constituent campus,

242. By requiring Mr. McGarry—a transgender man—to use a restroom that is inconsistent with his gender identity, Defendant University of North Carolina excludes Mr. McGarry from participation in, denies him the benefits of, and subjects him to discrimination in educational programs and activities at Defendant’s constituent campus, UNC-Greensboro, “on the basis of sex,” which violates Mr. McGarry’s rights under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*

243. By requiring H.S.—a transgender young woman—to use a restroom that is inconsistent with her gender identity, Defendant University of North Carolina excludes H.S. from participation in, denies her the benefits of, and subjects her to discrimination in educational programs and activities at Defendant’s constituent campus, UNCSA-HS, “on the basis of sex,” which violates H.S.’s rights under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*

* * *
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

A. Declaring that the unlawful provisions of H.B. 2 discussed above and their enforcement by Defendants violate Plaintiffs’ rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution;

B. Declaring that the unlawful provisions of H.B. 2 discussed above and their enforcement by Defendants violate Plaintiffs’ rights under Title IX;

C. Preliminarily and permanently enjoining enforcement by Defendants of the unlawful provisions of H.B. 2 discussed above;

D. Requiring Defendants in their official capacities to allow individuals, including transgender people, to use single-sex facilities in accordance with their gender identity in all public schools and universities, executive branch agencies, and public agencies; and requiring Defendants in their official capacities to allow local governments to enact and to continue to enforce anti-discrimination protections for LGBT people;

E. Awarding Plaintiffs their costs, expenses, and reasonable attorneys’ fees pursuant to 42 U.S.C. § 1988 and other applicable laws; and

F. Granting such other and further relief as the Court deems just and proper.

G. The declaratory and injunctive relief requested in this action is sought against each Defendant; against each Defendant’s officers, employees, and agents; and against all persons acting in active concert or participation with any Defendant, or under any Defendant’s supervision, direction, or control.

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Dated: April 21, 2016

Respectfully submitted,

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U.S. Supreme Court

ROMER v. EVANS, ___ U.S. ___ (1996)
ROMER v. EVANS, ___ U.S. ___ (1996)

ROY ROMER, GOVERNOR OF COLORADO, ET AL. PETITIONERS v. RICHARD G. EVANS ET AL.
CERTIORARI TO THE SUPREME COURT OF COLORADO
No. 94-1039

Argued October 10, 1995
Decided May 20, 1996

After various Colorado municipalities passed ordinances banning discrimination based on sexual orientation in housing, employment, education, public accommodations, health and welfare services, and other transactions and activities, Colorado voters adopted by statewide referendum "Amendment 2" to the State Constitution, which precludes all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Respondents, who include aggrieved homosexuals and municipalities, commenced this litigation in state court against petitioner state parties to declare Amendment 2 invalid and enjoin its enforcement. The trial court's grant of a preliminary injunction was sustained by the Colorado Supreme Court, which held that Amendment 2 was subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process. On remand, the trial court found that the Amendment failed to satisfy strict scrutiny. It enjoined Amendment 2's enforcement, and the State Supreme Court affirmed.

Held:

Amendment 2 violates the Equal Protection Clause. Pp. 4-14.

(a) The State's principal argument that Amendment 2 puts gays and lesbians in the same position as all other persons by denying them special rights is rejected as implausible. The extent of the change in legal status effected by this law is evident from the authoritative construction of Colorado's Supreme Court - which establishes that the amendment's immediate effect is to repeal all existing statutes, regulations, ordinances, and policies of state and local entities barring discrimination based on sexual orientation, and that its ultimate effect is to prohibit any governmental entity from adopting similar,
or more protective, measures in the future absent state constitutional amendment - and from a review of the terms, structure, Page II and operation of the ordinances that would be repealed and prohibited by Amendment 2. Even if, as the State contends, homosexuals can find protection in laws and policies of general application, Amendment 2 goes well beyond merely depriving them of special rights. It imposes a broad disability upon those persons alone, forbidding them, but no others, to seek specific legal protection from injuries caused by discrimination in a wide range of public and private transactions. Pp. 4-9.

(b) In order to reconcile the Fourteenth Amendment's promise that no person shall be denied equal protection with the practical reality that most legislation classifies for one purpose or another, the Court has stated that it will uphold a law that neither burdens a fundamental right nor targets a suspect class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end. See, e.g., Heller v. Doe, 509 U.S. 312, 319-320. Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment is at once too narrow and too broad, identifying persons by a single trait and then denying them the possibility of protection across the board. This disqualification of a class of persons from the right to obtain specific protection from the law is unprecedented and is itself a denial of equal protection in the most literal sense. Second, the sheer breadth of Amendment 2, which makes a general announcement that gays and lesbians shall not have any particular protections from the law, is so far removed from the reasons offered for it, i.e., respect for other citizens' freedom of association, particularly landlords or employers who have personal or religious objections to homosexuality, and the State's interest in conserving resources to fight discrimination against other groups, that the amendment cannot be explained by reference to those reasons; the Amendment raises the inevitable inference that it is born of animosity toward the class that it affects. Amendment 2 cannot be said to be directed to an identifiable legitimate purpose or discrete objective. It is a status-based classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. Pp. 9-14.

882 P.2d 1335, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined. [ ROMER v. EVANS, ___ U.S. ___ (1996) , 1]

JUSTICE KENNEDY delivered the opinion of the Court.

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal
Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

I

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as "Amendment 2," its designation when submitted to the voters. The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder and the City and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services. Denver Rev. Municipal Code, Art. IV 28-91 to 28-116 (1991); Aspen Municipal Code 13-98 (1977); Boulder Rev. Code 12-1-1 [ROMER v. EVANS, ___ U.S. ___ (1996), 2] to 12-1-11 (1987). What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. See Boulder Rev. Code 12-1-1 (defining "sexual orientation" as "the choice of sexual partners, i.e., bisexual, homosexual or heterosexual"); Denver Rev. Municipal Code, Art. IV 28-92 (defining "sexual orientation" as "[t]he status of an individual as to his or her heterosexuality, homosexuality or bisexuality"). Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Colo. Const., Art. II, 30b.

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

"No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing." Ibid.

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. Among the plaintiffs (respondents here) were homosexual persons, some of them government employees. They alleged that enforcement of Amendment 2 would subject [
them to immediate and substantial risk of
discrimination on the basis of their sexual orientation. Other plaintiffs (also respondents
here) included the three municipalities whose ordinances we have cited and certain other
governmental entities which had acted earlier to protect homosexuals from discrimination
but would be prevented by Amendment 2 from continuing to do so. Although Governor
Romer had been on record opposing the adoption of Amendment 2, he was named in his
official capacity as a defendant, together with the Colorado Attorney General and the
State of Colorado.

The trial court granted a preliminary injunction to stay enforcement of Amendment 2, and
an appeal was taken to the Supreme Court of Colorado. Sustaining the interim injunction
and remanding the case for further proceedings, the State Supreme Court held that
Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it
infringed the fundamental right of gays and lesbians to participate in the political process.
Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (Evans I). To reach this conclusion, the
state court relied on our voting rights cases, e.g., Reynolds v. Sims, 377 U.S. 533 (1964);
663 (1966); Williams v. Rhodes, 393 U.S. 23 (1968), and on our precedents involving
discriminatory restructuring of governmental decisionmaking, see, e.g., Hunter v.
Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967); Washington v.
remand, the State advanced various arguments in an effort to show that Amendment 2
was narrowly tailored to serve compelling interests, but the trial court found none
sufficient. It enjoined enforcement of Amendment 2, and the Supreme Court of Colorado,
in a second opinion, affirmed the ruling. Evans v. Romer, 882 P.2d 1335 (Colo. 1994)(Evans II). We granted certiorari and now affirm the judgment, but on a rationale
different from that adopted by the State Supreme Court. [ ROMER v. EVANS, ___ U.S. ___ (1996) , 4]

II

The State's principal argument in defense of Amendment 2 is that it puts gays and
lesbians in the same position as all other persons. So, the State says, the measure does no
more than deny homosexuals special rights. This reading of the amendment's language is
implausible. We rely not upon our own interpretation of the amendment but upon the
authoritative construction of Colorado's Supreme Court. The state court, deeming it
unnecessary to determine the full extent of the amendment's reach, found it invalid even
on a modest reading of its implications. The critical discussion of the amendment, set out
in Evans I, is as follows:

"The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes,
regulations, ordinances, and policies of state and local entities that barred discrimination
discrimination in employment, housing and public accommodations on the basis of sexual orientation); Boulder, Colo., Rev. Code 12-1-2 to -4 (1987) (same); Denver, Colo., Rev. Mun. Code art. IV, 28-91 to -116 (1991) (same); Executive Order No. D0035 (December 10, 1990) (prohibiting employment discrimination for 'all state employees, classified and exempt' on the basis of sexual orientation); Colorado Insurance Code, 10-3-1104, 4A C. R. S. (1992 Supp.) (forbidding health insurance providers from determining insurability and premiums based on an applicant's, a beneficiary's, or an insured's sexual orientation); and various provisions prohibiting discrimination based on sexual orientation at state colleges.26.

"26. Metropolitan State College of Denver prohibits college sponsored social clubs from discriminating in membership on the basis of sexual orientation and Colorado State University has an antidiscrimination policy which encompasses sexual orientation.

"The 'ultimate effect' of Amendment 2 is to prohibit any governmental entity from adopting similar, or more [ ROMER v. EVANS, ___ U.S. ___ (1996) , 5] protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." 854 P.2d, at 1284-1285, and n. 26.

Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances that the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

The change that Amendment 2 works in the legal status of gays and lesbians in the private sphere is far-reaching, both on its own terms and when considered in light of the structure and operation of modern anti-discrimination laws. That structure is well illustrated by contemporary statutes and ordinances prohibiting discrimination by providers of public accommodations. "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. ___, ___ (1995) (slip op., at 13). The duty was a general one and did not specify protection for particular groups. The common law rules, however, proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations, Civil Rights Cases, 109 U.S. 3, 25 (1883). In consequence, most States have chosen to counter discrimination by enacting detailed statutory schemes. See, e.g., S. D. Codified Laws 20-13-10, 20-13-22, 20-13-23 (1995); Iowa Code 216.6-216.8 (1994); Okla. Stat., Tit. 25, 1302, 1402 (1987); 43 Pa. Cons. Stat. 953, 955 (Supp. 1995);
Colorado's state and municipal laws typify this emerging tradition of statutory protection and follow a consistent pattern. The laws first enumerate the persons or entities subject to a duty not to discriminate. The list goes well beyond the entities covered by the common law. The Boulder ordinance, for example, has a comprehensive definition of entities deemed places of "public accommodation." They include "any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind." Boulder Rev. Code 12-1-1(j) (1987). The Denver ordinance is of similar breadth, applying, for example, to hotels, restaurants, hospitals, dental clinics, theaters, banks, common carriers, travel and insurance agencies, and "shops and stores dealing with goods or services of any kind," Denver Rev. Municipal Code, Art. IV, 28-92.

These statutes and ordinances also depart from the common law by enumerating the groups or persons within their ambit of protection. Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply. In following this approach, Colorado's state and local governments have not limited anti-discrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny under our cases. See, e.g., J. E. B. v. Alabama ex rel. T. B., 511 U.S. __, __ (1994) (slip op., at 8) (sex); Lalli v. Lalli, 439 U.S. 259, 265 (1978) (illegitimacy); McLaughlin v. Florida, 379 U.S. 184, 191 -192 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (ancestry). Rather, they set forth an extensive catalogue of traits which cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability [ ROMER v. EVANS, ___ U.S. ___ (1996) , 7] of an individual or of his or her associates - and, in recent times, sexual orientation. Aspen Municipal Code 13-98(a)(1) (1977); Boulder Rev. Code 12-1-1 to 12-1-4 (1987); Denver Rev. Municipal Code, Art. IV, 28-92 to 28-119 (1991); Colo. Rev. Stat. 24-34-401 to 24-34-707 (1988 and Supp. 1995).

Amendment 2 bars homosexuals from securing protection against the injuries that these public-accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment. See, e.g., Aspen Municipal Code 13-98(b), (c) (1977); Boulder Rev. Code 12-1-2, 12-1-3 (1987); Denver Rev. Municipal Code, Art. IV 28-93 to 28-95, 28-97 (1991).

Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government. The State Supreme Court cited two examples of protections in the governmental sphere that are now rescinded and may not be
reintroduced. The first is Colorado Executive Order D0035 (1990), which forbids employment discrimination against "all state employees, classified and exempt' on the basis of sexual orientation." 854 P.2d, at 1284. Also repealed, and now forbidden, are "various provisions prohibiting discrimination based on sexual orientation at state colleges." Id., at 1284, 1285. The repeal of these measures and the prohibition against their future reenactment demonstrates that Amendment 2 has the same force and effect in Colorado's governmental sector as it does elsewhere and that it applies to policies as well as ordinary legislation.

Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection [ ROMER v. EVANS, ___ U.S. ___ (1996), 8] of general laws and policies that prohibit arbitrary discrimination in governmental and private settings. See, e.g., Colo. Rev. Stat. 24-4-106(7) (1988) (agency action subject to judicial review under arbitrary and capricious standard); 18-8-405 (making it a criminal offense for a public servant knowingly, arbitrarily or capriciously to refrain from performing a duty imposed on him by law); 10-3-1104(1)(f) (prohibiting "unfair discrimination" in insurance); 4 Colo. Code of Regulations 801-1, Policy 11-1 (1983) (prohibiting discrimination in state employment on grounds of specified traits or "other non-merit factor"). At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and thus forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality, and so would appear to be no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.

If this consequence follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment has this effect, however, and neither need we. In the course of rejecting the argument that Amendment 2 is intended to conserve resources to fight discrimination against suspect classes, the Colorado Supreme Court made the limited observation that the amendment is not intended to affect many anti-discrimination laws protecting non-suspect classes, Romer II, 882 P.2d at 1346, n. 9. In our view that does not resolve the issue. In any event, even if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by [ ROMER v. EVANS, ___ U.S. ___(1996), 9] enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against
exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

III

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 271 - 272 (1979); F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. See, e.g., Heller v. Doe, 509 U.S. ___, ___ (1993) (slip op., at 6).

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.

Taking the first point, even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. See New Orleans v. Dukes, 427 U.S. 297 (1976) (tourism benefits justified classification favoring pushcart vendors of certain longevity); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (assumed health concerns justified law favoring optometrists over opticians); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (potential traffic hazards justified exemption of vehicles advertising the owner's products from general advertising ban); Kotch v. Board of River Port Pilot Comm'rs for Port of New Orleans, 330 U.S. 552 (1947) (licensing scheme that disfavored persons unrelated to current river boat pilots justified by possible efficiency and safety benefits of a closely knit pilotage system). The laws challenged in the cases just cited were narrow enough in scope and grounded in a sufficient factual context for us to ascertain that there existed some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law. See United States Railroad Retirement
Bd. v. Fritz, 449 U.S. 166, 181 (1980) (STEVENS, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.").

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law [ ROMER v. EVANS, ___ U.S. ___ (1996), 11] is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928).

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. ":Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." Sweatt v. Painter, 339 U.S. 629, 635 (1950) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)). Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

Davis v. Beason, 133 U.S. 333 (1890), not cited by the parties but relied upon by the dissent, is not evidence that Amendment 2 is within our constitutional tradition, and any reliance upon it as authority for sustaining the amendment is misplaced. In Davis, the Court approved an Idaho territorial statute denying Mormons, polygamists, and advocates of polygamy the right to vote and to hold office because, as the Court construed the statute, it "simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offences, and those who advocate a practical resistance to the laws of the Territory and justify and approve the commission of crimes [ ROMER v. EVANS, ___ U.S. ___ (1996), 12] forbidden by it." Id., at 347. To the extent Davis held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome. Dunn v. Blumstein, 405 U.S. 330, 337 (1972); cf. United States v. Brown, 381 U.S. 437 (1965); United States v. Robel, 389 U.S. 258 (1967). To the extent Davis held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable. See Richardson v. Ramirez, 418 U.S. 24 (1974).
A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of `equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973). Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 462 (1988), and Amendment 2 does not.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in [ ROMER v. EVANS, ___ U.S. ___ (1996) , 13] particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . ." Civil Rights Cases, 109 U.S., at 24.

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

It is so ordered. [ ROMER v. EVANS, ___ U.S. ___ (1996) , 1]
Dear Colleague Letter on Transgender Students
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May 13, 2016

Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance. This prohibition encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status. This letter summarizes a school’s Title IX obligations regarding transgender students and explains how the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) evaluate a school’s compliance with these obligations.

ED and DOJ (the Departments) have determined that this letter is significant guidance. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you have questions or are interested in commenting on this guidance, please contact ED at ocr@ed.gov or 800-421-3481 (TDD 800-877-8339); or DOJ at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Accompanying this letter is a separate document from ED’s Office of Elementary and Secondary Education, Examples of Policies and Emerging Practices for Supporting Transgender Students. The examples in that document are taken from policies that school districts, state education agencies, and high school athletics associations around the country have adopted to help ensure that transgender students enjoy a supportive and nondiscriminatory school environment. Schools are encouraged to consult that document for practical ways to meet Title IX’s requirements.

Terminology

- Gender identity refers to an individual’s internal sense of gender. A person’s gender identity may be different from or the same as the person’s sex assigned at birth.

- Sex assigned at birth refers to the sex designation recorded on an infant’s birth certificate should such a record be provided at birth.

