

GENDER IDENTITY ISSUES IN THE LAW
NATIONAL ASSOCIATION OF WOMEN
JUDGES – DISTRICT 4
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Case Study: Gavin Grimm's Story

CASE HISTORY

GAVIN GRIMM V. GLOUCESTER COUNTY PUBLIC SCHOOL BOARD

- *G.G. v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015) (dismissing Title IX claim and denying motion for preliminary injunction).
- *G. G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) (reversing dismissal of Title IX claim and denial of preliminary injunction, and remanding for further consideration).
- *G.G. v. Gloucester Cty. Sch. Bd.*, 824 F.3d 450, 2016 U.S. App. LEXIS 9909 (4th Cir., 2016) (denying rehearing en banc).
- *G.G. v. Gloucester Cty. Sch. Bd.*, 2016 U.S. Dist. LEXIS 93164 (E.D. Va., June 23, 2016) (granting injunction).
- *G. G. v. Gloucester Cty. Sch. Bd.*, 654 Fed. Appx. 606, 2016 U.S. App. LEXIS 13052 (4th Cir., 2016) (denying motion to stay)
- *Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (U.S., 2016) (granting stay).
- *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (U.S., 2016) (granting certiorari)
- *Gloucester Cty. Sch. Bd. v. G. G.*, 2017 U.S. LEXIS 1626 (U.S., Mar. 6, 2017) (vacating 4th Circuit mandate and remanding for further consideration).
- *G. G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729 (4th Cir. 2017), as amended (Apr. 18, 2017) (vacating the preliminary injunction entered by the district court in 2016).
- *Grimm v. Gloucester Cty. Sch. Bd.*, 869 F.3d 286, 289 (4th Cir. 2017) (remanding case to the district court to assess whether case had become moot by reason of student's graduation on June 10, 2017).
- *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018) (denying the school board's motion to dismiss and holding that Title IX and the Constitution protect transgender students).

CASE SUMMARY

The American Civil Liberties Union and the ACLU of Virginia filed a lawsuit against the Gloucester County School Board in June 2015 for adopting a discriminatory bathroom policy that segregates transgender students from their peers. The policy effectively expels trans students from communal restrooms and requires them to use “alternative private” restroom facilities. The case was filed in the Eastern District of Virginia, Newport News Division, on behalf of Gavin Grimm, a transgender male student at Gloucester High School who was then scheduled to graduate in June 2017. The lawsuit argues the bathroom policy is unconstitutional under the Fourteenth Amendment and violates Title IX. The ACLU sought both injunctive relief and damages for the violation of Mr. Grimm’s civil rights.

“This could be your child, your sister, your brother, your niece, your nephew... I am not the only transgender student in Gloucester County and I deserve the rights of every other human being. I am just a human. I am just a boy. Please consider my rights when you make your decision.”

■ Gavin Grimm’s testimony at the county’s school board meeting (2014)

As part of Mr. Grimm’s medical treatment for severe gender dysphoria, Mr. Grimm and his mother notified administrators of his male gender identity at the beginning of his sophomore year so that he could socially transition in all aspects of his life. As permitted by a Title IX implementing regulation, 34 C.F.R. 106.33, Gloucester High School provides separate common restrooms for boys and girls. With permission from school administrators, Mr. Grimm used the common boys’ restrooms for almost two months without any incidents. But after receiving complaints from some parents and residents of Gloucester County, on December 9, 2014, the school board adopted the new policy excluding transgender students from using common gender-segregated restrooms that did not correspond to their “biological gender.” The ACLU filed a federal discrimination complaint with the Department of Justice and Department of Education in December 2014.

A motion for preliminary injunction was filed asking the court to rule in time for Mr. Grimm to be able to use the same restrooms as other boys at Gloucester High School when classes resumed for the 2015-16 school year. The Departments of Education OCR and the Department of Justice filed a statement of interest concluding that the only way schools could provide gender-segregated restrooms under 34 C.F.R. 106.33, and avoid discriminating against transgender students on the basis of sex, would be to allow transgender students to use the restrooms that corresponded with their gender identity.

The district court declined to rule on the school board’s motion to dismiss Mr. Grimm’s Equal Protection Claim, denied the injunction, and dismissed Mr. Grimm’s claim under Title IX. That decision was appealed before the Fourth Circuit, which became the first federal appellate court to consider whether Title IX’s broad prohibition against discrimination on the basis of sex prohibits schools from excluding transgender students from common gender-segregated facilities. The Departments of Education and Justice filed an *amicus* brief in the Fourth Circuit consistent with the statement of interest filed in the district court.

Granting deference to the Department of Education’s conclusion pursuant to *Auer v. Robbins*, 519 U.S. 452 (1997), the Fourth Circuit overturned the district court’s decision in April 2016, and later declined to stay its mandate pending the school board’s appeal to the United States Supreme Court and denied reconsideration *en banc*. The district court granted a limited injunction, applicable to Mr. Grimm, on June 23, 2016.

