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# UNDRESSING THE LOCKER ROOM ISSUE: APPLYING TITLE IX TO THE LEGAL BATTLE OVER LOCKER ROOM EQUALITY FOR TRANSGENDER STUDENT-ATHLETES

MEGHAN M. PIRICS\*

## I. INTRODUCTION

In a letter dated November 2, 2015, the Office for Civil Rights (OCR) held that Township High School District 211, located in Palatine, Illinois, violated Title IX by excluding a transgender female student “from participati[ng] and denying her the benefits of its education program, providing services to her in a different manner, subjecting her to different rules of behavior, and subjecting her to different treatment on the basis of sex.”<sup>1</sup> Student A, as she was referred to in the case, was denied access to the women’s locker rooms at her school during the course of her participation in physical education classes and as a member of a women’s athletics team.<sup>2</sup> The OCR found that, due to her inability to use the female locker rooms, Student A did not receive the same opportunity to benefit from the District’s educational programs as other students and experienced a continuing sense of isolation from her classmates and teammates.<sup>3</sup> As a result, the OCR required the District to take certain steps to

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1. Letter from Adele Rapport, Reg’l Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Dr. Daniel E. Cates, Superintendent, Township High Sch. Dist. 211, at 1 (Nov. 2, 2015), <https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf> [hereinafter Township High Sch. Dist. 211 Case].

2. *Id.* at 1.

3. Letter from Adele Rapport, Reg’l Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Dr. Daniel E. Cates, Superintendent, Township High Sch. Dist. 211, at 2 (Dec. 3, 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05141055-a.pdf>.

ameliorate the issue.<sup>4</sup> Though this specific case centered on an issue in a high school setting, other cases concerning transgender students' access to locker rooms have been popping up in middle school and collegiate settings, as more and more students face discrimination based on their gender identity.

This Article will explore the relationship between Title IX and the protections it may afford transgender intercollegiate student-athletes who are discriminated against through the receipt of unequal access to locker rooms at school and during participation in athletic events. Part II provides an explanation of what "transgender" means and discusses the current debate surrounding whether transgender student-athletes should be allowed to use the locker room that corresponds with their chosen sexual identity. Part III gives an overview of Title IX, its application to athletics, and the interpretations and guidelines that set forth specific policies regarding Title IX. Part IV examines the potential protections Title IX affords transgender student-athletes by looking at case law from similar instances in the school setting. Part V concludes by contemplating how protection under Title IX would impact the future of intercollegiate athletics, especially for transgender student-athletes.

## II. THE LOCKER ROOM DEBATE

Recently, the issue of whether a transgender student should be allowed to use the locker room associated with his or her chosen gender identity has become a heavily-disputed issue, especially amongst parents in the school setting.<sup>5</sup> To understand why this is such a hot-button topic, it is important to have a basic understanding of what it means to be a transgender individual and how participation opportunities on sports teams have increased for transgender student-athletes as of late. Thus, this Part provides important background

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4. Agreement to Resolve at 2, Township High Sch. Dist. 211, Office for Civil Rights, U.S. Dep't of Educ., No. 05-14-1055 (Dec. 2, 2015), <https://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf>.

5. See generally Jaime Chambers, *Transgender Student in Boy's Locker Room Sparks Debate*, FOX5 San Diego (Feb. 10, 2016), <http://fox5sandiego.com/2016/02/10/transgender-student-in-boys-locker-room-sparks-debate/>; Bettie Cross, *Dripping Springs Transgender Bathroom Controversy Heats up*, CBS Austin (Dec. 12, 2016), <http://keyetv.com/news/local/dripping-springs-transgender-bathroom-controversy-heats-up>; Wesley Goheen & Rebekka Schramm, *Parents Threaten Removal of Children over Transgender Bathroom Debate*, CBS46 News, <http://www.cbs46.com/story/31964788/parents-threaten-removal-of-children-in-transgender-bathroom-debate> (last updated June 10, 2016); Kelly McLaughlin, *California Freshman Is Uncomfortable Changing in Front of Student He Knew as Female*, Daily Mail Online (Feb. 12, 2016), <http://www.dailymail.co.uk/news/article-3444479/Transgender-locker-room-debate-California-high-school-freshman-boy-says-s-uncomfortable-changing-student-knew-female.html>.

information on transgender individuals, as well as important policies allowing transgender student-athletes to participate on teams at various levels of sport. This Part then provides an explanation of the locker room debate, including a summary of the arguments presented by those who are for and those who are against allowing transgender individuals to use the locker rooms associated with their gender identity. It concludes by offering a hypothetical used to illustrate how this issue affects transgender student-athletes, specifically at the intercollegiate level.

#### *A. Transgender Individuals*

The word “transgender” is an umbrella term used to describe “people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.”<sup>6</sup> Specifically, a transgender man is a person who was assigned the female sex at birth, but identifies and lives as a man.<sup>7</sup> Similarly, a transgender woman is a person who was assigned the male sex at birth, but identifies and lives as a woman.<sup>8</sup> Certain studies suggest that transsexuality is neurobiological, which involves the brain’s exposure to “atypical hormone levels during fetal development.”<sup>9</sup> In the past, transgender individuals who showed signs of this neurobiological difference were diagnosed with “Gender Identity Disorder,” a diagnosis often given to individuals with “strong and persistent cross-gender identification” accompanied by “significant distress or impairment in social, occupational, or other important areas of functioning.”<sup>10</sup>

In 2013, however, medical experts moved away from diagnosing transgender people with Gender Identity Disorder, as the diagnosis of “disorder” came to suggest that transgender individuals had a mental illness rather than an inherent feeling that their birth gender did not match their gender identity.<sup>11</sup> Now, experts use the term “Gender Dysphoria” to refer to the “distress

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6. GLAAD Media Reference Guide—Transgender, GLAAD, <http://www.glaad.org/reference/transgender> (last visited May 15, 2017).