- Transgender describes those individuals whose gender identity is different from the sex they were assigned at birth. A transgender male is someone who identifies as male but was assigned the sex of female at birth; a transgender female is someone who identifies as female but was assigned the sex of male at birth.
Gender transition refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Compliance with Title IX

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations. The Departments treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments’ interpretation is consistent with courts’ and other agencies’ interpretations of Federal laws prohibiting sex discrimination.

The Departments interpret Title IX to require that when a student or the student’s parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student’s gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity. Because transgender students often are unable to obtain identification documents that reflect their gender identity (e.g., due to restrictions imposed by state or local law in their place of birth or residence), requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

A school’s Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.

1. Safe and Nondiscriminatory Environment

Schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly. If sex-based harassment creates a hostile environment, the school must take prompt and effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. 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. For a more detailed discussion of Title IX
requirements related to sex-based harassment, see guidance documents from ED’s Office for Civil Rights (OCR) that are specific to this topic.\textsuperscript{10}

2. **Identification Documents, Names, and Pronouns**

Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex. The Departments have resolved Title IX investigations with agreements committing that school staff and contractors will use pronouns and names consistent with a transgender student’s gender identity.\textsuperscript{11}

3. **Sex-Segregated Activities and Facilities**

Title IX’s implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.\textsuperscript{12} When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.\textsuperscript{13}

- **Restrooms and Locker Rooms.** A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.\textsuperscript{14} A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.\textsuperscript{15}

- **Athletics.** Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.\textsuperscript{16} A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (\textit{i.e.}, the same gender identity) or others’ discomfort with transgender students.\textsuperscript{17} Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport.\textsuperscript{18}

- **Single-Sex Classes.** Although separating students by sex in classes and activities is generally prohibited, nonvocational elementary and secondary schools may offer nonvocational single-sex classes and extracurricular activities under certain circumstances.\textsuperscript{19} When offering such classes and activities, a school must allow transgender students to participate consistent with their gender identity.

- **Single-Sex Schools.** Title IX does not apply to the admissions policies of certain educational institutions, including nonvocational elementary and secondary schools, and private undergraduate colleges.\textsuperscript{20} Those schools are therefore permitted under Title IX to set their own
sex-based admissions policies. Nothing in Title IX prohibits a private undergraduate women’s college from admitting transgender women if it so chooses.

- **Social Fraternities and Sororities.** Title IX does not apply to the membership practices of social fraternities and sororities. Those organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses.

- **Housing and Overnight Accommodations.** Title IX allows a school to provide separate housing on the basis of sex. But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students. Nothing in Title IX prohibits a school from honoring a student’s voluntary request for single-occupancy accommodations if it so chooses.

- **Other Sex-Specific Activities and Rules.** Unless expressly authorized by Title IX or its implementing regulations, a school may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule. Likewise, a school may not discipline students or exclude them from participating in activities for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity (e.g., in yearbook photographs, at school dances, or at graduation ceremonies).

- **4. Privacy and Education Records**

Protecting transgender students’ privacy is critical to ensuring they are treated consistent with their gender identity. The Departments may find a Title IX violation when a school limits students’ educational rights or opportunities by failing to take reasonable steps to protect students’ privacy related to their transgender status, including their birth name or sex assigned at birth. Nonconsensual disclosure of personally identifiable information (PII), such as a student’s birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender students and may also violate the Family Educational Rights and Privacy Act (FERPA). A school may maintain records with this information, but such records should be kept confidential.

- **Disclosure of Personally Identifiable Information from Education Records.** FERPA generally prevents the nonconsensual disclosure of PII from a student’s education records; one exception is that records may be disclosed to individual school personnel who have been determined to have a legitimate educational interest in the information. Even when a student has disclosed the student’s transgender status to some members of the school community, schools may not rely on this FERPA exception to disclose PII from education records to other school personnel who do not have a legitimate educational interest in the information. Inappropriately disclosing (or requiring students or their parents to disclose) PII from education records to the school community may
violate FERPA and interfere with transgender students’ right under Title IX to be treated consistent with their gender identity.

**Disclosure of Directory Information.** Under FERPA’s implementing regulations, a school may disclose appropriately designated directory information from a student’s education record if disclosure would not generally be considered harmful or an invasion of privacy.\(^{28}\) Directory information may include a student’s name, address, telephone number, date and place of birth, honors and awards, and dates of attendance.\(^{29}\) School officials may not designate students’ sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy.\(^{30}\) A school also must allow eligible students (i.e., students who have reached 18 years of age or are attending a postsecondary institution) or parents, as appropriate, a reasonable amount of time to request that the school not disclose a student’s directory information.\(^{31}\)

**Amendment or Correction of Education Records.** A school may receive requests to correct a student’s education records to make them consistent with the student’s gender identity. Updating a transgender student’s education records to reflect the student’s gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.

- Under FERPA, a school must consider the request of an eligible student or parent to amend information in the student’s education records that is inaccurate, misleading, or in violation of the student’s privacy rights.\(^ {32}\) If the school does not amend the record, it must inform the requestor of its decision and of the right to a hearing. If, after the hearing, the school does not amend the record, it must inform the requestor of the right to insert a statement in the record with the requestor’s comments on the contested information, a statement that the requestor disagrees with the hearing decision, or both. That statement must be disclosed whenever the record to which the statement relates is disclosed.\(^ {33}\)

- Under Title IX, a school must respond to a request to amend information related to a student’s transgender status consistent with its general practices for amending other students’ records.\(^ {34}\) If a student or parent complains about the school’s handling of such a request, the school must promptly and equitably resolve the complaint under the school’s Title IX grievance procedures.\(^ {35}\)

* * *

We appreciate the work that many schools, state agencies, and other organizations have undertaken to make educational programs and activities welcoming, safe, and inclusive for all students.

Sincerely,

/s/ Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education

/s/ Vanita Gupta
Principal Deputy Assistant Attorney General for Civil Rights
U.S. Department of Justice
Dear Colleague Letter: Transgender Students

1 20 U.S.C. §§ 1681–1688; 34 C.F.R. Pt. 106; 28 C.F.R. Pt. 54. In this letter, the term schools refers to recipients of Federal financial assistance at all educational levels, including school districts, colleges, and universities. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a).


3 ED, Examples of Policies and Emerging Practices for Supporting Transgender Students (May 13, 2016), www.ed.gov/osee/oshs/emergingpractices.pdf. OCR also posts many of its resolution agreements in cases involving transgender students online at www.ed.gov/ocr/lgbt.html. While these agreements address fact-specific cases, and therefore do not state general policy, they identify examples of ways OCR and recipients have resolved some issues addressed in this guidance.

4 34 C.F.R. §§ 106.4, 106.31(a). For simplicity, this letter cites only to ED’s Title IX regulations. DOJ has also promulgated Title IX regulations. See 28 C.F.R. Pt. 54. For purposes of how the Title IX regulations at issue in this guidance apply to transgender individuals, DOJ interprets its regulations similarly to ED. State and local rules cannot limit or override the requirements of Federal laws. See 34 C.F.R. § 106.6(b).


6 See Lusardi v. Dep’t of the Army, Appeal No. 012013395 at 9 (U.S. Equal Emp’t Opportunity Comm’n Apr. 1, 2015) (“An agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual’s gender identity.”).

7 See G.G., 2016 WL 1567467, at *1 n.1 (noting that medical authorities “do not permit sex reassignment surgery for persons who are under the legal age of majority”).

8 34 C.F.R. § 106.31(b)(4); see G.G., 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles); Cruzan v. Special Sch. Dist. No. 1, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman “merely [to be] present in the women’s faculty restroom” created a hostile environment); Glenn, 663 F.3d at 1321 (defendant’s proffered justification that “other women might object to [the plaintiff’s] restroom use” was “wholly irrelevant”). See also Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (recognizing that “mere negative attitudes, or fear . . . are not permissible bases for” government action).
Dear Colleague Letter: Transgender Students

9 See, e.g., Resolution Agreement, In re Downey Unified Sch. Dist., CA, OCR Case No. 09-12-1095, (Oct. 8, 2014), www.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (agreement to address harassment of transgender student, including allegations that peers continued to call her by her former name, shared pictures of her prior to her transition, and frequently asked questions about her anatomy and sexuality); Consent Decree, Doe v. Anoka-Hennepin Sch. Dist. No. 11, MN (D. Minn. Mar. 1, 2012), www.ed.gov/ocr/docs/investigations/05115901-d.pdf (consent decree to address sex-based harassment, including based on nonconformity with gender stereotypes); Resolution Agreement, In re Tehachapi Unified Sch. Dist., CA, OCR Case No. 09-11-1031 (June 30, 2011), www.ed.gov/ocr/docs/investigations/09111031-b.pdf (agreement to address sexual and gender-based harassment, including harassment based on nonconformity with gender stereotypes). See also Lusardi, Appeal No. 0120133395, at *15 (“Persistent failure to use the employee’s correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment”).


12 34 C.F.R. §§ 106.32, 106.33, 106.34, 106.41(b).

13 See 34 C.F.R. § 106.31.

14 34 C.F.R. § 106.33.

15 See, e.g., Resolution Agreement, In re Township High Sch. Dist. 211, IL, OCR Case No. 05-14-1055 (Dec. 2, 2015), www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (agreement to provide any student who requests additional privacy “access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.”).

16 34 C.F.R. § 106.41(b). Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.

17 34 C.F.R. § 106.6(b), (c). An interscholastic athletic association is subject to Title IX if (1) the association receives Federal financial assistance or (2) its members are recipients of Federal financial assistance and have ceded controlling authority over portions of their athletic program to the association. Where an athletic association is covered by Title IX, a school’s obligations regarding transgender athletes apply with equal force to the association.

18 The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled On the Team: Equal Opportunity for Transgender Student Athletes (2010) by Dr. Pat Griffin & Helen J. Carroll (On the Team), https://www.ncaaconference.com/sites/default/files/NCLR_TransStudentAthlete%282%29.pdf. See NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes 2, 30-31 (2011), https://www.ncaaconference.com/sites/default/files/Transgender_Handbook_2011_Final.pdf (citing On the Team). The On the Team report noted that policies that may be appropriate at the college level may “be unfair and too complicated for [the high school] level of competition.” On the Team at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.

19 34 C.F.R. § 106.34(a), (b). Schools may also separate students by sex in physical education classes during participation in contact sports. Id. § 106.34(a)(1).

20 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d); 34 C.F.R. § 106.34(c) (a recipient may offer a single-sex public nonvocational elementary and secondary school so long as it provides students of the excluded sex a "substantially
equal single-sex school or coeducational school").


(24 agreement to provide access to single-sex overnight events consistent with students’ gender identity, but allowing students to request access to private facilities).

24 See 34 C.F.R. §§ 106.31(a), 106.31(b)(4). See also, In re Downey Unified Sch. Dist., CA, supra n. 9; In re Cent. Piedmont Cnty. Coll., NC, supra n. 11.

25 34 C.F.R. § 106.31(b)(7).


29 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.


32 34 C.F.R. § 99.20.


34 See 34 C.F.R. § 106.31(b)(4).

35 34 C.F.R. § 106.8(b).
Examples of Policies and Emerging Practices for Supporting Transgender Students

U.S. Department of Education
Office of Elementary and Secondary Education
Office of Safe and Healthy Students
May 2016
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May 2016
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If you need technical assistance, please contact the Office of Safe and Healthy Students at:
OESE.Info.SupportingTransgenderStudents@ed.gov

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Examples of Policies and Emerging Practices for Supporting Transgender Students

The U.S. Department of Education ("ED") is committed to providing schools with the information they need to provide a safe, supportive, and nondiscriminatory learning environment for all students. It has come to ED’s attention that many transgender students (i.e., students whose gender identity is different from the sex they were assigned at birth) report feeling unsafe and experiencing verbal and physical harassment or assault in school, and that these students may perform worse academically when they are harassed. School administrators, educators, students, and parents are asking questions about how to support transgender students and have requested clarity from ED. In response, ED developed two documents:

- ED’s Office for Civil Rights and the U.S. Department of Justice’s Civil Rights Division jointly issued a Dear Colleague Letter ("DCL") about transgender students’ rights and schools’ legal obligations under Title IX of the Education Amendments of 1972.¹ Any school that has questions related to transgender students or wants to be prepared to address such issues if they arise should review the DCL.

- ED’s Office of Elementary and Secondary Education compiled the attached examples of policies² and emerging practices³ that some schools are already using to support transgender students. We share some common questions on topics such as school records, privacy, and terminology, and then explain how some state and school district policies have answered these questions. We present this information to illustrate how states and school districts are supporting transgender students. We also provide information about and links to those policies at the end of the document, along with other resources that may be helpful as educators develop policies and practices for their own schools.

² In this document, the term policy or policies refers generally to policies, guidance, guidelines, procedures, regulations, and resource guides issued by schools, school districts, and state educational agencies.
³ ED considers emerging practices to be operational activities or initiatives that contribute to successful outcomes or enhance agency performance capabilities. Emerging practices are those that have been successfully implemented and demonstrate the potential for replication by other agencies. Emerging practices typically have not been rigorously evaluated, but still offer ideas that work in specific situations.
Each person is unique, so the needs of individual transgender students vary. But a school policy setting forth general principles for supporting transgender students can help set clear expectations for students and staff and avoid unnecessary confusion, invasions of privacy, and other harms. The education community continues to develop and revise policies and practices to address the rights of transgender students and reflect our evolving understanding and the individualized nature of transgender students’ needs.

This document contains information from some schools, school districts, and state and federal agencies. Inclusion of this information does not constitute an endorsement by ED of any policy or practice, educational product, service, curriculum or pedagogy. In addition, this document references websites that provide information created and maintained by other entities. These references are for the reader’s convenience. ED does not control or guarantee the accuracy, relevance, timeliness, or completeness of this outside information. This document does not constitute legal advice, create legal obligations, or impose new requirements.
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**Student Transitions**

1. **How do schools find out that a student will transition?**

   Typically, the student or the student’s parent or guardian will tell the school and ask that the school start treating the student in a manner consistent with the student’s gender identity. Some students transition over a school break, such as summer break. Other students may undergo a gender transition during the school year, and may ask (or their parents may ask on their behalf) teachers and other school employees to respect their identity as they begin expressing their gender identity, which may include changes to their dress and appearance. Some school district or state policies address how a student or parent might provide the relevant notice to the school.

   - Alaska’s Matanuska-Susitna Borough School District issued guidelines (“Mat-Su Borough Guidelines”) advising that transgender students or their parents or guardians should contact the building administrator or the student’s guidance counselor to schedule a meeting to develop a plan to address the student’s particular circumstances and needs.

   - The guidelines issued by Washington’s Superintendent of Public Instruction (“Washington State Guidelines”) offer an example of a student who first attended school as a boy and, about midway through a school year, she and her family decided that she would transition and begin presenting as a girl. She prefers to dress in stereotypically feminine attire such as dresses and skirts. Although she is growing her hair out and consistently presents as female at school, her hair is still in a rather short, typically boyish haircut. The student, her parents, and school administrators asked her friends and teachers to use female pronouns to address her.

2. **How do schools confirm a student’s gender identity?**

   Schools generally rely on students’ (or in the case of younger students, their parents’ or guardians’) expression of their gender identity. Although schools sometimes request some form of confirmation, they generally accept the student’s asserted gender identity. Some schools offer additional guidance on this issue.

   - Los Angeles Unified School District issued a policy (“LAUSD Policy”) noting that “[t]here is no medical or mental health diagnosis or treatment threshold that
students must meet in order to have their gender identity recognized and respected” and that evidence may include an expressed desire to be consistently recognized by their gender identity.

- The New York State Education Department issued guidance (“NYSED Guidance”) recommending that “schools accept a student’s assertion of his/her/their own gender identity” and provides examples of ways to confirm the assertion, such as a statement from the student or a letter from an adult familiar with the student’s situation. The same guidance also offers the following example: “In one middle school, a student explained to her guidance counselor that she was a transgender girl who had heretofore only been able to express her female gender identity while at home. The stress associated with having to hide her female gender identity by presenting as male at school was having a negative impact on her mental health, as well as on her academic performance. The student and her parents asked if it would be okay if she expressed her female gender identity at school. The guidance counselor responded favorably to the request. The fact that the student presented no documentation to support her gender identity was not a concern since the school had no reason to believe the request was based on anything other than a sincerely held belief that she had a female gender identity.”

- Alaska’s Anchorage School District developed administrative guidelines (“Anchorage Administrative Guidelines”) noting that being transgender “involves more than a casual declaration of gender identity or expression but does not require proof of a formal evaluation and diagnosis. Since individual circumstances, needs, programs, facilities and resources may differ; administrators and school staff are expected to consider the needs of the individual on a case-by-case basis.”

3. How do schools communicate with the parents of younger students compared to older transgender students?

Parents are often the first to initiate a conversation with the school when their child is transgender, particularly when younger children are involved. Parents may play less of a role in an older student’s transition. Some school policies recommend, with regard to an older student, that school staff consult with the student before reaching out to the student’s parents.

- The District of Columbia Public Schools issued guidance (“DCPS Guidance”) noting that “students may choose to have their parents participate in the transition process, but parental participation is not required.” The guidance further
recommends different developmentally appropriate protocols depending on grade level. The DCPS Guidance suggests that the school work with a young student’s family to identify appropriate steps to support the student, but recommends working closely with older students prior to notification of family. The guidance also provides a model planning document with key issues to discuss with the student or the student’s family.