On July 13, 2016, the school board petitioned the Supreme Court of the United States for an emergency stay of the injunction and the Fourth Circuit’s mandate pending the Court’s decision on its forthcoming petition for writ of certiorari. The Supreme Court stayed the injunction and the Fourth Circuit’s mandate on August 3, 2016. On October 28, 2016, the Court granted Certiorari on two questions: (1) whether the school board’s policy constitutes “discrimination” “on the basis of sex” under Title IX, and (2) whether the Department of Education’s conclusion that 34 C.F.R. § 106.33 does not authorize schools to exclude boys and girls who are transgender from the restrooms that other boys and girls use—as set forth in an opinion letter, statement of interest, and *amicus* brief—is entitled to *Auer* deference.

“Our country has a long and ignominious history of discriminating against our most vulnerable and powerless. We have an equally long history, however, of brave individuals... who refused to accept quietly the injustices that were perpetuated against them.

Today, [Gavin Grimm] adds his name to the list of plaintiffs whose struggle for justice has been delayed and rebuffed... [his] journey is delayed but not finished.”

■ Senior Judge Andre Davis, joined by Judge Henry Floyd

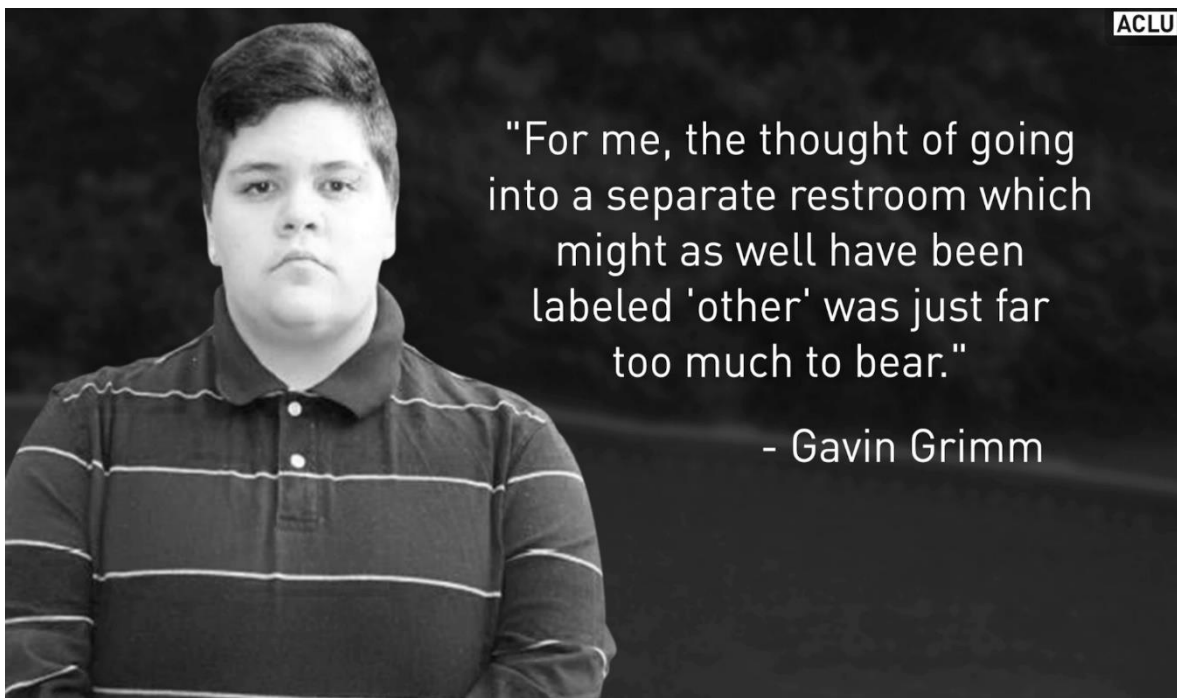
G. G. v. Gloucester Cty. Sch. Bd., 853 F.3d 729 (4th Cir. 2017)

On March 6, 2016, the Supreme Court remanded Mr. Grimm’s case back to the Fourth Circuit Court to be reconsidered in light of the Departments of Justice and Education’s February 2017 decision to rescind Title IX guidance, which clarified protections for transgender students.

On April 7, 2017, the 4th Circuit Court of Appeal vacated the unopposed Motion for Preliminary Injunction entered by the District Court on June 23, 2016. Gavin Grimm and Gloucester County School Board filed their respective Supplemental Briefs on May 8, 2017 in the 4th Circuit Court of Appeals. On June 2, 2017, Gavin Grimm and the Gloucester County School Board filed their respective Supplemental Reply Briefs in the 4th Circuit Court of Appeals. On August 11, 2017, a Joint Stipulation of Voluntary Dismissal of the case was filed in the 4th Circuit Court of Appeals.

Plaintiff, Gavin Grimm filed an Amended Complaint in the U.S. District Court of the Eastern District of Virginia, Newport News Division on August 11, 2017. The Defendant, Gloucester County School Board filed a Brief in Support of Motion to Dismiss Amended Complaint on September 22, 2017. Grimm filed a Memorandum in Opposition to Gloucester County School Board's Motion to Dismiss Amended Complaint on September 29, 2017.