- Similarly, the Massachusetts Department of Elementary and Secondary Education issued guidance (“Massachusetts Guidance”) that notes: “Some transgender and gender nonconforming students are not openly so at home for reasons such as safety concerns or lack of acceptance. School personnel should speak with the student first before discussing a student’s gender nonconformity or transgender status with the student’s parent or guardian. For the same reasons, school personnel should discuss with the student how the school should refer to the student, e.g., appropriate pronoun use, in written communication to the student’s parent or guardian.”

- Chicago Public Schools’ guidelines (“Chicago Guidelines”) provide: “When speaking with other staff members, parents, guardians, or third parties, school staff should not disclose a student’s preferred name, pronoun, or other confidential information pertaining to the student’s transgender or gender nonconforming status without the student’s permission, unless authorized to do so by the Law Department.”

- Oregon’s Department of Education issued guidance stating, “In a case where a student is not yet able to self-advocate, the request to respect and affirm a student’s identity will likely come from the student’s parent. However, in other cases, transgender students may not want their parents to know about their transgender identity. These situations should be addressed on a case-by-case basis and school districts should balance the goal of supporting the student with the requirement that parents be kept informed about their children. The paramount consideration in such situations should be the health and safety of the student, while also making sure that the student’s gender identity is affirmed in a manner that maintains privacy and confidentiality.”
Privacy, Confidentiality, and Student Records

4. How do schools protect a transgender student’s privacy regarding the student’s transgender status?

There are a number of ways schools protect transgender students’ interests in keeping their transgender status private, including taking steps to prepare staff to consistently use the appropriate name and pronouns. Using transgender students’ birth names or pronouns that do not match their gender identity risks disclosing a student’s transgender status. Some state and school district policies also address how federal and state privacy laws apply to transgender students and how to keep information about a student’s transgender status confidential.

- California’s El Rancho Unified School District issued a regulation (“El Rancho Regulation”) that provides that students have the right to openly discuss and express their gender identity, but also reminds school personnel to be “mindful of the confidentiality and privacy rights of [transgender] students when contacting parents/legal guardians so as not to reveal, imply, or refer to a student’s actual or perceived sexual orientation, gender identity, or gender expression.”

- The Chicago Guidelines provide that the school should convene an administrative support team to work with transgender students and/or their parents or guardians to address each student’s individual needs and supports. To protect the student’s privacy, this team is limited to “the school principal, the student, individuals the student identifies as trusted adults, and individuals the principal determines may have a legitimate interest in the safety and healthy development of the student.”

- The Mat-Su Borough Guidelines state: “In some cases, a student may want school staff and students to know, and in other cases the student may not want this information to be widely known. School staff should take care to follow the student’s plan and not to inadvertently disclose information that is intended to be kept private or that is protected from disclosure (such as confidential medical information).”

- The Massachusetts Guidance advises schools “to collect or maintain information about students’ gender only when necessary” and offers an example: “One school reviewed the documentation requests it sent out to families and noticed that field trip permission forms included a line to fill in indicating the student’s gender. Upon consideration, the school determined that the requested information was irrelevant to the field trip activities and deleted the line with the gender marker request.”
5. How do schools ensure that a transgender student is called by the appropriate name and pronouns?

One of the first issues that school officials may address when a student notifies them of a gender transition is determining which name and pronouns the student prefers. Some schools have adopted policies to prepare all school staff and students to use a student’s newly adopted name, if any, and pronouns that are consistent with a student’s gender identity.

- A regulation issued by Nevada’s Washoe County School District ("Washoe County Regulation") provides that: “Students have the right to be addressed by the names and pronouns that correspond to their gender identity. Using the student’s preferred name and pronoun promotes the safety and wellbeing of the student. When possible, the requested name shall be included in the District’s electronic database in addition to the student’s legal name, in order to inform faculty and staff of the name and pronoun to use when addressing the student.”

- A procedure issued by Kansas City Public Schools in Missouri ("Kansas City Procedure") notes that: “The intentional or persistent refusal to respect the gender identity of an employee or student after notification of the preferred pronoun/name used by the employee or student is a violation of this procedure.”

- The NYSED Guidance provides: “As with most other issues involved with creating a safe and supportive environment for transgender students, the best course is to engage the student, and possibly the parent, with respect to name and pronoun use, and agree on a plan to reflect the individual needs of each student to initiate that name and pronoun use within the school. The plan also could include when and how this is communicated to students and their parents.”

- The DCPS Guidance includes a school planning guide for principals to review with transgender students as they plan how to ensure the school environment is safe and supportive. The school planning guide allows the student to identify the student’s gender identity and preferred name, key contacts at home and at school, as well as develop plans for access to restrooms, locker rooms, and other school activities.
6. How do schools handle requests to change the name or sex designation on a student’s records?

Some transgender students may legally change their names. However, transgender students often are unable to obtain identification documents that reflect their gender identity (e.g., due to financial limitations or legal restrictions imposed by state or local law). Some school district policies specify that they will use the name a student identifies as consistent with the student’s gender identity regardless of whether the student has completed a legal name change.

- The NYSED Guidance provides that school records, including attendance records, transcripts, and Individualized Education Programs, be updated with the student’s chosen name and offers an example: “One school administrator dealt with information in the student’s file by starting a new file with the student’s chosen name, entered previous academic records under the student’s chosen name, and created a separate, confidential folder that contained the student’s past information and birth name.”

- The DCPS Guidance notes: “A court-ordered name or gender change is not required, and the student does not need to change their official records. If a student wishes to go by another name, the school’s registrar can enter that name into the ‘Preferred First’ name field of [the school’s] database.”

- The Kansas City Procedure recognizes that there are certain situations where school staff or administrators may need to report a transgender student’s legal name or gender. The procedure notes that in these situations, “school staff and administrators shall adopt practices to avoid the inadvertent disclosure of such confidential information.”

- The Chicago Guidelines state: “Students are not required to obtain a court order and/or gender change or to change their official records as a prerequisite to being addressed by the name and pronoun that corresponds to their gender identity.”

- The Massachusetts Guidance also addresses requests to amend records after graduation: “Transgender students who transition after having completed high school may ask their previous schools to amend school records or a diploma or transcript that include the student’s birth name and gender. When requested, and when satisfied with the gender identity information provided, schools should amend the student’s record.”
Sex-Segregated Activities and Facilities

7. How do schools ensure transgender students have access to facilities consistent with their gender identity?

Schools often segregate restrooms and locker rooms by sex, but some schools have policies that students must be permitted to access facilities consistent with their gender identity and not be required to use facilities inconsistent with their gender identity or alternative facilities.

- The Washington State Guidelines provide: “School districts should allow students to use the restroom that is consistent with their gender identity consistently asserted at school.” In addition, no student “should be required to use an alternative restroom because they are transgender or gender nonconforming.”

- The Washoe County Regulation provides: “Students shall have access to use facilities that correspond to their gender identity as expressed by the student and asserted at school, irrespective of the gender listed on the student’s records, including but not limited to locker rooms.”

- The Anchorage Administrative Guidelines emphasize the following provision: “However, staff should not require a transgender or gender nonconforming student/employee to use a separate, nonintegrated space unless requested by the individual student/employee.”

8. How do schools protect the privacy rights of all students in restrooms or locker rooms?

Many students seek additional privacy in school restrooms and locker rooms. Some schools have provided students increased privacy by making adjustments to sex-segregated facilities or providing all students with access to alternative facilities.

- The Washington State Guidelines provide that any student who wants increased privacy should be provided access to an alternative restroom or changing area. The guidelines explain: “This allows students who may feel uncomfortable sharing the facility with the transgender student(s) the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student.”
• The NYSED Guidance gives an example of accommodating all students’ interest in privacy: “In one high school, a transgender female student was given access to the female changing facility, but the student was uncomfortable using the female changing facility with other female students because there were no private changing areas within the facility. The principal examined the changing facility and determined that curtains could easily be put up along one side of a row of benches near the group lockers, providing private changing areas for any students who wished to use them. After the school put up the curtains, the student was comfortable using the changing facility.”

• Atherton High School, in Jefferson County, Kentucky, issued a policy that offers examples of accommodations to address any student’s request for increased privacy: “use of a private area within the public area of the locker room facility (e.g. nearby restroom stall with a door or an area separated by a curtain); use of a nearby private area (e.g. nearby restroom); or a separate changing schedule.”

• The DCPS Guidance recommends talking to students to come up with an acceptable solution: “Ultimately, if a student expresses discomfort to any member of the school staff, that staff member should review these options with the student and ask the student permission to engage the school LGBTQ liaison or another designated ally in the building.”

9. How do schools ensure transgender students have the opportunity to participate in physical education and athletics consistent with their gender identity?

Some school policies explain the procedures for establishing transgender students’ eligibility to participate in athletics consistent with their gender identity. Many of those policies refer to procedures established by state athletics leagues or associations.

• The NYSED Guidance explains that “physical education is a required part of the curriculum and an important part of many students’ lives. Most physical education classes in New York’s schools are coed, so the gender identity of students should not be an issue with respect to these classes. Where there are sex-segregated classes, students should be allowed to participate in a manner consistent with their gender identity.”

• The LAUSD Policy provides that “participation in competitive athletics, intramural sports, athletic teams, competitions, and contact sports shall be facilitated in a
manner consistent with the student’s gender identity asserted at school and in accordance with the California Interscholastic Federation bylaws.” The California Interscholastic Federation establishes a panel of professionals, including at least one person with training or expertise in gender identity health care or advocacy, to make eligibility decisions.

- The Rhode Island Interscholastic League’s policy states that all students should have the opportunity to participate in athletics consistent with their gender identity, regardless of the gender listed on school records. The policy provides that the league will base its eligibility determination on the student’s current transcript and school registration information, documentation of the student’s consistent gender identification (e.g., affirmed written statements from student, parent/guardian, or health care provider), and any other pertinent information.

10. How do schools treat transgender students when they participate in field trips and athletic trips that require overnight accommodations?

Schools often separate students by sex when providing overnight accommodations. Some school policies provide that students must be treated consistent with their gender identity in making such assignments.

- Colorado’s Boulder Valley School District issued guidelines (“Boulder Valley Guidelines”) providing that when a school plans overnight accommodations for a transgender student, it should consider “the goals of maximizing the student’s social integration and equal opportunity to participate in overnight activity and athletic trips, ensuring the [transgender] student’s safety and comfort, and minimizing stigmatization of the student."

- The Chicago Guidelines remind school staff: “In no case should a transgender student be denied the right to participate in an overnight field trip because of the student’s transgender status.”
Additional Practices to Support Transgender Students

11. What can schools do to make transgender students comfortable in the classroom?

Classroom practices that do not distinguish or differentiate students based on their gender are the most inclusive for all students, including transgender students.

- The DCPS Guidance suggests that “[w]herever arbitrary gender dividers can be avoided, they should be eliminated.”

- The Massachusetts Guidance states that “[a]s a general matter, schools should evaluate all gender-based policies, rules, and practices and maintain only those that have a clear and sound pedagogical purpose.”

- Minneapolis Public Schools issued a policy providing that students generally should not be grouped on the basis of sex for the purpose of instruction or study, but rather on bases such as student proficiency in the area of study, student interests, or educational needs for acceleration or enrichment.

- The Maryland State Department of Education issued guidelines that include an example of eliminating gender-based sorting of students: “Old Practice: boys line up over here.” New Practice: birthdays between January and June; everybody who is wearing something green, etc.”

12. How do school dress codes apply to transgender students?

Dress codes that apply the same requirements regardless of gender are the most inclusive for all students and avoid unnecessarily reinforcing sex stereotypes. To the extent a school has a dress code that applies different standards to male and female students, some schools have policies that allow transgender students to dress consistent with their gender identity.

- Wisconsin’s Shorewood School District issued guidelines (“Shorewood Guidelines”) that allow students to dress in accordance with their gender identity and remind school personnel that they must not enforce a dress code more strictly against transgender and gender nonconforming students than other students.

- The Washington State Guidelines encourage school districts to adopt gender-neutral dress codes that do not restrict a student’s clothing choices on the basis of gender: “Dress codes should be based on educationally relevant considerations, apply
13. How do schools address bullying and harassment of transgender students?

Unfortunately, bullying and harassment continue to be a problem facing many students, and transgender students are no exception. Some schools make clear in their nondiscrimination statements that prohibited sex discrimination includes discrimination based on gender identity and expression. Their policies also address this issue.

- The NYSED Guidance stresses the importance of protecting students from bullying and harassment because “[the] high rates experienced by transgender students correspond to adverse health and educational consequences,” including higher rates of absenteeism, lower academic achievement, and stunted educational aspirations.

- The Shorewood Guidelines specify that harassment based on a student’s actual or perceived transgender status or gender nonconformity is prohibited and notes that these complaints are to be handled in the same manner as other discrimination, harassment, and bullying complaints.

- The DCPS Guidance provides examples of prohibited harassment that transgender students sometimes experience, including misusing an individual’s preferred name or pronouns on purpose, asking personal questions about a person’s body or gender transition, and disclosing private information.

14. How do school psychologists, school counselors, school nurses, and school social workers support transgender students?

School counselors can help transgender students who may experience mental health disorders such as depression, anxiety, and posttraumatic stress. Mental health staff may also consult with school administrators to create inclusive policies, programs, and practices that prevent bullying and harassment and ensure classrooms and schools are safe, healthy, and supportive places where all students, including transgender students, are respected and can express themselves. Schools will be in a better position to support transgender students if they communicate to all students that resources are available, and that they are competent to provide support and services to any student who has questions related to gender identity.
• The NYSED Guidance suggests that counselors can serve as a point of contact for transgender students who seek to take initial steps to assert their gender identity in school.

• The Chicago Guidelines convene a student administrative support team to determine the appropriate supports for transgender students. The team consists of the school principal, the student, adults that the student trusts, and individuals the principal determines may have a legitimate interest in the safety and healthy development of the student.

15. How do schools foster respect for transgender students among members of the broader school community?

Developing a clear policy explaining how to support transgender students can help communicate the importance the school places on creating a safe, healthy, and nondiscriminatory school climate for all students. Schools can do this by providing educational programs aimed at staff, students, families, and other community members.

• The Massachusetts Guidance informs superintendents and principals that they “need to review existing policies, handbooks, and other written materials to ensure they are updated to reflect the inclusion of gender identity in the student antidiscrimination law, and may wish to inform all members of the school community, including school personnel, students, and families of the recent change to state law and its implications for school policy and practice. This could take the form of a letter that states the school’s commitment to being a supportive, inclusive environment for all students.”

• The NYSED Guidance states that “school districts are encouraged to provide this guidance document and other resources, such as trainings and information sessions, to the school community including, but not limited to, parents, students, staff and residents.”

16. What topics do schools address when training staff on issues related to transgender students?

Schools can reinforce commitments to providing safe, healthy, and nondiscriminatory school climates by training all school personnel about appropriate and respectful treatment of all students, including transgender students.
• The Massachusetts Guidance suggests including the following topics in faculty and staff training “key terms related to gender identity and expression; the development of gender identity; the experiences of transgender and other gender nonconforming students; risks and resilience data regarding transgender and gender nonconforming students; ways to support transgender students and to improve school climate for gender nonconforming students; [and] gender-neutral language and practices.”

• The El Rancho Regulation states that the superintendent or designee “shall provide to employees, volunteers, and parents/guardians training and information regarding the district’s nondiscrimination policy; what constitutes prohibited discrimination, harassment, intimidation, or bullying; how and to whom a report of an incident should be made; and how to guard against segregating or stereotyping students when providing instruction, guidance, supervision, or other services to them. Such training and information shall include guidelines for addressing issues related to transgender and gender-nonconforming students.”

17. How do schools respond to complaints about the way transgender students are treated?

School policies often provide that complaints from transgender students be handled under the same policy used to resolve other complaints of discrimination or harassment.

• The Boulder Valley Guidelines provide that “complaints alleging discrimination or harassment based on a person’s actual or perceived transgender status or gender nonconformity are to be handled in the same manner as other discrimination or harassment complaints.”

• The Anchorage Administrative Guidelines provide that “students may also use the Student Grievance Process to address any civil rights issue, including transgender issues at school.”
Terminology

18. What terms are defined in current school policies on transgender students?

Understanding the needs of transgender students includes understanding relevant terminology. Most school policies define commonly used terms to assist schools in understanding key concepts relevant to transgender students. The list below is not exhaustive, and only includes examples of some of the most common terms that school policies define.

- *Gender identity* refers to a person’s deeply felt internal sense of being male or female, regardless of their sex assigned at birth. (Washington State Guidelines)

- *Sex assigned at birth* refers to the sex designation, usually “male” or “female,” assigned to a person when they are born. (NYSED Guidance)

- *Gender expression* refers to the manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice or mannerisms. (Washoe County Regulation)

- *Transgender or trans* describes a person whose gender identity does not correspond to their assigned sex at birth. (Massachusetts Guidance)

- *Gender transition* refers to the process in which a person goes from living and identifying as one gender to living and identifying as another. (Washoe County Regulation)

- *Cisgender* describes a person whose gender identity corresponds to their assigned sex at birth. (NYSED Guidance)

- *Gender nonconforming* describes people whose gender expression differs from stereotypic expectations. The terms *gender variant* or *gender atypical* are also used. Gender nonconforming individuals may identify as male, female, some combination of both, or neither. (NYSED Guidance)

- *Intersex* describes individuals born with chromosomes, hormones, genitalia and/or other sex characteristics that are not exclusively male or female as defined by the medical establishment in our society. (DCPS Guidance)

- *LGBTQ* is an acronym that stands for “lesbian, gay, bisexual, transgender, and queer/questioning.” (LAUSD Policy)
• *Sexual orientation* refers to a person’s emotional and sexual attraction to another person based on the gender of the other person. Common terms used to describe sexual orientation include, but are not limited to, heterosexual, lesbian, gay, and bisexual. Sexual orientation and gender identity are different. (LAUSD Policy)

19. How do schools account for individual preferences and the diverse ways that students describe and express their gender?