On May 22, 2018, the U.S. District Court of the Eastern District of Virginia denied the school board's motion to dismiss the case and held that Title IX and the Constitution protect transgender students from being excluded from the common restrooms that align with their gender identity. The District Court held, as a matter of first impression, that claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory under Title IX. The court also determined Grimm's allegations were sufficient to plead that policy was not substantially related to important governmental objective of protecting other students' privacy rights.



GENDER IDENTITY DISCRIMINATION

HISTORY OF DISCRIMINATION

Though transgender people increasingly are protected explicitly under local and state non-discrimination laws, the systemic discrimination and violence that transgender people experience in meeting their most basic survival needs leads to very poor health outcomes, and high rates of poverty, homelessness and criminal justice system contact.

Identity Documents: Transgender and gender non-conforming people face the following significant barriers to accessing and utilizing affirming identification:

- Transgender people often have government issued identification that does not accurately reflect their name and/or gender, or no ID at all, which can lead to humiliation, violence, and arrest.
- Changing the name and gender marker on identification can be costly or impossible depending on the type of ID and the resources available to the individual.
- Transgender people are often forced to present identification with an outdated picture that does not reflect their gender presentation, which can cause humiliation, violence and arrest.
- Increasingly, you need identification to obtain other identification, making it difficult to impossible for transgender people to obtain government-issued ID at all.

Youth: Young people who identify as transgender or gender non-conforming or who are perceived as transgender are subjected disproportionately to discipline and violence by peers as well as by foster care agencies, schools, juvenile detention facilities and doctors.

- People who break gender norms are subject to increased bullying and other forms of harassment in school. In one 2009 report, almost 90% of transgender students reported verbal harassment and over 50% reported physical harassment within the year.
- Transgender individuals are more likely to be kicked out of their homes and studies estimate that between 20 and 50% of homeless youth are LGBT.

Work: Transgender people often have a difficult time finding or keeping a job due to bias and discrimination in the workplace and employment barriers for people with past criminal justice system contact. Experiences of discrimination are increased for transgender people of color, especially transgender women of color.

- A report by Make the Road New York found that 60% of transgender survey respondents had never been offered a job when applying as openly transgender.
- The National Transgender Discrimination Survey (NTDS) found that 90% of those surveyed experienced harassment or discrimination at work; 44% reported experiencing

under-employment; 16% said they had been compelled to engage in underground employment for income; 11% turned to sex work; 25% of undocumented respondents had been physically assaulted at work.

Healthcare: The health care system disproportionately regulates the care available to and forced upon people who transgress gender norms.

- The rate of suicide for transgender people is almost 40 times higher than the general population
- Transgender women have rates of HIV infection nearly 50 times as high as other adults.
- Transgender individuals are more likely to be refused medical care because of their transgender status. In a recent survey, 19% of respondents reported being refused care due to their transgender or gender non-conforming status, with even higher numbers among people of color in the survey.
- Access to health care related to gender transition is routinely excluded from public and private insurance coverage and is denied altogether to people in custodial settings.

Policing/Incarceration: Transgender communities are disproportionately incarcerated and face extreme violence in the criminal justice system. Police targeting of transgender people, the need to participate in criminalized economies because of employment discrimination, and lack of access to alternatives to incarceration like drug treatment programs all contribute to this. When incarcerated, transgender individuals are almost always detained according to birth assigned sex and face systemic harassment, violence, and sexual assault while incarcerated.

- 47% of black transgender respondents in the NTDS reported being incarcerated.
- A study of California prisoners found that 59% of trans women housed in men's prisons had been sexually abused while incarcerated, as compared to 4% of non-trans prisoners in men's prisons.

References

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- Ann Haas, et al., Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey (Jan. 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>.
- Make the Road New York, A Report on the Employment Experiences of Transgender and Gender Non-Conforming People (October 2013), http://www.maketheroad.org/pix_reports/Discrimination_at_the_Workplace_from_Application_to_Termination_Full_Report_Oct2013.pdf.

LEGAL OVERVIEW

Under the familiar tiers-of-scrutiny framework in cases arising under the Equal Protection Clause, “the actions of a governmental entity that discriminates on the basis of sex are subject to heightened scrutiny,” *Craig v. Boren*, 429 U.S. 190, 197 (1976). State entities “may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’” *United States v. Virginia*, 518 U.S. 515, 541-42 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). Therefore, “generalizations about ‘the way women are,’ estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.” *Id.* at 550.

The Supreme Court has consistently held that a party who seeks to defend discriminatory classifications on the basis of sex must offer an “exceedingly persuasive justification” for that classification. *Id.* at 531; *Mississippi Univ. for Women*, 458 U.S. at 724. The government must show “at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” *Virginia*, 518 U.S. at 533 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724). The governmental interests enumerated must be “real, as [o]pposed to . . . merely speculative.” *Bernal v. Fainter*, 467 U.S. 216, 227-28 (1984). If the governmental action at issue does not concern a suspect or quasi-suspect classification, such as sex, however, a court will uphold it “so long as it bears a rational relation to some legitimate end.” *Romer v. Evans*, 517 U.S. 620, 631 (1996).

The Supreme Court has not decided whether transgender status is a quasi-suspect class under the Equal Protection Clause. In a recent decision further summarized below, the U.S. District Court for the Southern District of Ohio thoroughly analyzed whether transgender people are a quasi-suspect class under the Equal Protection Clause, and whether school policies barring transgender students from restrooms that correspond to their gender identity pass muster under heightened scrutiny. *Bd. of Educ. v. U.S. Dep’t of Educ.*, 2016 U.S. Dist. LEXIS 131474 (S.D. Ohio Sept. 26, 2016). The court’s analysis is summarized as follows:

The Supreme Court employs the following four factors to determine whether a new classification requires heightened scrutiny: (1) whether the class has been historically “subjected to discrimination,” *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); (2) whether the class has a defining characteristic that “frequently bears no relation to ability to perform or contribute to society,” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); (3) whether the class exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group,” *Lyng*, 477 U.S. at 638; and (4) whether the class is “a minority or politically powerless,” *id.*

A district court in the Southern District of New York recently held that heightened scrutiny applied to a transgender plaintiff’s equal-protection claim because discrimination on the basis

of transgender status is discrimination on the basis of sex. *Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015).¹ The court considered the four-factor test to identify a quasi-suspect class and determined that transgender individuals were indeed such a class, *id.* at 139-40. See also *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Mitchell v. Price*, No. 11-cv-260, 2014 WL 6982280, at *8 (W.D. Wisc. Dec. 10, 2014) (“[T]he parties agree that [the plaintiff’s] Fourteenth Amendment equal protection claims based on her transgender status receive heightened scrutiny.”).

First, transgender people have historically been subject to discrimination, including in education, employment, housing, and access to healthcare. *Adkins*, 143 F. Supp. 3d at 139. Second, there is no relationship between a person’s transgender status and their ability to contribute to society. Third, transgender people have “immutable [and] distinguishing characteristics that define them as a discrete group,” *Lyng*, 477 U.S. at 638, or as the Second Circuit put it in *Windsor*, “the characteristic of the class calls down discrimination when it is manifest,” 699 F.3d at 183. See also *Adkins*, 143 F. Supp. 3d at 139-40 (noting that transgender people encounter obstacles when there is a mismatch between the sex indicated on a birth certificate and the person’s gender identity, and that “transgender people often face backlash in everyday life when their status is discovered”). Finally, as a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings, transgender people are a politically powerless minority group. The efforts of states to pass legislation requiring individuals to use sex-segregated bathrooms that correspond with their birth sex are but one example of the relative political powerlessness of this group. See *Carcano*, 2016 WL 4508192, at *6-7 (describing the enactment of North Carolina’s “bathroom bill”); see also *Adkins*, 143 F. Supp. 3d at 140 (noting there are no openly transgender members of the U.S. Congress or federal judiciary).

The *Highland* court went on to find that the school district’s justifications for excluding transgender students from gender-segregated school facilities—protecting the dignity and privacy rights of other students, and purported safety issues and lewdness concerns—did not pass muster under heightened scrutiny or rational basis review. *Bd. of Educ.*, 2016 U.S. Dist. LEXIS 131474, at *60-69. While *Highland* is not binding case law, it provides a thorough analysis of how existing Supreme Court precedent compels the conclusion that the Equal Protection Clause prohibits state discrimination against transgender individuals.

Outside the context of the Equal Protection Clause, a seminal Supreme Court case on sex stereotyping, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), strongly indicates discrimination against an individual based on their transgender status is a violation of Title VII of the Civil Rights

¹ *Adkins* held that transgender people were a quasi-suspect class in light of the Second Circuit’s holding that LGB people were a quasi-suspect class in *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff’d by United States v. Windsor*, 133 S. Ct. 2675 (2013). The Supreme Court, however, did not squarely hold whether LGB people are a suspect class. See 133 S. Ct. at 2706 (Scalia, J., dissenting).

Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and, transitively, Title IX. In *Price Waterhouse*, an employee was advised that if she wanted to advance in her career she should be less “macho” and learn to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” 490 U.S. at 235. In ruling for the plaintiff, the Supreme Court confirmed “that Title VII barred not just discrimination based on the fact that [the employee] was a woman, but also discrimination based on the fact that she failed ‘to act like a woman.’” *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000). *Price Waterhouse* “eviscerated” the reasoning of some lower court decisions that attempted to narrow Title VII by drawing a distinction between discrimination based on sex and discrimination based on gendered behavior. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004); accord *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Schwenk*, 204 F.3d at 1202.

Under *Price Waterhouse*, it does not matter whether a plaintiff is perceived “to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.” *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008). Transgender individuals are people who do not conform to the general assumption that a person’s gender identity will correspond to the sex identified for that person at birth. Thus, “it would seem that any discrimination against [transgender] . . . individuals who, by definition, do not conform to gender stereotypes—is . . . discrimination on the basis of sex as interpreted by *Price Waterhouse*.” *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) (“Because the term ‘transgender’ describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual’s transgender status constitutes discrimination based on gender stereotyping.”). There is inherently “a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.” *Glenn*, 663 F.3d at 1316.