Some students may use different terms to identify themselves or describe their situations. For example, a transgender male student may identify simply as male, consistent with his gender identity. The same principles apply even if students use different terms. Some school policies directly address this question and provide additional guidance.

• The Washington State Guidelines recognize how “terminology can differ based on religion, language, race, ethnicity, age, culture and many other factors.”

• Washington’s Federal Way School District issued a resource guide that states: “Keep in mind that the meaning of gender conformity can vary from culture to culture, so these may not translate exactly to Western ideas of what it means to be transgender. Some of these identities include Hijra (South Asia), Fa’afafine (Samoa), Kathoey (Thailand), Travesti (South America), and Two-Spirit (Native American/First Nations).”

• The Washoe County Regulation, responding to cultural diversity within the state, offers examples of “ways in which transgender and gender nonconforming youth describe their lives and gendered experiences: trans, transsexual, transgender, male-to-female (MTF), female-to-male (FTM), bi-gender, two-spirit, trans man, and trans woman.”

• The DCPS Guidance provides this advice to staff: “If you are unsure about a student’s preferred name or pronouns, it is appropriate to privately and tactfully ask the student what they prefer to be called. Additionally, when speaking about a student it is rarely necessary to label them as being transgender, as they should be treated the same as the rest of their peers.”
Cited Policies on Transgender Students


- Chicago Public Schools (IL), *Guidelines Regarding the Support of Transgender and Gender Nonconforming Students* (2016), [cps.edu/SiteCollectionDocuments/TL_TransGenderNonconformingStudents_Guidelines.pdf](http://cps.edu/SiteCollectionDocuments/TL_TransGenderNonconformingStudents_Guidelines.pdf)


• Massachusetts Department of Elementary and Secondary Education, *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment Nondiscrimination on the Basis of Gender Identity* (2014), www.doe.mass.edu/ssce/GenderIdentity.pdf


• Washoe County School District (NV), *Gender Identity and Gender Non-Conformity – Students* (2015), washoecountyschools.net/csi/pdf_files/5161%20Reg%20Gender%20Identity%20v1.pdf
Select Federal Resources on Transgender Students

- U.S. Department of Education
  - Office for Civil Rights, *Publications on Title IX*, [www.ed.gov/about/offices/list/ocr/publications.html#TitleIX](http://www.ed.gov/about/offices/list/ocr/publications.html#TitleIX)
  - Office for Civil Rights, *How to File a Discrimination Complaint*, [www.ed.gov/about/offices/list/ocr/docs/howto.html](http://www.ed.gov/about/offices/list/ocr/docs/howto.html)
  - National Center on Safe Supportive Learning Environments, [safesupportivelearning.ed.gov](http://safesupportivelearning.ed.gov)

- U.S. Department of Health and Human Services
  - Centers for Disease Control and Prevention, *LGBT Youth Resources*, [www.cdc.gov/lgbthealth/youth-resources.htm](http://www.cdc.gov/lgbthealth/youth-resources.htm)

- U.S. Department of Housing and Urban Development
• U.S. Department of Labor

March 18, 2016

**VIA FEDEX, ELECTRONIC MAIL, AND FACSIMILE**

Pine-Richland School Board
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Dear Members of the School Board, Superintendent Miller, and Principal Bowman:

We write on behalf of several transgender students at Pine-Richland High School (the “High School”). We understand that the School Board of the Pine-Richland School District (the “School District”) has received several communications concerning transgender students’ access to restrooms and other single-sex school facilities at Pine-Richland High School. Specifically, the Alliance Defending Freedom (“ADF”), a conservative Christian non-profit organization, and parents of some students have recently sent letters or emails requesting that the School District enact a policy prohibiting transgender students from using restrooms and other single-sex facilities consistent with those students’ gender identity.

We understand that the High School and School District currently permit transgender students to use restrooms and other sex-specific facilities consistent with their gender identity, and we urge the School District to continue respecting the gender identity of each of its students through inclusive, nondiscriminatory practices and policies. As set forth below, the High School’s existing practice is commendable; it respects the gender identity of the School District’s transgender students (we understand there are currently several transgender students at the High School), while
ensuring a safe and inclusive environment for all of the School District’s students. Moreover, our understanding of the High School’s practice is that it is consistent with state and federal law—indeed, as explained in this letter, prohibiting transgender students from being able to use sex-specific facilities appropriate to their gender identity would violate state and federal anti-discrimination laws, endanger the health and welfare of its students, and may expose the School District to potential liability.

As the nation’s oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender (“LGBT”) people and people living with HIV, Lambda Legal has frequently been counsel of record or amicus curiae in cases addressing coverage of transgender people under sex discrimination law.¹ We write to correct any misapprehensions of fact and law that may have been provided to you by ADF, among others, and to provide you with accurate information about the law governing the use of restrooms and other single-sex facilities by transgender and gender-nonconforming students.

As discussed in detail below, one simple principle is abundantly clear:

**The School District has a legal responsibility to respect the gender identity of all its students and to not discriminate against students on the basis of gender identity or expression. That includes permitting transgender students to access sex-specific restrooms and other facilities consistent with their gender identity.**

**Federal law prohibits discrimination against transgender students and requires that schools treat transgender students consistent with their gender identity.**

The law is clear that **all** students, including transgender students,² are protected from sex-based discrimination under federal law. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (“Title IX”), and its implementing regulations, 34 C.F.R. § 106.31 et seq., prohibit discrimination on the basis of sex in federally financed education programs and activities. The Department of Education’s Office of

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² “Transgender” is an umbrella term used to describe people whose gender identity—that is, one’s inner sense of being male or female—differs from their assigned or presumed sex at birth.
Civil Rights (“OCR”) has clarified that “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and [the Office of Civil Rights] accepts such complaints for investigation.”

Likewise, the Department of Justice (“DOJ”) has explained that Title VII of the Civil Rights Act of 1964 (another federal statute interpreted similarly that, like Title IX, prohibits sex discrimination) “encompasses discrimination based on gender identity, including transgender status.”

Moreover, contrary to what ADF states in its letter, the Department of Education’s OCR has explicitly addressed the issue of transgender students’ access to appropriate restrooms and other facilities, and has explained that, although schools are free to have separate restrooms and facilities for boys and girls, schools generally “must treat transgender students consistent with their gender identity.” In other words, the OCR has clarified that, under Title IX, schools must permit transgender students to access sex-specific facilities consistent with their gender identity. Likewise, the federal government has issued guidance requiring that transgender federal employees,

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consistent with Title VII, be “allow[ed] access to restrooms and ... locker room facilities consistent with his or her gender identity.”

Indeed, contrary to what ADF states in its letter, the federal government routinely enforces these nondiscrimination requirements with respect to access to single-sex facilities for transgender individuals. On multiple occasions, school districts, the Department of Education, and DOJ have entered into resolution agreements requiring that school districts allow transgender students to use the restrooms and other single-sex facilities that accord with their gender identity in order to resolve charges of discrimination on the basis of gender identity. For example, on July 24, 2013, DOJ entered into a settlement agreement with the Arcadia Unified School District in California after the school refused to allow a male student who is transgender to use the boys’ restrooms and locker rooms. The agreement made clear that “[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX.” Similarly, on October 14, 2014, OCR approved a resolution agreement with a girl who is transgender and had been subjected to discrimination and gender-based peer harassment in her school district. The agreement memorialized the student’s ability to use sex-designated restrooms and other facilities in accordance with her gender identity.

And in November of last year, OCR found a public school district to be in violation of Title IX for denying a transgender girl access to her high school’s female locker rooms. In so doing, OCR noted that denying the transgender student access to

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10 Id. at 1.

the locker rooms in accordance with her gender identity amounted to discrimination on the basis of sex, in violation of Title IX—a finding that not only exposes the school district in question to legal liability, but also to losing federal funds.

Numerous federal courts have also agreed that Title IX protects all students, including transgender students, from discrimination based on identity perceived failure to conform to gender stereotypes. And in March 2015, a federal court held that Section 1557 of the Affordable Care Act, which incorporates Title IX’s prohibition on sex-based discrimination, “protects plaintiffs . . . who allege discrimination based on ‘gender identity.’” Such court decisions form part of an ever-growing consensus that discrimination on the basis of gender identity is a form of sex-based discrimination. Simply put, discrimination on the basis of gender identity is “literally” discrimination on the basis of sex.

The adoption of a discriminatory policy, practice, or custom on the basis of gender identity by a public school district would not only violate Title IX, it may also violate constitutional guarantees of liberty and equality. In particular, courts have held that a public school violates the Equal Protection Clause’s prohibition of sex-based discrimination when it discriminates against transgender students on the basis of their gender identity or gender-nonconformity. The U.S. Supreme Court also recognized last year that the “Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”

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14 See, e.g., Glenn, 663 F.3d at 1317 (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”); Smith v. City of Salem, 378 F.3d 566, 572-73 (6th Cir. 2004) (holding that transgender plaintiff sufficiently stated constitutional and Title VII sex discrimination claims based on his allegations that he was discriminated against because of his gender-nonconforming behavior and appearance); Schroer v. Billington, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008); Macy v. Holder, Appeal No. 0120120821 (EEOC Apr. 20, 2012).

15 Schroer, 577 F. Supp. 2d at 306-07.

16 Cf. Glenn, 663 F.3d at 1320 (“We conclude that a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”).

Local law and Pennsylvania state law also prohibit discrimination against students based on gender identity.

Local law and Pennsylvania state law also prohibit discrimination against students based on gender identity or expression. In 2009, Allegheny County adopted an ordinance banning discrimination in public accommodations, as well as employment and housing, on the basis of a person’s gender identity, gender expression, and other protected traits. In addition, the Pennsylvania Human Relations Act (“PHRA”) prohibits discrimination on the basis of sex in connection with public accommodations. The PHRA’s prohibition of sex discrimination has been held to include a prohibition on gender discrimination, and courts have held that the PHRA should be interpreted “in accord with its federal counterparts,” including Title

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18 See Allegheny County Code of Ordinance, Div. 2, Art. V, § 215.35, available at http://ecode360.com/13705121; see also id. § 215-31 (defining “Gender Identity or Expression” as the “Self-perception, or perception by others whether accurate or not, as male or female, including a person’s appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one’s physical anatomy, chromosomal sex, or sex assigned at birth.”).


20 See Mitchell, 2006 WL 456173, at *2 (holding that transgender plaintiff sufficiently pleaded claims of gender discrimination based on transgender status under PHRA as well as Title VII); see also Brief Amicus Curiae of the Pennsylvania Human Relations Commission in Support of Plaintiff’s Opposition to Defendant’s Motion to Dismiss, Stacy v. LSI Corp., No. 5:10-CV-04693-ER, 2011 WL 10773442, at *2 (E.D. Pa. Jan. 3, 2011) (“[T]here is no basis of statutory construction that supports the conclusion that Gender Identity Disorder is categorically excluded from the PHRA.”).
Similarly, the Pennsylvania Fair Educational Opportunities Act provides that “all persons shall have equal opportunities for education regardless of their race, religion, color, ancestry, national origin, sex, handicap or disability.” And Pennsylvania state law requires that educators treat students equitably, respect the civil rights of all and not discriminate on the basis of sex.

Other state courts and agencies across the country have held that single-sex facilities in public schools must respect students’ gender identity.

Other school districts throughout the country have recognized that they need to respect their students’ gender identity, particularly within the context of using single-sex facilities. In a Maine case involving a young fourth-grade transgender girl named Susan, the Maine Supreme Court held that a school’s decision to bar the student from the girls’ bathroom constituted discrimination on the basis of gender identity because “[s]he was treated differently from other students solely because of her status as a transgender girl.” In Susan’s case, the school initially “determined that Susan should use the girls’ bathroom” and “provided her with the same access to public facilities that it provided other girls.” But then, as a result of “others’ complaints,” the school later made the decision to “ban Susan from the girls’ bathroom.” The Maine Supreme Court found that the school’s decision to ban Susan from the girl’s bathroom constituted discrimination on the basis of gender identity.

Similarly, Colorado’s Division of Civil Rights found that a school’s decision to ban a six-year-old transgender girl from the girls’ bathroom constituted discrimination and

21 Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996) (internal citation omitted); see also Atkinson v. Lafayette College, 460 F.3d 447, 454 n.6 (3d Cir. 2006) (“Claims under the PHRA are interpreted coextensively with Title VII claims.”); Barb v. Miles, Inc., 861 F. Supp. 356, 359 n.1 (W.D. Pa. 1994) (“The courts have uniformly held that the PHRA should be interpreted consistent with Title VII.”).


23 See 22 PA. CODE § 235.4(b)(4) (“Professional educators shall exhibit consistent and equitable treatment of students, fellow educators and parents. They shall respect the civil rights of all and not discriminate on the basis of race, national or ethnic origin, culture, religion, sex or sexual orientation, marital status, age, political beliefs, socioeconomic status, disabling condition or vocational interest. This list of bases of discrimination is not all-inclusive.”); see also id. § 235.8(1) (“The professional educator may not . . . Discriminate on the basis of race, National or ethnic origin, culture, religion, sex or sexual orientation, marital status, age, political beliefs, socioeconomic status; disabling condition or vocational interest against a student or fellow professional. This list of bases of discrimination is not all-inclusive.”); id. § 12.4 (students may not be denied access to public education or subject to disciplinary action on account of sex or other traits).

was “objectively and subjectively hostile, intimidating or offensive.” In its
determination, the agency found “that the restroom restriction [] created an
exclusionary environment, which tended to ostracize the [student], in effect producing
an environment in which the [student] was forced to disengage from her group of
friends” and that “also deprived her of the social interaction and bonding that
commonly occurs in girls’ restrooms during these formative years.”

**Adoption of a discriminatory policy on the basis of gender identity would be
harmful to the health and well-being of transgender students.**

Adopting policies that discriminate on the basis of gender identity would harm
the health and well-being of the transgender students within the School District. And
requiring transgender students to use a single-user restroom or other facility separate
from other students, or a faculty or nurse’s restroom, does not solve these problems, but
rather exacerbates them by singling out the student for restrictions based on gender
identity. Indeed, discriminatory restroom policies single out transgender students as
different and send a clear message to their peers that there is something wrong with
them or inferior about them. Transgender students already face high rates of physical
and verbal harassment in schools, and discriminatory restroom policies invite further
harassment by inviting peers as well as school staff to question transgender students
about their bodies—questions that would universally be considered inappropriate and
harassing if they were directed toward non-transgender children—and would cause
transgender students to be “outed” without their permission or consent if forced to use
separate facilities that are not used by other students (such as single-user restrooms or
faculty restrooms), or if forced to use restrooms and other facilities that do not match
their gender identity.

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529.pdf.

26 Id. at 11.

27 See G. Kosciw et al., GLSEN, *The 2013 National School Climate Survey* 23 (2014), available at
html/downloads/reports/reports/ntds full.pdf (“Those who expressed a transgender identity or gender
non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%)
and sexual violence (12%); harassment was so severe that it led almost one-sixth (15%) to leave a school in
K-12 settings or in higher education.”); Pub. Health Agency of Can., *Gender Identity in Schools:
Questions and Answers* 4 (2010) (“Studies suggest that in the school setting, as many as 96% of gender
variant youth are verbally harassed and as many as 83% physically harassed. As a result, as many as
three-quarters of gender variant youth report not feeling safe in school and three out of four report
dropping out.”).
These discriminatory restroom policies stigmatize and ostracize transgender students and can contribute to lower self-esteem and serious mental health conditions, such as depression and suicidal inclinations. Discriminatory restroom policies can inflict physical harm by causing transgender students to fast, dehydrate themselves, or refrain from using restroom facilities at all. Exclusionary policies also interfere with medically necessary treatment for gender dysphoria, the medical diagnosis for “discomfort or distress that is caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth.” Treating gender dysphoria typically involves social role transition, wherein transgender people come to live all aspects of their lives consistently with their gender identity—including accessing restrooms and other facilities consistent with one’s gender identity.

Discriminatory restroom policies and the stigma they impose upon transgender students also impair the academic success of transgender students by affecting their attendance, causing a decline in their grades, and driving some transgender students to drop out of school altogether.

The School District cannot accept private biases or generalized and speculative privacy concerns as a basis for discriminatory policies.

We understand that some have expressed the view that permitting transgender students to use restrooms and locker rooms consistent with their gender identity infringes on the privacy of non-transgender students. But the School District cannot accept the private biases or preferences of others, or generalized or speculative privacy concerns as a basis for discriminatory policies.