EDUCATION

- All schools and educational programs that receive public education funding from the federal government must comply with the U.S. Constitution, which prohibits state actors (including public schools) from discriminating against people on the basis of sex.
- The U.S. Department of Education’s Office for Civil Rights enforces five federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age in programs or activities that receive federal financial assistance from the Department of Education (ED).
- This includes Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex. Under Title IX, students must not be denied access to

educational benefits and opportunities on the basis of gender.” *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). “Students are not only protected from discrimination, but also specifically shielded from being ‘excluded from participation in’ or ‘denied the benefits of’ any ‘education program or activity receiving Federal financial assistance.’” *Id.* (quoting 20 U.S.C. § 1681(a)).

- ED issues regulations that schools receiving federal education funding must follow, as well as guidance documents explaining how to comply with existing regulations.
- Anyone who believes a school or program receiving federal education funds is discriminating against someone because of their gender, gender identity, or sexual orientation may file a complaint with the Office for Civil Rights. You do not need to be a victim of the discrimination to file the complaint; you can file a complaint on behalf of another person or group.
- OCR may investigate a school or educational program in response to a complaint. If it finds a school is violating a federal civil rights statute, it may refuse to provide any additional federal education funding until the school complies with the law.
- People who are harmed as a result of a school or education program discriminating against them in violation of Title IX may also file a lawsuit against the school to stop the discriminatory actions and/or compensate them for the harm.

Notable Decisions

- *Doe v. Boyertown Area School District*, 893 F.3d 179 (3rd Cir. July 26, 2018) (stating that discrimination based on transgender status, including denial of equal access to restrooms, may violate Title IX and rejecting arguments that a school policy protecting transgender students violated other students’ rights).
- *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. May 30, 2017) (holding that discrimination against transgender students constitutes sex discrimination under Title IX and the Equal Protection Clause).
- *Dodds v. U.S. Dept. of Education*, 845 F.3d 217 (6th Cir. Dec.16, 2016) (holding that discrimination against transgender students likely constitutes sex discrimination under Title IX and the Equal Protection Clause).
- *J.A.W. v. Evansville Venderburgh School Corporation*, No. 3:18-cv-37-WTL-MPB (S.D. Ind. Aug. 3, 2018) (holding that a school district’s exclusion of a transgender student from using the boys’ restrooms likely violated Title IX and the Equal Protection Clause).

EMPLOYMENT

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, is the primary federal employment discrimination law in the United States. Title VII prohibits discrimination in the terms and conditions of employment based on race, color, sex, religion, or national origin.
- Several separate anti-discrimination employment laws have been passed at the federal level since 1964, including the:
 - Age Discrimination in Employment Act of 1967, 29 U.S.C. § 631, *et seq.*
 - Americans with Disabilities Act of 1990, 42 U.S.C. 12101, *et seq.*
 - Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.*
 - Genetic Information Nondiscrimination Act, and the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, *et seq.*
 - Equal Pay Act, 29 U.S.C. § 206(d), *et seq.*
- The Civil Rights Act of 1991 made a number of critical changes in Title VII, including providing for the availability of jury trials in Title VII cases; allowing the award of punitive and compensatory damages in Title VII cases, up to a specified dollar-amount cap based on the number of employees employed by the defendant company; making clear that an award of attorney's fees under Title VII may include an award of costs incurred for expert witness testimony, and permitting a plaintiff who prevails in a "mixed motive" situation some limited recovery, even if the employer would have made the same employment decision in the absence of any unlawful motive.
- Title VII of the Civil Rights Act is enforced by the U.S. Equal Employment Opportunity Commission (EEOC). An individual pursuing a claim under Title VII is required to file an administrative charge of discrimination with the EEOC or a "state deferral agency," such as the Virginia Council on Human Rights, prior to bringing suit.
- The EEOC will investigate the charge and, if cause is found to believe Title VII has been violated, will attempt to conciliate – that is, settle – the claim by informal methods. If conciliation fails, or if a no-cause finding is made, the agency will issue a right-to-sue notice, permitting the employee to bring a private civil action in federal or state court. The employee must sue, if at all, within 90 days of her receipt of the right-to-sue notice.
- In 2012, the EEOC handed down a decision in *Macy v. Holder*, Appeal No. 0120120821 (EEOC April 20, 2012) that wholeheartedly embraced protection for transgender and transitioning employees under the existing rubric of Title VII. The Commission relied on *Price Waterhouse* for the proposition, in the Supreme Court's words, that Title VII bars

“not just discrimination because of biological sex, but also gender stereotyping – failing to act and appear according to expectations defined by gender.” And “gender,” the Commission wrote, “encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.”

- On March 27, 2015, the EEOC issued a final decision in *Lusardi v. McHugh*, Appeal No. 0120133395, a complaint filed by a civilian contractor. After she began presenting as a woman, supervisors continued to address her as “sir” and used male pronouns. The Commission held that the repeated use of name and identity pronouns inconsistent with the employee’s presented gender constituted a violation of Title VII.

Notable Decisions

- *EEOC v. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. March 8, 2018) (holding that termination of employee on the basis of transitioning or transgender status violates Title VII of the 1964 Civil Rights Act).
- *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. March 25, 2005) (holding that termination of employee based on her gender transition violates Title VII).
- *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. Aug. 5, 2004) (holding that termination based on gender transition constitutes sex-based discrimination under Title VII).
- *Parker v. Strawser Construction*, No. 2:17-cv-541, 2018 WL 1942374 (S.D. Ohio Apr. 25, 2018) (holding that Title VII protects against anti-transgender discrimination).
- *Wittmer v. Phillips*, 66 Co., No. CV H-17-2188, 2018 WL 1626366 (S.D. Tex. Apr. 4, 2018) (holding that Title VII protects transgender workers against discrimination).
- *E.E.O.C. v. Rent-a-Center East, Inc.*, 264 F.Supp.3d 952 (C.D. Ill. Sept. 8, 2017) (holding that discrimination against transgender workers violates Title VII).
- *Fabian v. Hospital of Central Connecticut*, 172 F.Supp.3d 509 (D. Conn. Mar. 18, 2016) (holding that discrimination based on applicant’s transgender status violates Title VII).
- *U.S. v. Southeast Oklahoma State University*, 2015 WL 4606079 (W.D. Okla. July 10, 2015) (holding that harassment, health insurance exclusion, and termination based on gender transition constituted sex stereotyping discrimination under Title VII).
- *Finkle v. Howard County*, 12 F.Supp.3d 780 (D. Md. 2014) (holding a claim of discrimination-based gender identity constitutes sex discrimination under Title VII).

Related Cases

- *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. Apr. 4, 2017) (*en banc*) (holding that discrimination based on sexual orientation is sex-based discrimination under Title VII).
- *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. Feb. 26, 2018) (holding that sexual orientation discrimination is motivated in part by sex and impermissible under Title VII).

OTHER NOTABLE DECISIONS

Numerous federal courts have ruled that federal sex discrimination laws under Title IX education law and Title VII employment law protect individuals based on transgender or transition status. Courts have also held that the Fair Housing Act, the Equal Credit Opportunity Act, and Section 1557 of the Affordable Care Act (ACA) also prohibit discrimination against transgender people.

- *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. Dec. 6, 2011) (holding that termination of employee based on her gender transition, transgender status and unsubstantiated “bathroom concerns” constitutes sex-based discrimination in violation of the Equal Protection Clause of the U.S. Constitution).
- *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. June 8, 2000) (holding that refusal to serve transgender customer constitutes sex-based discrimination under the Equal Credit Opportunity Act).
- *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. Feb. 29, 2000) (holding that the Gender Motivated Violence Act (GMVA) applied to targeting of a transgender person).
- *Flack v. Wisconsin Department of Health Services*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018) (holding that a Medicaid program’s refusal to cover treatments related to gender transition is “text-book discrimination based on sex” in violation of the ACA and the Equal Protection Clause).
- *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 WL 2191733 (W.D. Wis. May 11, 2018) (reasoning that Title VII and the ACA prohibit anti-transgender discrimination).
- *Karnoski v. Trump*, C17-1297-MJP, 2017 WL 5668071 (W.D. Wash. Apr. 13, 2018) (maintaining a preliminary injunction on policy of excluding transgender individuals from serving openly in the military and holding that transgender people are entitled to heightened scrutiny under the Constitution).
- *F.V. v. Barron*, 286 F.Supp.3d 1131 (D. Idaho March 5, 2018) (finding the practice of denying transgender individuals’ applications to change the sexes listed on their birth certificates violated Equal Protection Clause)
- *Prescott v. Rady Children’s Hospital-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the ACA).
- *Smith v. Avanti*, 249 F.Supp.3d 1149, 2017 WL 1284723 (D. Colo. Apr. 5, 2017) (holding Fair Housing Act prohibited discrimination against a transgender woman and partner).
- *Norsworthy v. Beard*, 87 F.Supp.3d 1164 (N.D. Ca. Oct. 5, 2015) (granting preliminary injunction against prison officials and medical staff for denying necessary medical treatment for inmate’s gender dysphoria—finding likely Equal Protection Clause and Eighth Amendment violation).

Adapted from *Federal Case Law on Transgender People and Discrimination*, National Center for Transgender Equality (2018), <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination>

ARE THERE STATE AND LOCAL LAWS THAT CLEARLY PROHIBIT DISCRIMINATION AGAINST TRANSGENDER PEOPLE?

Yes. Eighteen states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington) and the District of Columbia all have such laws. Their protections vary. For example, Nevada's law bans discrimination in employment, housing, and public accommodations like restaurants, hospitals, and retail stores; Maine's law covers those categories plus access to credit and education.