30 Eli Coleman et al., World Prof’l Ass’n for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People 5, 8-10 (7th ed. 2012).

concerns, to justify a discriminatory policy that would prevent a transgender student from using the same restrooms and single-sex facilities as those of the same gender. Indeed, the DOJ has explicitly recognized that, with respect to transgender individuals’ access to restrooms in accordance with gender identity, “generalized assertions of safety and privacy cannot override Title IX’s guarantee of equal educational opportunity.”32

Courts, too, have recognized that a person’s discomfort with sharing public spaces with transgender individuals is not a legitimate basis to exclude transgender individuals from accessing restrooms and other spaces where people are separated based on sex. For example, in *Dept. of Fair Employment and Housing v. American Pac. Corp.*, 2014 WL 2178570, *4* (Cal. Super. Ct. Mar. 13, 2014), the court held that an employer could not defend its policy prohibiting a transgender man from using a men’s locker room by appealing to employees’ supposed discomfort in sharing the restroom with transgender individuals, because such “hypothetical assertions of emotional discomfort” were “no different than similar claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation in housing, education, and access to public facilities like restrooms, locker rooms, swimming pools, eating facilities, and drinking fountains.” Similarly, the court in *Cruzan v. Special Sch. Dist. # 1*, 294 F.3d 981 (8th Cir. 2002) rejected the discrimination claims of a female teacher who objected to sharing a workplace restroom with a female transgender co-worker, finding plaintiff had alleged no harm beyond the “[m]ere inconvenience” of having to share a space with a transgender person. *Id.* at 984. The court also found that the objecting teacher was free to use other restrooms, noting that “[s]ingle-stall, unisex bathrooms are also available.” *Id.*33

Finally, there is a simple means of addressing any privacy concerns that does not involve discrimination against transgender students. Should a student find the presence of a transgender student in a restroom or other single-sex space disconcerting, it is the objecting student who should be invited to use a single-user restroom or other separate facility, not transgender students—who seek nothing more than to live their lives consistent with their gender identity and with the respect and dignity they deserve.34


33 See also *California Education Committee, LLC v. O’Connell*, No. 34-2008-00026507-CU-CR-GDS, slip op. (Cal. Super. Ct. June 1, 2009) (student’s privacy rights not violated by having to share locker room with transgender student); *Crosby v. Reynolds*, 763 F. Supp. 666, 669 (D. Me. 1991) (sharing housing with “a preoperative transsexual” did not “violate[] a clearly established constitutional right” to privacy); *Lusardi*, 2015 WL 1607756, at *9 (“[a]llowing the preference of co-workers to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices” the law is meant to overcome).

34 See also Note 12, OCR Letter, *supra*, at 12 (“Those female students wishing to protect their own private bodies from exposure to being observed in a state of undress by other girls in the locker rooms, including transgender girls, could change behind a privacy curtain.”).
The School District would potentially be subject to liability and a loss of funding if it were to discriminate against transgender students.

ADF has claimed in its letter to the School District that permitting transgender students to access facilities appropriate to their gender identity amounts to “inappropriate exposure to the opposite sex in intimate settings” and supposedly forces students into “vulnerable interactions with opposite-sex students.” ADF has also claimed that the School District could be subject to tort liability if it does not change its policy so as to prohibit transgender students from accessing facilities that do not correspond to their “biological” or “anatomical” sex. That is a mischaracterization of the High School’s policy and a misstatement of the law. Pine-Richland High School’s policy does not permit sex-specific facilities to be used by “members of the opposite sex”; it merely permits transgender students to use restrooms and other facilities appropriate to their gender, like other students. And there is no basis for ADF to suggest that any transgender students in the School District have engaged in any harassing or offensive behavior, or what ADF refers to as “vulnerable interactions.”

Moreover, ADF’s letter cites no legal authority—and we are not aware of any—that stands for the proposition that a school will be exposed to liability based on a policy permitting transgender students to live their lives consistently with their gender identity. To the contrary, as explained above, the law prohibits discrimination against transgender students and requires that those students be treated consistently with their gender identity, and the School District would potentially be subject to liability, and a loss of Title IX funding, were it to discriminate against its transgender students.

*   *   *

At the end of the day, transgender and gender-nonconforming students seek nothing more than to be treated like all other students and with dignity and respect. A practice or policy that would force transgender students to use restrooms and other facilities that are not appropriate to their gender identity, or that would require them to use a separate, single-user restroom or locker room, would not be consistent with notions of fairness, equality and dignity and would run afoul of the School District’s obligations under local, state and federal anti-discrimination law.

To assist transgender and gender-nonconforming students as well as school districts across the country, we have prepared several resources you may find useful. For more information, you can visit our “Know Your Rights: Transgender” hub at http://www.lambdalegal.org/know-your-rights/transgender, where we provide guidance on matters such as restroom access rights and the updating and maintenance of school records. You may also access our “Transgender Rights Toolkit: Equal Access to Public Restrooms” at http://www.lambdalegal.org/publications/trt_equal-access-to-public-restrooms.
We hope that the School District continues to respect the gender identity of all students and act in compliance with its obligations under local, state and federal law. Should you have any questions or need further information, please do not hesitate to contact us at 212-809-8585.

Very truly yours,

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35 This letter is not intended to set forth a complete statement of all of the legal rights or remedies of the students we represent, nor all of the relevant facts, nor the legal or equitable bases on which the students’ rights and remedies rest, nor to waive or compromise them in any way.
On September 23, 2013, Complainant filed an appeal from the Agency's September 5, 2013, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Commission accepts the appeal pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether Complainant proved that she was subjected to disparate treatment and harassment based on sex when the Agency restricted her from using the common female restroom, and a team leader (S3) intentionally and repeatedly referred to her by male pronouns and made hostile remarks.

BACKGROUND

This case concerns allegations of disparate treatment on the basis of sex in the terms and conditions of Complainant's employment and allegations that harassment based on sex subjected Complainant to a hostile work environment. Although Complainant was hired as a civilian employee with the U.S. Army Aviation and Missile Research Development and Engineering Center (“AMRDEC”) at Redstone Arsenal in Huntsville, Alabama in 2004, the allegations in this complaint relate only to the period from October 2010 to August 2011 (the “relevance time period”). Complainant was employed at the AMRDEC Software Engineering Directorate (“SED”) under the supervision of S1, the Quality Division Chief. During the relevant time period, however, Complainant was co-located in a separate unit - the Project Management Office, Aircraft Survivability Equipment (“ASE”) where she worked as a Software Quality Assurance Lead under the direction of S3, the Software Engineering Lead, who was in turn supervised by S2, the Technical Chief. In August 2011, Complainant returned to her primary job at SED.

Complainant's Transition and Bathroom Access

Complainant is a transgender woman. Although Complainant had discussed her gender identity with S1 as early as 2007, she began the process of transitioning her gender presentation/expression in 2010. In April 2010, Complainant obtained a decree from an Alabama court changing her name from one commonly associated with men to one commonly associated with women. At that time, she also requested that the government change her name and sex on all personnel records. The Office of Personnel Management (“OPM”) effected those changes on October 13, 2010. This caused Complainant's work e-mail address to reflect her new name.
On October 26, 2010, at the request of S2, Complainant met with S2 and S1 to discuss the process of transitioning from presenting herself as a man to living and working, in conformance with her gender identity, as a woman. At that meeting, Complainant and her supervisors discussed how Complainant would explain her transition to colleagues and the estimated timeline for any medical procedures.

*2 As part of that meeting, they also discussed which bathrooms Complainant would use when she began presenting as a woman. The plan, written in the form of a memorandum from Complainant to management, indicated that Complainant would use a single-user restroom referred to as the “executive restroom” or the “single shot rest room” rather than the multi-user “common women's restroom” until Complainant had undergone an undefined surgery.

S2 testified that in his recollection no one “insisted” that Complainant utilize only the executive restroom but that the plan was mutually crafted by himself, S1, and Complainant. Report of Investigation (ROI), Volume (Vol.) 1, 2323; Transcript of Fact-Finding Conference (TR) 123. According to Complainant, “We agreed up front in order to allow people to become accustomed to me and not feel uncomfortable that I would use the front bathroom for a period of time.” ROI Vol. 1, 2223; TR 23. She testified that she agreed to use the executive bathroom for the initial period “[b]ecause I have a good heart and I did believe there were people who might have issues with it and the ability for them to grow comfortable with who I was . . . would have provided it.” ROI Vol.1, 2223-2224; TR 23-24. S1 expressed at the time that it was her belief, after consulting with Human Resources, that because Complainant was a woman, she was free to use whichever women's restroom she wanted. ROI Vol. 1, 2224, 2389; TR24, 189.

Regardless of the motivations behind the creation of the transition plan, it apparently had to be “approved” by higher level management. The Deputy Program Manager of the Program Executive Office testified that he made the final decision as to which bathroom Complainant would use. ROI Vol. 1, 2451; TR 251. He stated:

I made the decision based on the fact that I have a significant number of women in my building who would probably be extremely uncomfortable having an individual, despite the fact that she is conducting herself as a female, is still basically a male, physically.

And that would cause as many problems if more problems [sic] than having the individuals use a private bathroom. I also thought that under the circumstances, a male restroom would be inappropriate. So, that was left [sic] to use the single use bathrooms.

ROI Vol. 1, 2452; TR 252. Additionally, a Lieutenant who supervised S2 testified that Complainant's bathroom access was conditioned on a medical procedure:

[W]e all agreed back then that there was a procedure, operation that was to take place that would essentially signify a complete transformation to a female. . . And that procedure would be the point of where all the bathrooms would be on limits for or within limits for [the Complainant] to use for that point.

ROI Vol. 1, 2491; TR 291.

The transition plan was given final approval by the Deputy Program Manager in early November 2010. Complainant e-mailed the entire staff on November 22, 2010, explaining her situation and indicating that for an initial period, she would use the executive restroom. She began presenting as a woman at work following the Thanksgiving holiday. Complainant regularly used the executive restroom except on three occasions in early 2011. On one occasion, the executive restroom was out of order for several days. On another occasion, the executive restroom was being cleaned. In these incidents, Complainant felt that her only options were to leave the facility to locate a restroom off-site, use the common women's restroom, or use the common men's restroom. She chose to use the restroom associated with her gender. After each incident, Complainant was confronted by S2 who told her she'd been observed using the common women's restroom, that she was making people uncomfortable, and that she had to use the executive restroom until she could show proof of having undergone the “final surgery.” ROI Vol. 1, 2245; TR 45.
Complainant testified that in January 2011 when S2 confronted her about using the common women's restroom, she responded, “I am legally female. I used it.” ROI Vol. 1, 2229; TR 29.

Harassment

During the relevant time period, S3 repeatedly referred to Complainant by her former male name, by male pronouns, and as “sir.” Complainant testified that S3 referred to her using these male signifiers on at least seven occasions when he did not correct himself, on four additional occasions when he did correct himself, and, specifically, in a July 2011 e-mail exchange. Complainant stated that S3 referred to her using male signifiers during heated discussions and meetings. S3 made these comments in front of coworkers and contractors and sometimes in front of people who had no prior knowledge of her transition. Complainant did not correct S3 because she did not want to question her supervisor in front of other people. Additionally, Complainant did not correct S3 in private because she felt she “was in enough hot water” and “anything else ... would have gotten [her] kicked out of there.” ROI Vol. 1, 2264; TR 64.

S3 admitted to using male signifiers in reference to Complainant even after he was aware of her gender transition, but attempted to excuse his behavior by saying it was not meant in a malicious way and was merely a “slip of the tongue.” ROI Vol. 1, 2299-2300; TR 99-100. Complainant acknowledged that there were occasions when S3's usage of male signifiers was merely a “slip of the tongue,” but Complainant also believes there were occasions when S3 intentionally used male pronouns to refer to Complainant in order to elicit a response from her. ROI Vol.1, 2299, 285; TR 85. Complainant testified that she could tell S3 used male signifiers during heated discussions or moments of anger because “[h]is veins were popping out of his forehead, his face was red, and he was quite agitated.” ROI Vol.1, 2286; TR 86. Complainant also stated that during these exchanges S3's demeanor and body language were ““representative of a negative connotation.” ROI Vol. 1, 2275; TR 75.

In July 2011 Complainant and S3 exchanged a series of e-mails regarding Complainant's belief that her team members did not treat her as an equal. In a July 26, 2011 e-mail, in response to Complainant's statement that S3 was on the side of other employees who do not treat her as an equal, S3 responded to Complainant, “Sir, not on anyone's side.” ROI Vol. 1, 488. Complainant testified that S3 wrote “sir” in this e-mail out of anger because during their “verbal conversation that ensued after that e-mail ... he was fairly agitated.” ROI Vol. 1, 2268; TR 68.

Witness testimony corroborates that during the relevant time period S3 intentionally referred to Complainant by her former male name and as “sir” well after Complainant's November 2010 letter notifying her colleagues of her transition. ROI Vol. 1, 2531; TR 331. Specifically, a witness stated that S3 smirked and giggled in front of others while joking, “What is this, [Complainant's former male name] or [Complainant's name]?” Vol. 1, 2534; TR 334. This witness also testified that Complainant stated she was working in a hostile or uncomfortable environment.

After Complainant's e-mail address changed to reflect her name, but before she began presenting as female, curious coworkers questioned Complainant about the situation. As a result of the questions S2 asked Complainant to “hold down the chatter with people that were inquiring” about her transition. ROI Vol.1, 2222; TR 22.

Complainant testified that, although she did not inform management that she felt she was being subjected to a hostile work environment, she did tell Colonel 2 that there were “some issues.” ROI Vol. 1, 2269, TR 69.

EEO Investigation and Final Agency Decision

Complainant initiated EEO counselor contact on September 6, 2011, and filed a formal complaint on March 14, 2012, alleging that the Agency subjected her to disparate treatment and a hostile work environment based on sex when the Agency restricted her from using the common female restroom and a team leader (S3) repeatedly referred to her by her
former male name and called her “sir.” The Agency accepted the complaint and conducted an investigation, including a fact-finding conference. The Agency issued Complainant a copy of the investigative file and a notice of right to request a hearing before an EEOC Administrative Judge (AJ) or an immediate final agency decision (FAD). Complainant elected an immediate FAD, which the Agency issued on September 5, 2013.

In its final decision, the Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination or harassment as alleged. Specifically, the Agency concluded that it had provided legitimate, non-discriminatory reasons for its requirement that she use the executive restroom, and that Complainant failed to show that the explanations were pretext for unlawful discrimination. The Agency determined that, during a meeting with management, Complainant agreed to use the “single shot” executive restroom until she “had surgery,” and that testimony and e-mails between Complainant and management reflected that management was supportive of Complainant and “committed to ensuring [Complainant] would be treated with dignity and respect.” Additionally, the Agency concluded that Complainant had not shown that she was subjected to disparate treatment based on sex because Complainant did not tell management that the amenities in the executive restroom were inadequate compared to the common female restroom facility and, therefore, management did not deny her access to equal facilities.

The Agency further determined that, although S2 reminded Complainant about the bathroom access plan she had with management, the comments were not sufficiently severe or pervasive to constitute harassment.

With respect to Complainant's claim that S3 referred to her by male pronouns, names, and titles, the Agency concluded that these were isolated incidents that were not sufficiently severe or pervasive to constitute a hostile work environment.

On September 23, 2013, Complainant filed this appeal of the agency's final decision.

**CONTENTIONS ON APPEAL**

Complainant contends that the Agency erred when it found that she failed to show that she was subjected to sex discrimination and harassment. Complainant contends that, by restricting her to the single stall restroom because she is transgender, the Agency changed the terms and conditions of her employment solely based on her sex, in violation of Title VII. Complainant also reiterates her claim that the Agency subjected her to a hostile work environment by allowing S3 to refer to her by a male name and pronouns. Complainant contends that, although S3 claimed that his use of incorrect gender pronouns and names was a “slip of the tongue,” S3 only did this in heated exchanges or group settings and in a manner that communicated a derogatory connotation. Complainant maintains that “these daily humiliations and reminders that the Agency did not accept her gender identity created a hostile work environment.” Complainant's Brief, p. 10.

In its reply, the Agency requests that we affirm its final decision. The Agency maintains that, taking into account the concerns of Complainant's female co-workers who had known her as male for years, management asked Complainant to use the single-stall restroom in the executive suite, and she agreed to do so until her surgery was “complete.” The Agency maintains that there is no law that mandates that agencies allow transgender individuals to use restrooms that are consistent with their gender identity. The Agency further maintains that, if it had been aware of Complainant's concerns about the restroom facilities, arrangements could have been made to accommodate her needs, but it is unclear whether her inability to use a restroom with equivalent amenities constitutes an adverse action. The Agency contends that the record reflects that it was “very supportive of the complainant's transition from male to female,” and that Complainant was grateful for her managers' and co-workers' support. Agency Brief, p. 7. The Agency concludes that, in the absence of legal precedent, management worked out a “fair solution” that took into account the concerns of all employees. Id.

**STANDARD OF REVIEW**
As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.A. (Nov. 9, 1999) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law”).

ANALYSIS AND FINDINGS

Disparate Treatment: Restroom Facilities

*6 Title VII states that “[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex.” 42 U.S.C. § 2000e-16(a). This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1), (2) (making it unlawful for a covered employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,” or 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 sex).

To establish a claim of disparate treatment on the basis of sex, a complainant must show the agency took an adverse employment action against the complainant because of the complainant's sex. This can be shown through either direct or indirect evidence.

“Direct evidence” is either written or verbal evidence that, on its face, demonstrates bias and is linked to an adverse action. Pomerantz v. Dept' of Veterans Affairs, EEOC Appeal No. 01990534 (Sept. 13, 2002). Where there is direct evidence of discrimination, there is no need to prove a prima facie case or facts from which an inference of discrimination can be drawn. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). Moreover, where the trier of fact finds that there is direct evidence of discrimination, liability is established. Guidance on Recent Developments in Disparate Treatment Theory, No. 915.002, July 14, 1992, Section III; EEOC Compliance Manual § 604.3, “Proof of Disparate Treatment,” at 6-7 (June 1, 2006).