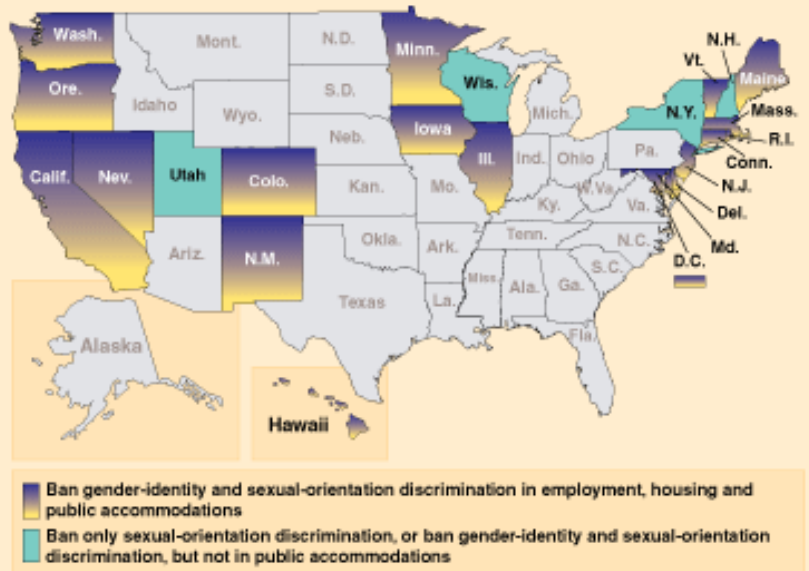
At least 200 cities and counties have banned gender identity discrimination, including Atlanta, Austin, Boise, Buffalo, Cincinnati, Dallas, El Paso, Indianapolis, Kansas City, Louisville, Milwaukee, New Orleans, New York City, Philadelphia, Phoenix, Pittsburgh, and San Antonio, among others.

The governors of Indiana, Kentucky, Michigan, New York, and Pennsylvania have issued executive orders banning discrimination against transgender state workers. Some cities and counties have also protected their transgender public employees through local ordinances, charter provisions, or other means.

For more information, visit *Know Your Rights: Transgender People and the Law*, American Civil Liberties Union (2018), <https://www.aclu.org/know-your-rights/transgender-people-and-law>.

18 States Ban Transgender Discrimination

Eighteen states and the District of Columbia prohibit gender-identity and sexual-orientation discrimination in housing, employment and public accommodations. Three states ban only sexual-orientation bias, and Utah bans both gender-identity and sexual-orientation discrimination, but not in public accommodations.



Source: American Civil Liberties Union (ACLU)

ADVERSE PRECEDENT

- *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007) (holding that discrimination against transgender workers may sometimes constitute sex discrimination under Title VII but that such discrimination was not covered in all cases).
- *Texas v. United States*, 201 F.Supp.3d 810 (N.D. Tex. Aug. 21, 2016) (holding that Title IX does not prohibit discrimination based on gender identity or transgender status).
- *Johnston v. University of Pittsburgh*, 97 F.Supp.3d 657 (W.D. Pa. Mar. 31, 2015) (holding that Title IX does not prohibit discrimination based on gender identity or transgender status).

STATE LAW ISSUES

VIRGINIA STATE CONSTITUTION

"That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination." Va. Const. art. I, § 11.

VIRGINIA HUMAN RIGHTS ACT (VHRA)

The VHRA defines unlawful, discriminatory practices as "[c]onduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability shall be an 'unlawful discriminatory practice' for the purposes of this chapter." Va. Code Ann. § 2.2-3901. Additionally, the VHRA notes that the terms "because of sex or gender" or "on the basis of sex or gender" encompass discrimination "because of or on the basis of pregnancy, childbirth or related medical conditions." *Id.*

This should mean that Virginia law also protects transgender people from discrimination if such discrimination is determined to be discrimination based on sex under federal law. No court has, as yet, made such a ruling. This interpretation is aligned with the guidance issued in an advisory opinion by the Virginia Office of the Attorney General, explaining:

"For more than a quarter-century, since the General Assembly enacted the Virginia Human Rights Act, it has been our Commonwealth's policy to protect all individuals within the Commonwealth from unlawful discrimination on the basis of sex. Numerous other Virginia statutes also prohibit sex-based discrimination in areas such as employment, housing, and contracting. Those statutes most likely prohibit discriminatory conduct against LGBT Virginians when that conduct is based on sex-stereotyping or on treating them less favorably on account of their gender. Additionally, while a strong argument could be made that discrimination on the basis of gender identity or sexual orientation is always sex discrimination within the meaning of Virginia's anti-discrimination statutes, the Supreme Court of Virginia has not considered and resolved that question." Op. Atty. Gen., May 10, 2016, 2016 WL 2940460.

The VHRA offers specific protections against discharge for employees of small businesses not covered under Title VII. If upheld as transgender inclusive, this would be only Virginia state statute prohibiting discharge of transgender employee by any state or private employer.

The Virginia Legislature has refused to amend VHRA to include gender identity and sexual orientation every session since 2006. *See, e.g.*, Va. Gen. Assemb. Reg. Sess. SB 202 (2018).

BEST PRACTICES

The following are tips and best practices to respectfully engage with transgender or gender non-conforming individuals. Although not an exhaustive list, these strategies can allow you to become a more effective ally by promoting inclusive practices that allow each person to feel safe, valued, and engaged, because your words and actions make a difference.

- **Use the correct terminology.** Transgender people use many different terms to describe their experiences. Respect the term a person uses to describe themselves, which may include transsexual, pansexual, non-binary, or genderqueer, among others. If a person is not sure of which identity label fits them best, do not assign them a label or tell them which term you think they should use.
- **Use the correct pronouns.** There are many transgender individuals that use *he* or *she*, but many are gender fluid or gender non-conforming and use alternative pronouns, including *them*, *they*, *their*, *ze*, *zhe*, *sie*, or *hir*, among others. If you don't know what pronouns to use, listen first. If you are unsure which pronoun a person uses, listen first to the pronoun other people use when referring to them. You can also ask which pronoun the person uses or prefers. If you accidentally use the wrong pronoun, apologize quickly and sincerely, then move on.
- **Respect the name a transgender person is currently using.** Refer to the person as they introduce themselves. If needed, ask someone for their "birth name" or "given name," rather than asking them for their "real name."
- **Do not assume someone is transgender based on appearance alone.** Individuals who identify as transgender come from diverse backgrounds. It is not possible to look around a room and "see" if there are any transgender people. Many individuals do not appear "visibly trans," meaning they are not perceived to be transgender by others.
- **Do not make assumptions about a transgender person's sexual orientation.** Gender identity is different than sexual orientation. Gender identity is an individual's sense of being a man or a woman, or outside that gender binary. Sexual orientation is who an individual is attracted to; transgender people can be gay, lesbian, bisexual, or straight.
- **Be careful about confidentiality, disclosure, and "outing."** Some transgender people feel comfortable disclosing their gender history, and some do not. Listen to those who choose to publicly discuss their gender history to raise awareness and make cultural change. Do not share, speculate, or gossip about a person's gender identity.

- **Accept that if someone tells you they are transgender, they are.** Understand there is no “right” or “wrong” way to transition, and that it is different for every person. If a legal claim requires evidence regarding gender identity, obtain consent for disclosure and share an individual’s gender history only to the extent necessary.
- **Do not ask about a transgender person’s genitals, surgical status, or sex life.** Some transgender people access medical care like hormones and surgeries as part of their transition to align their bodies with their gender identity. Some transgender people want their authentic gender identity to be recognized without hormones or surgery. Some transgender people cannot access medical care, hormones, and/or surgeries due to a lack of financial resources or access to healthcare. A transgender person’s identity is not dependent on medical procedures or their physicality. It is inappropriate to ask a person about the appearance or surgical history.
- **Avoid backhanded compliments and “helpful” tips.** The following comments are examples of statements that may be hurtful or even insulting:
 - “I would have never known you were transgender. You look so pretty.”
 - “You look just like a real woman.”
 - “She’s so gorgeous, I would have never guessed she was transgender.”
 - “You’d pass so much better if you wore more make-up, had a better wig, etc.”
 - “Have you considered a voice coach?”
- **At meetings and events, set an inclusive tone.** At a meeting where not everyone is known, consider asking people to introduce themselves with their name and pronouns. This sends the message that you are not making assumptions about anyone’s gender, and that people are free to self-identify. However, if you feel this practice will have the effect of singling out someone in the room, avoid it. In a group setting, identify people by articles of clothing instead of using gendered language. For example, the “person in the blue shirt,” instead of the “woman in the front.” Be aware of meeting facilities, such as whether all-gender bathrooms are available, to make spaces inclusive.
- **Listen to transgender people.** The best way to be an ally is to listen with an open mind to transgender people speaking for themselves. Talk to transgender people in your community. Check out books, films, YouTube channels, and trans blogs to find out more about transgender people and the issues that people within the community face.

Adapted from *Tips for Allies of Transgender People*, GLAAD (Jun. 2018), <https://www.glaad.org/transgender/allies> and *Trans@MIT Allies Toolkit: Actions Tips for Allies of Trans People*, Mass. Inst. of Tech. (Mar. 31, 2006), <http://www.teni.ie/attachments/0356681d-ece3-41d0-8d11-69fdcb290caa.PDF>.

ADDITIONAL RESOURCES

Equality Virginia

P.O. Box 17860
Richmond, VA 23226
804-643-4816
info@equalityvirginia.org

National Center for Lesbian Rights

870 Market Street, Suite 370
San Francisco, CA 94102
415.392.6257
Info@NCLRights.org

GLBTQ Legal Advocates & Defenders (GLAD)

30 Winter St., Ste. 800
Boston, MA 02108
617-426-1350
gladlaw@gladlaw.org

National Center for Transgender Equality

1400 16th St., NW, Ste. 510
Washington, DC 20036
202-642-4542
ncte@traansequality.org

Gender Justice

550 Rice Street, Ste. 105
St. Paul, MN 55103
651-789-2090

Transgender Law Center

1629 Telegraph Ave., 400
Oakland, CA 94612
415-865-0176 x 306

Human Rights Campaign

1640 Rhode Island Ave. NW
Washington, DC 20036
202-628-4168

National LGBTQ Task Force

1325 Massachusetts Ave. NW., Ste. 600
Washington, DC 20005
202-393-5177

GLAAD

104 W 29th St #4
New York, NY 10001
(212) 629-3322

The Trevor Project

Lifeline: 866-4-U-TREVOR (866-488-7386)
TrevorChat and TrevorText also available

Adapted from Kylar W. Broadus, *Practice Tips for Working with Transgender Clients*, Am. Bar Assoc. (2018), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/sexual-orientation-gender-identity/practice-tips-for-working-with-transgender-clients.html.