Complainant is a transgender individual. “Transgender” is an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth. American Psychological Association, Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression, p. 1 (2011); see also Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes”). “Gender identity” refers to a person's internal sense of being male or female (or, in some instances, both or neither); “gender expression” refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics. Id. In this case, Complainant identified as female and has consistently presented herself as female since at least November 2010.

*7 Complainant alleges that the Agency subjected her to sex discrimination when it treated her differently than other employees because she is transgender. In Macy v. Department of Justice, EEOC Appeal No. 0120120821 (April 20, 2012), the Commission held that discrimination against a transgender individual because that person is transgender is, by definition, discrimination “based on . . . sex,” and such discrimination violates Title VII, absent a valid defense. We stated:

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment “related to the sex of the victim.” See Schwenk, 204 F.3d [1187] at 1202. This is true regardless.
of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that “an employer may not take gender into account in making an employment decision.” Price Waterhouse, 490 U.S. at 244.

Here, the Agency acknowledges that Complainant's transgender status was the motivation for its decision to prevent Complainant from using the common women's restroom. The Deputy Program Manager testified that the restriction was imposed due to the Agency's belief that a significant number of women in the building would be “extremely uncomfortable having an individual [use the common female restroom because], despite the fact that she is conducting herself as a female, [the individual] is still basically a male, physically.” Likewise, the Agency acknowledges that it restricted Complainant from the common women's restroom because of concerns about employee reaction to Complainant as a transgender individual. S1, for example, testified that management limited Complainant to the front executive restroom because it otherwise would have been a “real shocker for everyone in the workplace.” This constitutes direct evidence of discrimination on the basis of sex.

The Agency defends its actions in part by pointing out that the Complainant agreed to use the “single shot” restroom while other employees adjusted to her transition. In this case, the “agreement” in question was a one-page memorandum from the Complainant to the management team. It outlined the reasons for Complainant's transition and a tentative list of next steps under the heading “Path Forward.” The first step, starting in mid-November, was for Complainant to start dressing consistent with her gender identity. During this time, her plan said she would “use [the] single shot restroom.” The next step, set to occur about a month later, was for Complainant to undergo an undefined “Surgical Procedure” and then put in a request to use the common facility. In accordance with her plan, Complainant used the single-shot restroom in the period following her change in dress. She apparently did not undergo a surgical procedure in December and did not submit a formal request to use the common facility exclusively. On two occasions, however, she found that the single-shot restroom was out-of-order or closed and decided to use the common facility. She was confronted by S2 after each time she used the common facility. He told her that she could not use those facilities until she had undergone “final surgery.” Complainant asserted in response that she was “legally female” and entitled to use the women's restroom if needed.

This case represents well the peril of conditioning access to facilities on any medical procedure. Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity (for transgender individuals, or anyone else). An agency may not condition access to facilities -- or to other terms, conditions, or privileges of employment -- on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity. 3

On this record, there is no cause to question that Complainant -- who was assigned the sex of male at birth but identifies as female -- is female. And certainly where, as here, a transgender female has notified her employer that she has begun living and working full-time as a woman, the agency must allow her access to the women's restrooms. This “real life experience” often is crucial to a transgender employee's transition. As OPM points out:

Commencement of the real life experience is often the most important stage of transition, and, for a significant number of people, the last step necessary for them to complete a healthy gender transition. As the name suggests, the real life experience is designed to allow the transgender individual to experience living full-time in the gender role to which he or she is transitioning... Once [a transitioning employee] has begun living and working full-time in the gender that reflects his or her gender identity, agencies should allow access to restrooms and (if provided to other
employees) locker room facilities consistent with his or her gender identity. . . . [T]ransitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to have access to facilities designated for use by a particular gender.

OPM Transgender Guidance.

Agencies are certainly encouraged to work with transgender employees to develop plans for individual workplace transitions. For a variety of reasons, including the personal comfort of the transitioning employee, a transition plan might include a limited period of time where the employee opts to use a private facility instead of a common one. See id.

Circumstances can change, however and an employee is never in a position to prospectively waive Title VII rights. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (“[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII.”); see also Vigil v. Dep’t of the Army, EEOC Request No. 05960521 (June 22, 1998) (“. . . [an] agreement that waives prospective Title VII rights is invalid as violative of public policy.”) Agencies should, as the OPM Guidance suggests, view any plan with a transitioning employee related to facility access as a “temporary compromise” and understand that the employee retains the right under Title VII to use the facility consistent with his or her gender. OPM Transgender Guidance.

*9 The Agency states that it would not allow Complainant to use the common female restroom because co-workers would feel uncomfortable with this approach. We recognize that certain employees may object -- some vigorously -- to allowing a transgender individual to use the restroom consistent with his or her gender identity. Some, like the Agency decision makers in this case, may not believe a transgender woman is truly female, and thus entitled or eligible to use a female bathroom, unless she has had gender reassignment surgery. Some co-workers may be confused or uncertain about what it means to be transgender, and/or embarrassed or even afraid to share a restroom with a transgender co-worker.

But supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort. See Macy, EEOC Appeal No. 0120120821; see also Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (female employee could not lawfully be fired because employer's foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants). Allowing the preferences of co-workers to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices that Title VII is intended to overcome.5 See Diaz, 442 F.2d at 389 (“While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large, extent, these very prejudices the Act was meant to overcome.”); Olsen v. Marriott Int'l, Inc., 75 F. Supp. 2d 1052 (D. Ariz. 1999); cf. Cruzan v. Special Sch. Dist., No.1, 294 F.3d 981 (8th Cir. 2002) (school's policy of allowing transgender women to use women's faculty restroom did not create a hostile work environment for other employees).

Finally, the Agency maintains that it is unclear whether restricting Complainant from using the common restrooms is even an adverse employment action. The Commission has long held that an employee is aggrieved for purposes of Title VII if she has suffered a harm or loss with respect to a term, condition, or privilege of employment. Diaz v. Dep't of Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). Equal access to restrooms is a significant, basic condition of employment. See e.g., OSHA, Interpretation of 20 C.F.R. 1910.141 § (c)(1)(i): Toilet Facilities (Apr. 4, 1998) (requiring that employers provide access to toilet facilities so that all employees can use them when they need to do so). Here the
Agency refused to allow the Complainant to use a restroom that other persons of her gender were freely permitted to use. That constitutes a harm or loss with respect to the terms and conditions of Complainant's employment.  

But the harm to the Complainant goes beyond simply denying her access to a resource open to others. The decision to restrict Complainant to a “single shot” restroom isolated and segregated her from other persons of her gender. It perpetuated the sense that she was not worthy of equal treatment and respect (making it unlawful to “segregate” employees in any way that deprives or tends to deprive them of equal employment opportunities); Religious Garb and Grooming in the Workplace: Rights and Responsibilities, Q. 8 and Ex. 8 (limiting employees who wear religious attire that might make customers uncomfortable to “back room” positions constitutes religious segregation and violates Title VII). The Agency's actions deprived Complainant of equal status, respect, and dignity in the workplace, and, as a result, deprived her of equal employment opportunities. In restricting her access to the restroom consistent with her gender identity, the Agency refused to recognize Complainant's very identity. Treatment of this kind by one's employer is most certainly adverse.

In sum, we find that the Agency's decision to restrict Complainant's access to the common women's restroom on account of her gender identity violated Title VII. We further find that the record contains direct evidence that the decision was based on the gender identity of the Complainant. The Agency, therefore, erred when it found that Complainant was not subjected to sex-based disparate treatment.

Harassment: Gender Pronouns, Titles, and Access to Facilities

To establish a claim of hostile work environment harassment, Complainant must show (1) that she was subjected to harassment in the form of unwelcome verbal or physical conduct because of a statutorily protected basis and (2) that the harassment had the purpose or effect of unreasonably interfering with the work environment and/or created an intimidating, hostile, or offensive work environment. See Harris v. Forklift Systems, 510 U.S. 17, 21 (1993).

In this case, Complainant contends that she was subjected to a hostile work environment because management restricted her from using the common women's restroom even after Complainant made clear that she no longer agreed with the initial plan restricting her to the executive bathroom facility, and S3 engaged in demeaning behavior toward her by refusing to refer to her correct name and gender.

Complainant testified that S3 called her male names and “sir” in moments of anger or in group settings, and that his body language reflected a negative connotation and intentional conduct when he did so. Complainant testified that S3 called her “sir” on approximately seven occasions, including in an e-mail in which he engaged Complainant in a heated discussion about work matters. Complainant is not the only witness to testify that S3 intentionally referred to Complainant with male names. We note that one witness testified that he thought that S3 intentionally referred to Complainant as “sir” and by her former male name well after Complainant announced her transition to co-workers in November 2010. The witness further testified that S3 also smirked and giggled and said to her, “Oh well, do we call her [by her male or female name]?” Further, the record contains a copy of e-mail correspondence between Complainant and S3 on July 26, 2011. The e-mails reveal that, after Complainant wrote that S3 was on the side of other employees who do not treat her as an equal, S3 responded, “No Sir, not on anyone's side.” The e-mails also reflect that this exchange occurred in the context of heated exchanges about work activities between Complainant and S3. S3 maintains that calling Complainant “‘sir” or referring to her with a male name was “just a slip of the tongue and only occurred twice.

After reviewing witness testimony and the e-mail exchanges between Complainant and S3, we are persuaded that S3's use of “sir” in this and several other situations was intentional. The e-mail exchanges reflect that S3 sometimes used male names and pronouns to insult Complainant or to convey sarcasm. Additionally, witness testimony indicates that S3 sometimes laughed and smiled when mentioning Complainant in groups and would say her feminine name with a
smirk. Further, Complainant testified in detail about S3's agitated demeanor when referring to her with male pronouns and names and another witness spoke of S3's “general feeling of hostility” toward Complainant and the snide comments S3 made that pertained to Complainant's transition and clothing. Complainant also testified that S3 seemed to especially call her male names when in the presence of other employees as a way to reveal that Complainant is transgender, as well as to ridicule and embarrass her.

The Commission has held that supervisors and coworkers should use the name and gender pronoun that corresponds to the gender identity with which the employee identifies in employee records and in communications with and about the employee. See Jameson v. U.S. Postal Serv., EEOC Appeal No. 0120130992 (May 21, 2013). Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment when “judged from the perspective of a reasonable person in the employee's position. See Oncale v. Sundowner Offshore Services, 523 U.S. 75, 81 (1998); see also Jameson, EEOC Appeal No. 0120130992; OPM Transgender Guidance (“Continued intentional misuse of the employee's new name and pronouns, and reference to the employee's former gender by managers, supervisors, or coworkers may undermine the employee's therapeutic treatment, and is contrary to the goal of treating transitioning employees with dignity and respect. Such misuse may also breach the employee's privacy, and may create a risk of harm to the employee.”).

In this case, Complainant had clearly communicated to management and employees that her gender identity is female and her personnel records reflected the same. Yet S3 continued to frequently and repeatedly refer to Complainant by a male name and male pronouns. While inadvertent and isolated slips of the tongue likely would not constitute harassment, under the facts of this case, S3's actions and demeanor made clear that S3's use of a male name and male pronouns in referring to Complainant was not accidental, but instead was intended to humiliate and ridicule Complainant. As such, S3's repeated and intentional conduct was offensive and demeaning to Complainant and would have been so to a reasonable person in Complainant's position.

Moreover, in determining whether actionable harassment occurred, S3's actions must be considered in the context of the Agency's actions related to Complainant's restroom access. As we note above, even after Complainant indicated that she no longer wished to abide by her initial plan regarding bathroom use, the Agency refused to allow Complainant to use the restroom consistent with her gender identity. It publicly segregated and isolated Complainant from other employees of her gender and communicated that she was not equal to those other employees because she is transgender. S3's comments compounded that discrimination and sent the message that Complainant was unworthy of basic respect and dignity because she is a transgender individual. Additionally, S3 was a team leader and his actions sometimes occurred in the presence of other employees and during meetings, signaling that such conduct was endorsed by Agency leadership.

Considering all these circumstances as we must, we find that these actions were sufficiently severe or pervasive to subject Complainant to a hostile work environment based on her sex. Because Complainant established that she was subjected to a level of severe or pervasive sex-based harassment that meets the Title VII standard for liability, the final element of our analysis is whether the Agency itself is liable for that harassment.

An agency may be vicariously liable for unlawful harassment by an employee when the agency has empowered that employee to take tangible employment actions against the victim -- i.e., the harassing employee is a supervisor of the victim. Vance v. Ball State University, 570 U.S. ___, 133 S.Ct. 2434 (2013). In cases where the harassing employee (or employees) is a co-worker of the victim, an agency is responsible for acts of harassment in the workplace when the agency was “negligent in permitting the harassment to occur.” Id. at 2451. Negligence in permitting harassment to occur can take many forms. An assessment of whether an Agency is liable under this standard depends on the facts and circumstances of each case and the unique context of each workplace. See id. at 2451 (discussing “variety of situations” that a negligence standard can address).
In her appeal, the Complainant alleged that the Agency was liable under the negligence theory. We therefore analyze her claim under that standard. 10

In this case, Complainant did not report S3's harassment to management. However, we note that S3's conduct sometimes occurred in groups or in the presence of other employees. For example, a witness testified that she witnessed S3 among a group of employees in which he would laugh and smile when Complainant's name was mentioned, and the group would laugh. Another witness testified that S3 would openly refer to Complainant by her former masculine name in the presence of other employees and smirk and giggle about it, well after he was aware of Complainant's gender identity as female. This witness testimony reflects that S3's conduct was pervasive, well-known, and openly practiced in the workplace. Consequently, we find that the Agency knew or should have known about S3's harassment. See *Mayer v. Dep't of Homeland Security*, EEOC Appeal No. 0120071846 (May 15, 2009) (Agency had constructive knowledge of sexual harassment because employees were aware that harasser was harassing Complainant); *Taylor v. Dep't of the Air Force*, EEOC Request No. 05920194 (July 8, 1992) (employers will generally be deemed to have constructive knowledge of harassment that is openly practiced in the workplace or is well-known among employees). There is no evidence that the Agency took prompt and effective corrective action to address the harassment. In fact, the only Agency actions we find in the record are when Complainant's supervisors chastised her for using a facility consistent with her gender and for discussing her transition with other employees. Consequently, we find that the Agency was negligent in permitting the harassment to occur and is therefore liable.

*13 In summary, we find that Complainant proved that she was subjected to disparate treatment on the basis of sex when she was denied equal access to the common female restroom facilities. We further find that the Agency is liable for subjecting Complainant to a hostile work environment based on sex by preventing her from using the common female restroom facilities and allowing a team leader intentionally and repeatedly to refer to her by male names and pronouns and make hostile remarks well after he was aware that Complainant's gender identity was female.

Decision of the Office of Special Counsel

Complainant filed a prohibited personnel practice complaint against the Agency with the U.S. Office of Special Counsel (OSC) based on the events described above. On August 29, 2014, OSC issued a report finding that the Agency had discriminated against Complainant based on conduct not adverse to work performance, in violation of *5 U.S.C. §2302(b)(10)*. U.S. Office of Special Counsel, Report of Prohibited Personnel Practice, OSC File No. MA-11-3846 (Jane Doe) (August 28, 2014) (the “OSC Report”). The report's findings were based, in part, on OSC's interpretation of Title VII requirements. OSC explained that, while it was not making any explicit findings related to sex discrimination, “EEO law and federal policies relating to discrimination based on sex, including gender identity and expression, . . . circumscribes the permissible considerations that an agency may make when determining whether conduct adversely affects work performance for purposes of *section 2302(b)(10).*” OSC Report at 1. Specifically, OSC found that “the Agency unlawfully discriminated against [Complainant] on the basis of gender identity, including her gender transition from man to a woman--conduct which did not adversely affect her performance or the performance of others.” Id. at 5.

OSC recommended that the Agency provide appropriate lesbian, gay, bisexual, and transgender (LGBT) diversity and sensitivity training to AMRDEC employees at Redstone Arsenal. OSC further recommended that appropriate remedial training regarding prohibited personnel practices, especially as they relate to transgender employees, be given to AMRDEC supervisors at Redstone Arsenal. OSC also found that Complainant did not suffer any economic harm that would require back pay, and that Complainant was ineligible to collect compensatory damages because the facts of this case arose before Congress created a compensatory damages remedy under section 107(b) of the Whistleblower Protection Enhancement Act of 2012; that provision is not retroactive. 11 OSC noted that it made no finding regarding Complainant's ability to recover damages under Title VII. 12
The OSC report does not moot the claim before the Commission. OSC addressed whether the Agency's actions violated U.S. government personnel practices. The answer to that question was affected, but not settled, by Title VII principles. Our decision today addresses the Agency's actions in light of the sex discrimination provisions in Title VII. However, in the Order below, we take notice of the remedies already prescribed by OSC in order to avoid duplicative actions by the Agency.

CONCLUSION

Consequently, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, the Commission REVERSES the Agency's final decision. We REMAND this matter to the Agency to take remedial actions in accordance with this decision and the ORDER below.

ORDER (E0610)

The Agency is ORDERED to undertake the following actions:

1. The Agency shall immediately grant Complainant equal and full access to the common female facilities.
2. The Agency shall immediately take meaningful and effective measures to ensure that coworkers and supervisors cease and desist from all discriminatory and harassing conduct directed at Complainant, and ensure that Complainant is not subjected to retaliation because of her EEO activity.
3. Within one hundred and twenty (120) calendar days from the date this decision becomes final, the Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages, and will afford her an opportunity to establish a causal relationship between the hostile work environment to which she was subjected and her pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages, and will provide all relevant information requested by the Agency. The Agency will issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. A copy of the final decision must be submitted to the Compliance Officer, as referenced below.
4. Within one hundred and twenty (120) calendar days from the date this decision becomes final, the Agency shall provide at least eight hours of EEO training to all civilian personnel and contractors working at its Aviation Missile Research Development Engineering Center at Redstone Arsenal, and the Huntsville Project Management Office. The training shall place special emphasis on sex discrimination, including issues of gender identity, harassment, and preventing and eliminating retaliation. Additionally, the training shall inform employees about the EEO process and how to report harassment in their workplace organization. The Agency may count the diversity and sensitivity training ordered by OSC towards the eight hours required by this Order.
5. Within one hundred and twenty (120) calendar days from the date this decision becomes final, the Agency shall provide at least 16 hours of in-person EEO training to all management officials at its Aviation Missile Research Development Engineering Center at Redstone Arsenal, and the Huntsville Project Management Office, regarding their responsibilities to ensure equal employment opportunities and the elimination of discrimination in the federal workplace. The training shall place special emphasis on sex discrimination, including issues of gender identity, harassment, and preventing and eliminating retaliation. The Commission does not consider training to be disciplinary action. The Agency may count in-person diversity and sensitivity training ordered by OSC towards the sixteen hours required by this Order.
6. The Agency shall consider taking appropriate disciplinary action against S2 and S3 and report its decision. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If S2 or S3 have left the Agency's employ, the Agency shall furnish documentation of the departure date.
7. The Agency shall post the notice referenced in the paragraph below entitled, “Posting Order.”
8. The Agency is further directed to submit a report of compliance, as provided in the statement entitled “Implementation of the Commission's Decision.” The report shall include supporting documentation and evidence that the corrective action has been implemented.
POSTING ORDER (G0610)

The Agency is ordered to post at its Redstone Arsenal, Alabama, and the Huntsville, Alabama, Project Management Office copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted by the Agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled “Implementation of the Commission's Decision,” within ten (10) calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled “Right to File a Civil Action.” 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

*16 The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington,
DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0610)

*17 If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above (“Right to File a Civil Action”).

FOR THE COMMISSION:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

Footnotes

1 The factual background as laid out here is not exhaustive. Two comprehensive reports of the facts relevant to this case have already been compiled: the EEO Report of Investigation and the Agency's Final Agency Decision (FAD). We have considered those documents as well as the Complainant's Brief in Support of Appeal and the extensive transcript from the Fact-Finding Conference conducted on October 17-18, 2012. The facts pertinent to the legal analysis necessary are largely not in dispute.


3 Gender reassignment surgery is in no way a fundamental element of a transition. Transitions vary according to individual needs and many do not involve surgery at all. As the Office of Personnel Management has explained: Some individuals will find it necessary to transition from living and working as one gender to another. These individuals often seek some form of medical treatment such as counseling, hormone therapy, electrolysis, and reassignment surgery. Some individuals, however, will not pursue some (or any) forms of medical treatment because of their age, medical condition, lack
of funds, or other personal circumstances. Managers and supervisors should be aware that not all transgender individuals will follow the same pattern, but they all are entitled to the same consideration as they undertake the transition steps deemed appropriate for them, and should all be treated with dignity and respect.


This is not to say that plans have no place in the transition process. Properly developed, transition plans ensure that a transitioning employee is treated with dignity and respect. The process of developing a plan also opens important channels of communication between the transitioning employee and management. The plans should not, however, be used as a means for restricting a transitioning employee. Rather, they should serve as tools for enabling the employee to complete his or her transition in an open and welcoming way.

Thus, for instance, employers may not prohibit a transgender female worker from using the female bathroom based on speculation or stereotypes that such workers are somehow inherently dangerous or prone to violence, any more than a sheriff's office can exclude men from supervisory positions in female inmate housing based on unsubstantiated concerns that substantially all male deputies are likely to engage in sexual misconduct. See Ambat v. City & County of San Francisco, 757 F.3d 1017, 1029 (9th Cir. July 14, 2014) (concluding the assumption that “all or substantially all” male deputies are likely to perpetrate sexual misconduct [against female inmates]” without evidence to support it “amount[s] to ‘the kind of unproven and invidious stereotype that Congress sought to eliminate from employment decisions when it enacted Title VII’”). Of course, if a transgender woman using a common female restroom were to assault a co-worker using the same restroom, then the matter could and should be dealt with like any other workplace conduct violation -- just as it would be if any other woman using a common female restroom assaulted a co-worker.

For this reason, the Commission disagrees with the holdings of cases like Kastl v. Maricopa County Cnty. College Dist., 325 Fed. Appx. 492 (9th Cir. 2009), and Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007). In Kastl, the employer contended “that it banned Kastl from using the women's restroom for safety reasons.” Id. at 494. In Etsitty, the employer claimed that it did so out of fear of being sued for allowing one of its employees to use the “wrong” restroom. In both cases, the courts found that these respective explanations were legitimate, non-discriminatory reasons under the circumstantial evidentiary framework from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and that the transgender employee had not proven that the proffered reason was pretextual. Kastl, at 493-94; Etsitty, 502 F.3d at 1224. The Commission finds the rationale of these cases unpersuasive. First, an employer need not use the McDonnell Douglas framework when there is direct evidence that an adverse employment action has been taken on the basis of a sex-based consideration such as an employee's transgender status. Second, where an employer proffers an explanation inextricably linked to the protected trait -- such as admitting that it refused to allow a transgender worker to use a restroom consistent with the worker's gender identity because of a belief that the worker's transgender status might raise safety or liability issues -- that rationale is not non-discriminatory. Instead, that proffered justification is indistinguishable from the protected trait at issue and thus cannot serve as a “legitimate” explanation.

Cf. Johnson v. State of NY, 49 F.3d 75, 80 (2nd Cir. 1995) (holding that a policy requiring active membership in an organization where membership was automatically rescinded at age 60 was not neutral; it was, instead, “inextricably linked” with age). Indeed, the Etsitty Court itself acknowledged that: “It may be that use of the women's restroom is an inherent part of one's identity as a male-to-female transsexual and that a prohibition on such use discriminates on the basis of one's status as a transgender.” Johnson v. State of NY, 49 F.3d 75, 80 (2nd Cir. 1995). However, as the Etsitty court went on to explain, it had already concluded that “Etsitty may not claim protection under Title VII based upon her transexuality per se” and thus Etsitty's claim had to “rest entirely on the Price Waterhouse theory of protection as a man who fails to conform to sex stereotypes.” Etsitty at 1224. In light of that fact, the Etsitty court concluded that “[h]owever far Price Waterhouse reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms.” Id. Of course, as noted previously, the Commission in Macy has held that discrimination on the basis of transgender status is per sex discrimination, finding that a plaintiff need not have specific evidence of gender stereotyping by the employer because “consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual.” Id., 2012 WL 1435995, at *8 (EEOC Apr. 20, 2012).

In this case, the Agency's restroom policy also deprived Complainant of the use of common locker and shower facilities that non-transgender employees could use, which also constituted a material employment disadvantage for Complainant.

Cf. John Doe, et al. v. Regional School Unit, 86 A.3d 600 (2014) (where it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the Maine Human Rights Act); Mathis v. Fountain-Fort Carson School District 8, Colo. Dep't of Regulatory Agencies, Div. of Civil Rights, Charge No. P20130034X, Determination available at http://www.transgenderlegal.org/media/uploads/
Complainant did not avail herself of a hearing. Therefore, we must assess the credibility of witnesses on the record, without the assistance of a neutral EEOC AJ's personal observations of witness demeanor and tone. Wagner v. Dept of Transp., EEOC Request No. 0120101568 (Aug. 23, 2010). We note, however, that the Agency conducted a fact-finding conference at which witnesses other than the Complainant gave testimony.

Given that the decision to restrict Complainant from the common restrooms consistent with her gender was instituted by management, there is an argument to be made that the supervisor liability standard is appropriate. We do not need to reach this issue, however, because Complainant has invoked the negligence liability standard and we find that she has met her burden under that analysis. See Wilson v. Tulsa Junior College, 164 F. 3d 534, 540 n. 4 (10th Cir. 1998) (“The Supreme Court recognized in [Faragher] and Ellerth the continuing validity of negligence as a separate basis for employer liability”).

See King v. Dep't of the Air Force, 119 M.S.P.R. 663, 668 (2013).

We address the matter of compensatory damages under Title VII in our Order, below.

EEOC DOC 0120133395 (E.E.O.C.), 2015 WL 1607756
Today we filed our opening brief and our response to the federal government’s attempt to dismiss our case on behalf of Dana Zzyym, our intersex client who is locked into this country because the U.S. Department of State refuses to issue them a passport with a gender marker other than either “F” for “female” or “M” for “male.” (Dana uses singular “they,” “them” and “their” gender-neutral pronouns.)

Intersex people are born with physical traits or characteristics that don’t match stereotypes of “male” or “female.” Indeed, many intersex people do have a gender identity that falls into binary categories of “male” or “female,” but many others (like Dana) identify as a third or different gender.

When Dana was born, medical staff initially left the space for “gender” on their birth certificate blank. Later, doctors and Dana’s parents decided to label Dana “male.” Ultimately Dana’s birth certificate was updated to state their gender as “unknown.” (Learn more about Dana’s case here.)

Dana wanted a passport to attend the International Intersex Forum world conference in Mexico City on behalf of the United States affiliate of the worldwide Organization Intersex International (OII-USA). Deprived by the U.S. government of a passport and the right to travel, Dana never got there.

Prime on the agenda of that meeting was the pivotal issue of surgeries on the genitals and reproductive organs of infants and children who are intersex. These surgeries, performed and repeated without success, commonly leave intersex people scarred and sterilized from childhood, for life.

That’s what happened to Dana, and that’s why they and others are advocating to end these painful, invasive and medically unnecessary surgeries (intersex genital mutilation, or “IGM”). But Dana didn’t get a chance to raise their voice in Mexico City, because Dana couldn’t truthfully (under threat of criminal penalty for false statements) check the gender-binary boxes on a bureaucratic form.
While Dana’s experience as a survivor of IGM is tragically common for intersex people, transgender people often face different challenges with respect to surgical intervention.

There is frequently no perceived “ambiguity” when a physician makes a determination of sex based on infant anatomy. But it turns out later that transgender people’s internal sense of their gender does not match what the doctor thought.

Many transgender people — though certainly not all — seek gender-affirming surgeries to align their bodies to their “brain sex,” a key factor in one’s sense of being a particular gender. But transgender people who suffer medically documented, clinical distress about their bodies, distress that can be successfully addressed through established surgical procedures, fight battle after battle to access needed medical care.

The flashpoint of surgery, facing each community in radically divergent ways, lays bare society’s rampant and vicious gender-norming impulses. It is nothing less than a human rights crisis that intersex babies and children are unnecessarily altered for life, without their consent. And ironically, all the while, fully competent and consenting transgender adults face often insurmountable odds securing the surgical treatment they require.

Lambda Legal, its clients and its allies continue to fight misunderstanding, immense prejudice, stigma and shaming of intersex and transgender people. Key to the fight for justice: We must educate and spread the word about diversity of humankind, and fight for dignity, respect, autonomy and the right to thrive for people of all genders and identities.
Frequently Asked Questions about Mississippi's HB 1523

By Lambda Legal
APRIL 6, 2016

http://www.lambdalegal.org/ms-faq

On April 5, 2016, Mississippi governor Phil Bryant signed HB1523, an anti-LGBT bill that invites a broad range of individuals, private businesses, and medical and social services agencies to discriminate based on religious beliefs about marriage, non-marital sexual relationships, and conformity with gender stereotypes. This FAQ is designed to help answer questions about this new law. If you experience discrimination on the basis of sexual orientation, gender identity, or HIV status, or have further questions, please contact the Legal Help Desk in our Southern Regional Office at 404-897-1880, call toll-free at 866-542-8336, or go to www.lambdalegal.org/help.

What is Mississippi HB 1523?

HB 1523 is a sweeping new law that explicitly targets LGBT people, single mothers, and anyone who has a sexual relationship outside a heterosexual marriage by allowing many types of religion-based discrimination against them.

What does this new law do?

HB 1523 permits discrimination based on religious beliefs or moral convictions that:

- Marriage is only for different-sex couples;
- Sexual relationships are to be reserved to such a marriage; and
- The terms male and female refer to an individual’s unchangeable sex as “determined by genetics and anatomy at the time of birth.”

The law seeks to allow individuals, private businesses, medical and social services agencies, licensed health professionals, schools, foster and adoptive parents, and even some government actors, to discriminate against LGBT people, including children, and sexually active, unmarried non-LGBT people in wide variety of ways based on these beliefs, including:

- Refusing counseling services, foster care, and adoption services – even while receiving government funding.
- Imposing anti-LGBT religious beliefs on youth in foster care, including publicly funded programs.
- Banning transgender students and workers from dressing, grooming and using restrooms and other sex-specific spaces in accordance with their gender identity.
- Denying medically necessary gender transition-related treatments, counseling, or services to transgender people.
- Denying psychological services, counseling, or fertility treatments based on religious objections that the patient is LGBT or in a non-marital heterosexual relationship.
- Refusals by public employees to issue marriage licenses to same-sex couples or to solemnize their marriages.
- Refusals by for-profit businesses of wedding-related goods or services.
- Denials by religious organizations of housing, employment, and various services.

It also prevents state government officials or workers from taking certain steps to protect LGBT people from harm, such as removing an LGBT youth from an abusive foster care placement if the stated reason for the abuse is faith-based.

The law also bans state government from fining, denying public grants or contracts, denying favorable tax status, denying professional licensing, refusing to hire, or taking any other action against those who discriminate against LGBT people based on religious beliefs, such as homeless shelters and other facilities and programs that serve the most vulnerable members of the LGBT community.

This law conflicts with several federal laws that protect LGBT people, including Title VII (covering employment), Title IX (covering federally funded education programs), the Affordable Care Act (banning discrimination in federally funded health programs and services), and rules governing federal funding of child welfare programs and services. If you experience discriminatory or unfair treatment because of your sexual orientation, gender identity or HIV status, contact the Legal Help Desk in our Southern Regional Office at 404-897-1880, call toll-free at 866-542-8336, or go to www.lambdalegal.org/help.

Can same-sex couples still get married in Mississippi?

Yes. The new law allows individual public employees to object on religious grounds to issuing marriage licenses but the law requires any objecting employees to ensure that their refusal does not block or delay issuance of licenses. Keep in mind that the state must comply with federal law and issue licenses equally to same-sex and
different-sex couples. If a couple is refused a license, they should contact our Legal Help Desk.

The new law makes clear that clergy are not required to perform marriage ceremonies inconsistent with their faith. It also allows public employees who are authorized to solemnize marriages, including judges and magistrates, to ask to be excused on religious grounds from solemnizing marriages. But, HB 1523 requires that the state’s court system ensure that persons authorized to perform marriage ceremonies are available and that any refusals to perform ceremonies do not prevent or delay couples’ ability to marry. So, although same-sex couples may encounter religious refusals by public employees, they are still entitled to receive marriage licenses and to have their ceremony performed by an authorized public official without delay. If a couple is refused a license or if the provision of the license is delayed, they should contact our Legal Help Desk.

What should I do if I go to a Methodist or Catholic hospital and they refuse to allow my same-sex spouse to accompany me for testing or treatment based on their religious beliefs?

The new law does not permit religiously affiliated hospitals or medical service providers to deny visitation based on a religious objection to the LGBT status or marital status of the patient. This avoids a conflict with federal rules that require nondiscriminatory visitation when a facility receives federal funding. HB 1523 also does not allow religiously affiliated hospitals to refuse medical decision-making by a patient’s designated representative. This means it may be helpful for same-sex couples to have legal documents designating each other to ensure that their relationship will be respected in case a hospital refuses to respect the decision-making authority all spouses should have automatically under state law. Whether or not you have such legal documents, if a health care provider refuses to honor your spousal relationship for any purpose, you should contact our Legal Help Desk so we can discuss with you whether to file a complaint or a lawsuit under section 1557 of the Affordable Care Act, the section of the “Obamacare” law that prohibits discrimination.

What if I have been receiving care at a Methodist or Catholic hospital and they refuse to treat me once they learn about my same-sex spouse or transgender status?
HB 1523 does allow religiously affiliated health care facilities and individual health care providers to reject LGBT patients for religious reasons as a matter of state law, although not to refuse emergency treatment. This state-law provision appears to conflict with the nondiscrimination requirements of the Affordable Care Act and other federal nondiscrimination rules. Should you be denied medical care by any health professional based on your sexual orientation, gender identity or HIV status, contact our Help Desk to discuss your potential options.

What if I’m not the biological parent of my child and they refuse to acknowledge me as a medical decision-maker based on their religious beliefs?

If Mississippi law does not recognize you as a legal parent, you may not have the right to be acknowledged as a medical decision-maker unless the legal parent can designate you legally as a guardian or representative of the child. Also, if the legal parent authorizes you for visitation with the child, the hospital or clinic needs to respect that regardless of any religious objection.

What should I do if my boss says that she doesn’t have to respect my request for family leave because my marriage to my same-sex partner isn’t valid based on her religion?

It depends whether you are employed by a government agency, a private company or a religious organization. Contact our Legal Help Desk so we can discuss with you whether to file a federal complaint under Title VII (the federal employment nondiscrimination law) and/or the federal Family Medical Leave Act (FMLA), or to take some other action. Your rights under these federal laws may depend on the size of your employer and whether it is part of government, a business or a religiously affiliated agency, as well as other issues.

Does this new law make it easier to fire employees for being gay, lesbian, bisexual or transgender?

Mississippi does not currently have legal protections for LGBT workers, but federal law provides important protections that are not affected by this new state law and HB 1523 unfortunately may encourage employers to act in ways that violate those important protections. For more information about your rights and what you can do if you experience discrimination at work, visit http://www.lambdalegal.org/know-your-rights/workplace.
What should I do if I experience religiously motivated discrimination at work based on my sexual orientation, gender identity or HIV status?

It depends on whether your employer is a government agency, a private business or a religious organization. This new law states that religious organizations may discriminate against workers based on employers’ religious objections to their same-sex relationship or marriage, to their non-marital heterosexual relationship, or to their gender identity or expression if inconsistent with their sex assigned at birth. But because Mississippi did not protect employees against these types of discrimination before passage of HB 1523, the key issue is the conflict the new state law creates in various circumstances with federal employment protections. There are more protections if you work for government or a for-profit business than if you work for a religiously affiliated agency. Start by reviewing the information available on our website: http://www.lambdalegal.org/know-your-rights/workplace. Then, contact our Legal Help Desk if you would like to discuss your particular situation.

Does this mean my school has to require me to use the wrong restroom if I’m a transgender boy? What should I do? All my peers only know me as a boy.

If your school receives federal funding and is not a religious institution, Title IX should protect your right to use the restroom according to your gender identity. You may want to start by reviewing the information here and here. Then contact our Legal Help Desk to discuss your situation.

What should I do if I go to a doctor for hormone therapy or other transition-related care and the doctor refuses to treat me because treating transgender patients is against his religion?

Contact our Legal Help Desk. We may be able to assist you in considering whether to file a complaint or a lawsuit against the doctor under Section 1557 of the Affordable Care Act, which prohibits discrimination based on gender identity or transgender status in federally funded health care services and programs. Also, you may find helpful information here and also here.
What should I do if my school counselor refuses to advise me because she has a religious objection to my LGBT status?

If your school receives federal funding and is not a religious institution, Title IX should protect your right to be treated equally by school counselors and other staff without discrimination based on your gender identity or sexual orientation. And if you attend a public school, the federal and state constitutions protect you as well. Contact our Legal Help Desk to discuss your situation.

When does HB 1523 take effect?

July 1, 2016.
EEOC Is Eager to Work With Latinos and LGBT Community to Protect LGBT Workers

09/14/2015 03:45 pm ET | Updated Sep 14, 2015

P. David Lopez
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Co-authored by Eduardo Juarez, EEOC Supervisory Trial Attorney, San Antonio Field Office and President Elect of the National LGBT Bar Association

The time is ripe for the lesbian, gay, bi-sexual, and transgender (LGBT) community and the Latino community to work together to ensure workplace equality for LGBT people.

According to a 2013 report by the UCLA Williams Institute, 4.3 percent of U.S. Latino adults consider themselves to be LGBT. This is a sizable portion of the general LGBT population. And 83 percent of Latinos support legal protections
against job discrimination for LGBT individuals, according to a 2012 study by the National Council of La Raza and Social Science Research Solutions.

Indeed, unknown to many is the fact that the iconic, Latino civil rights leader Cesar Chavez was the first major U.S. civil rights leader to publicly and strongly support LGBT rights. He understood the importance of fighting for equality for all people, not just one group. He astutely advocated for building coalitions among marginalized groups to ensure equality for all. Such coalition building and collaboration is vital to ensure further progress with respect to federal protections for LGBT employees.

The recent Supreme Court decision legalizing same-sex marriage in all 50 states has opened the door for the expansion of civil rights laws to protect LGBT workers from employment discrimination. The U.S. Equal Employment Opportunity Commission (EEOC) is committed to keeping those doors open and is eager to work with members of the Latino and LGBT communities to achieve that goal.

In the past five years, the EEOC, which is the nation’s lead enforcer of federal laws prohibiting employment discrimination, has taken significant action to further legal protections for the LGBT community.

In 2011, the EEOC submitted its first legal brief in support of a transgender employee, Alex Pacheco, who alleged she was fired by her employer because she is transgender and failed to conform to male gender stereotypes. Pacheco is also Latina.

Since then, the EEOC—through a coordinated effort of policy, federal sector decision-making, and litigation—has sought to clarify the protections for LGBT workers.

For example, the EEOC has issued decisions in the federal sector making it clear that workplace discrimination based on sexual orientation or against
transgender employees is unlawful under the provisions prohibiting employment discrimination in the landmark 1964 Civil Rights Act.

In the private sector, the EEOC has successfully resolved such complaints involving LGBT workers administratively. However, when necessary, the agency has filed suit in federal court to further protections for LGBT individuals.

For example, the EEOC recently resolved a case for a transgender employee in Florida, who was fired by her employer. The settlement included $150,000 plus policy changes at the company and training for all company employees.

Through this work, the EEOC hopes to further equal opportunity in the workplace and ensure the full potential of all workers.

We believe these efforts will make it easier for LGBT individuals, including Latinos who identify as LGBT, to overcome the discriminatory conduct they may face in the workplace.

Cesar Chavez, no doubt, would be proud.

Article first appeared in the San Antonio Express-News.
Employment discrimination is illegal. Discrimination occurs when you are being treated differently than others (or are harassed) because of your race, color, national origin, sex, pregnancy, religion, age, disability, or genetic information. It is also against the law for an employer to retaliate against you because you report discrimination against you or on behalf of others.

Although Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity, the EEOC and courts have said that sex discrimination includes discrimination based on an applicant or employee's gender identity or sexual orientation. For example, it is illegal for an employer to deny employment opportunities or permit harassment because:

- A woman does not dress or talk in a feminine manner.
- A man dresses in an effeminate manner or enjoys a pastime (like crocheting) that is associated with women.
- A female employee dates women instead of men.
- A male employee plans to marry a man.
- An employee is planning or has made a gender transition from female to male or male to female.

**Who is protected?**

Title VII applies to all private sector and state/local government employers with at least 15 employees. Note: State or local laws in your jurisdiction also may explicitly prohibit employment discrimination based on sexual orientation or gender identity.

Applicants and civilian employees of federal government agencies also have rights against LGBT discrimination under Title VII, and also Executive Order 11478, as amended.

Discrimination against an individual because that person is transgender, is by definition discrimination based on sex, and violates Title VII. Macy v. Department of Justice, EEOC Appeal No. 0120120821 (April 20, 2012) (transgender discrimination is sex discrimination in violation of Title VII because it involves non-conformance with gender norms and stereotypes, or based on a plain interpretation of the statutory language prohibiting discrimination because of sex); Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395 (March 27, 2015) (Title VII is violated where an employer denies an employee equal access to a common restroom corresponding to the employee’s gender identity, or harasses an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun corresponding to the employee’s gender identity as communicated to management and employees).
Discrimination based on sexual orientation also necessarily states a claim of sex discrimination under Title VII because (1) it literally involves treating an applicant or employee differently based on his or her sex, (2) it takes sex into account by treating him or her differently for associating with a person of the same sex, and, (3) it involves discrimination based on gender stereotypes -- employer beliefs about the person to whom the employee should be attracted because of the employee's sex. Baldwin v. Dep’t of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015). Examples of sex discrimination involving sexual orientation include:

- Denying an employee a promotion because he is gay or straight
- Discriminating in terms, conditions, or privileges of employment, such as by providing a lower salary to an employee because of sexual orientation, or denying spousal health insurance benefits to a female employee because her legal spouse is a woman, while providing spousal health insurance to a male employee whose legal spouse is a woman.
- Harassing an employee because of his or her sexual orientation, for example, by derogatory terms, sexually oriented comments, or disparaging remarks for associating with a person of the same or opposite sex.

It also violates Title VII to discriminate against or harass an employee because of his or her sexual orientation or gender identity in combination with another unlawful reason, for example, on the basis of transgender status and race, or sexual orientation and disability.

**How Do I Report Workplace Discrimination?**

**Employees or applicants of a private company, state government, or local municipality:** EEOC will investigate complaints of employment discrimination, harassment and retaliation and may act to stop it and seek remedies on your behalf for free. We accept complaints from job applicants, employees (full-time, part-time, seasonal and temporary), and former employees. Regardless of your citizenship and work authorization status, the law still protects you. Complaints may be filed by mail or in person at the nearest EEOC office. Visit www.eeoc.gov to find out more about laws against employment discrimination. In some cases, you have 180 days to file a complaint. In others, you have 300 days. Call us immediately if you believe you experienced discrimination.

**Federal government applicants and employees** should contact their agency EEO office within 45 days of experiencing discrimination to pursue a Title VII claim. Federal employees also may have rights to pursue claims in internal processes governed by E.O. 11478.

**The Equal Employment Opportunity Commission** is the federal agency that enforces laws against employment discrimination, harassment and retaliation. We have offices around the country that can help you. We can explain whether the situation you face is lawful or unlawful.

Contact Us!
**Call 1-800-669-4000**
You can ask for translation assistance.

Our mission is to stop and remedy unlawful employment discrimination.
A Guide to Restroom Access for Transgender Workers

Core principle: All employees, including transgender employees, should have access to restrooms that correspond to their gender identity.

Introduction
The Department of Labor’s (DOL) Occupational Safety and Health Administration (OSHA) requires that all employers under its jurisdiction provide employees with sanitary and available toilet facilities, so that employees will not suffer the adverse health effects that can result if toilets are not available when employees need them. This publication provides guidance to employers on best practices regarding restroom access for transgender workers. OSHA’s goal is to assure that employers provide a safe and healthy working environment for all employees.

Understanding Gender Identity
In many workplaces, separate restroom and other facilities are provided for men and women. In some cases, questions can arise in the workplace about which facilities certain employees should use. According to the Williams Institute at the University of California-Los Angeles, an estimated 700,000 adults in the United States are transgender—meaning their internal gender identity is different from the sex they were assigned at birth (e.g., the sex listed on their birth certificate). For example, a transgender man may have been assigned female at birth and raised as a girl, but identify as a man. Many transgender people transition to live their everyday life as the gender they identify with. Thus, a transgender man may transition from living as a woman to living as a man. Similarly, a transgender woman may be assigned male at birth, but transition to living as a woman consistent with her gender identity. Transitioning is a different process for everyone—it may involve social changes (such as going by a new first name), medical steps, and changing identification documents.

Why Restroom Access Is a Health and Safety Matter
Gender identity is an intrinsic part of each person’s identity and everyday life. Accordingly, authorities on gender issues counsel that it is essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity. Restricting employees to using only restrooms that are not consistent with their gender identity, or segregating them from other workers by requiring them to use gender-neutral or other specific restrooms, singles those employees out and may make them fear for their physical safety. Bathroom restrictions can result in employees avoiding using restrooms entirely while at work, which can lead to potentially serious physical injury or illness.

OSHA’s Sanitation Standard
Under OSHA’s Sanitation standard (1910.141), employers are required to provide their employees with toilet facilities. This standard is intended to protect employees from the health effects created when toilets are not available. Such adverse effects include urinary tract infections and bowel and bladder problems. OSHA has consistently interpreted this standard to require employers to allow employees prompt access to sanitary facilities. Further, employers may not impose unreasonable restrictions on employee use of toilet facilities.
**Model Practices for Restroom Access for Transgender Employees**

Many companies have implemented written policies to ensure that *all* employees—including transgender employees—have prompt access to appropriate sanitary facilities. The core belief underlying these policies is that all employees should be permitted to use the facilities that correspond with their gender identity. For example, a person who identifies as a man should be permitted to use men’s restrooms, and a person who identifies as a woman should be permitted to use women’s restrooms. The employee should determine the most appropriate and safest option for him- or herself.

The best policies also provide additional options, which employees may choose, but are not required, to use. These include:

- Single-occupancy gender-neutral (unisex) facilities; and
- Use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls.

Regardless of the physical layout of a worksite, all employers need to find solutions that are safe and convenient and respect transgender employees.

Under these best practices, employees are not asked to provide any medical or legal documentation of their gender identity in order to have access to gender-appropriate facilities. In addition, no employee should be required to use a segregated facility apart from other employees because of their gender identity or transgender status. Under OSHA standards, employees generally may not be limited to using facilities that are an unreasonable distance or travel time from the employee’s worksite.

**Other Federal, State and Local Laws**

Employers should be aware of specific laws, rules, or regulations regarding restroom access in their states and/or municipalities, as well as the potential application of federal anti-discrimination laws.

The Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), DOL, and several other federal agencies, following several court rulings, have interpreted prohibitions on sex discrimination, including those contained in Title VII of the *Civil Rights Act of 1964*, to prohibit employment discrimination based on gender identity or transgender status. In April 2015, the DOL’s Office of Federal Contract Compliance Programs (OFCCP) announced it would require federal contractors subject to Executive Order 11246, as amended, which prohibits discrimination based on both sex and gender identity, to allow transgender employees to use the restrooms and other facilities consistent with their gender identity. Also in April 2015, the EEOC ruled that a transgender employee cannot be denied access to the common restrooms used by other employees of the same gender identity, regardless of whether that employee has had any medical procedure or whether other employees’ may have negative reactions to allowing the employee to do so. The EEOC held that such a denial of access constituted direct evidence of sex discrimination under Title VII.

The following is a sample of state and local legal provisions, all reaffirming the core principle that employees should be allowed to use the restrooms that correspond to their gender identity.

**Colorado:** Rule 81.9 of the Colorado regulations requires that employers permit their employees to use restrooms appropriate to their gender identity rather than their assigned gender at birth without being harassed or questioned. 3 CCR 708-1-81.9 (revised December 15, 2014), available at http://cdn.colorado.gov/cs/Satellite/DORA-DCR/CBON/DORA/1251629367483.


**Delaware:** Guidance from the Delaware Department of Human Resource Management provides Delaware state employees with access to restrooms that correspond to their gender identity. The guidance was issued pursuant to the state’s gender identity nondiscrimination law.

Delaware’s policy also suggests: Whenever practical, a single stall or gender-neutral restroom may be provided, which all employees may utilize.
However, a transgender employee will not be compelled to use only a specific restroom unless all other co-workers of the same gender identity are compelled to use only that same restroom.


Iowa: The Iowa Civil Rights Commission requires that employers allow employees access to restrooms in accordance with their gender identity, rather than their assigned sex at birth.


Vermont: The Vermont Human Rights Commission requires that employers permit employees to access bathrooms in accordance with their gender identity.


Washington: The Washington State Human Rights Commission requires employers that maintain gender-specific restrooms to permit transgender employees to use the restroom that is consistent with their gender identity. Where single occupancy restrooms are available, the Commission recommends that they be designated as “gender neutral.”


Additional Information

- Transgender Law Center’s model employer policy, with an extensive section on restrooms, can be found at: http://transgenderlawcenter.org/wp-content/uploads/2013/12/model-workplace-employment-policy-Updated.pdf.

How OSHA Can Help

OSHA has a great deal of information to assist employers in complying with their responsibilities under the law. Information on OSHA requirements and additional health and safety information, including information on OSHA’s Sanitation standard, is available on the agency’s website (www.osha.gov).

Workers have a right to a safe workplace (www.osha.gov/workers.html#2). The law requires employers to provide their employees with working conditions that are free of known dangers. An employer’s duty to provide a safe workplace includes the duty to provide employees with toilet facilities that are sanitary and available, so that employees can use them when they need to do so. Employers also have a duty to protect all...
their employees, regardless of whether they are transgender, from any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. For more information on workplace violence, please see OSHA’s website at: www.osha.gov/SLTC/workplaceviolence.

Workers who believe that they have been exposed to a hazard or who just have a question should contact OSHA. For example, workers may file a complaint to have OSHA inspect their workplace if they believe that their workplace is unsafe or that their employer is not following OSHA standards. Just contact OSHA at: 1-800-321-OSHA (6742), or visit www.osha.gov. Complaints that are signed by an employee are more likely to result in an on-site inspection. It’s confidential. We can help.

The Occupational Safety and Health Act (OSH Act) prohibits employers from retaliating against their employees for exercising their rights under the OSH Act. These rights include raising a workplace health and safety concern with the employer, reporting an injury or illness, filing an OSHA complaint, and participating in an inspection or talking to an inspector. If workers have been retaliated against for exercising their rights, they must file a complaint with OSHA within 30 days of the alleged adverse action. For more information, please visit www.whistleblowers.gov.

OSHA can also help answer questions or concerns from employers. To reach your closest OSHA regional or area office, go to OSHA’s Regional and Area Offices webpage (www.osha.gov/html/RAmap.html) or call 1-800-321-OSHA (6742). OSHA also provides free, confidential on-site assistance and advice to small and medium-sized employers in all states across the country, with priority given to high-hazard worksites. On-site Consultation services are separate from enforcement activities and do not result in penalties or citations. To contact OSHA’s free consultation program, or for additional compliance assistance, call OSHA at 1-800-321-OSHA (6742).

References:

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