7. *See id.*

8. *See id.*

9. Erin E. Buzuvis, *Transgender Student-athletes and Sex-segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 11 (2011).

10. *Id.*

11. *See* Mary Kathryn Burke, 7 *Questions Answered About Transgender People*, ABC NEWS (Aug. 15, 2015), <http://abcnews.go.com/Health/questions-answered-transgender-people/story?id=30570113>.

[an individual] may feel when their gender identity does not match the gender they were assigned at birth.”<sup>12</sup> Therapy is commonly used upon diagnosis of Gender Dysphoria to develop a plan to cope with the distress a person may feel based on his or her gender identity.<sup>13</sup>

Beyond therapy, many transgender individuals elect to transform their bodies to match their gender identity by undergoing hormone treatments or a combination of hormone treatments and surgical procedures.<sup>14</sup> Hormone treatments for transgender males consist of androgens, whereas treatments for transgender females include estrogen, progesterone, and testosterone-blocking agents.<sup>15</sup> Individuals who are more troubled by the disparity between their sex and gender often elect to have gender reassignment surgery.<sup>16</sup> After undergoing a transitional reassignment surgery, transgender individuals can formally recognize the transition by legally changing their names and gender-markers on licenses, passports, school records, and other identification documents or records.<sup>17</sup>

### B. *Transgender Student-Athletes*

Recently, an influx of awareness of and support for the transgender community and its collective fight for equality has occurred, especially for individuals who express a change in their gender identity at a young age.<sup>18</sup> As evidence, various sports’ governing bodies and athletics associations implemented policies allowing for participation by transgender student-athletes on sports teams.<sup>19</sup> For example, the Wisconsin Interscholastic Athlet-

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12. *Id.*

13. *Gender Dysphoria: What It Is and How It’s Treated*, WEBMD, <http://www.webmd.com/mental-health/gender-dysphoria?page=2#3> (last visited May 15, 2017).

14. Buzuvis, *supra* note 9, at 11.

15. *Id.*

16. Jennifer V. Sinisi, *Gender Non-Conformity as a Foundation for Sex Discrimination: Why Title IX May Be an Appropriate Remedy for the NCAA’s Transgender Student-Athletes*, 19 VILL. SPORTS & ENT. L.J. 343, 350 (2012).

17. M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 959 (2015).

18. Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC’Y 301, 302–03 (2013).

19. *See, e.g.*, SHANE BENNETT ET AL., UPDATES TO POLICIES AND TOURNAMENT MATERIALS AROUND TRANSGENDER ATHLETE PARTICIPATION IN NIRSA CHAMPIONSHIP SERIES EVENTS (2014), <http://nirsa.net/nirsa/wp-content/uploads/here.pdf>; NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES (Aug. 2011), [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf) [hereinafter NCAA

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Association (WIAA) recently released its transgender participation policy, which provides individual schools within the association deference to decide whether a transgender student-athlete can participate on a team associated with the student's chosen gender identity.<sup>20</sup> If the school permits the request, the student may participate on the team associated with his or her chosen gender, but if the school denies the request, the student may only participate on a team that corresponds with his or her birth gender.<sup>21</sup>

The National Collegiate Athletic Association's (NCAA) Office of Inclusion released its own policy recommendations for inclusion of transgender student-athletes in 2010. According to the NCAA, it released the policy recommendations because it felt few member schools were equipped with the knowledge required to "effectively address a transgender student's interest in participating in athletics."<sup>22</sup> In the recommendations, the NCAA stated that "[a]ddressing the needs of transgender students is an important emerging equal opportunity issue that must be taken seriously by school leaders."<sup>23</sup> The NCAA provides two basic sets of policies regarding participation: One for students

undergoing hormonal treatment as part of their transition, and one for students not taking hormonal treatments.<sup>24</sup> The following policy recommendation pertains to those students undergoing hormonal treatment:

1. A trans male (FTM) [female to male] student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men's team, but is no longer eligible to compete on a women's team without changing that team status to a mixed team.
2. A trans female (MTF) [male to female] student-athlete be-

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INCLUSION POLICY]; *Transgender Participation Policy*, WIAA, [https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAA\\_transgenderpolicy.pdf](https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAA_transgenderpolicy.pdf) (last visited May 15, 2017) [hereinafter WIAA PARTICIPATION POLICY].

20. See WIAA PARTICIPATION POLICY, *supra* note 19.

21. See *id.*

22. NCAA INCLUSION POLICY, *supra* note 19, at 4.

23. *Id.* at 5.

24. See *id.* at 13.

ing treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.<sup>25</sup>

Concerning students not taking hormone treatments, the recommendation explains that a student “may participate in sex-separated sports activities in accordance with his or her assigned birth gender.”<sup>26</sup> Specifically, “[a] trans male [(female to male)] student-athlete who is not taking testosterone . . . may participate on [either] a men's or women's team.”<sup>27</sup> Additionally, a trans female (male to female) not taking hormone treatments may not compete on a women's team, and therefore may only participate on a men's team.<sup>28</sup>

The NCAA policy recommendations also include guidelines for providing access to facilities for transgender student-athletes. Specifically, the NCAA recommends that transgender student-athletes “should be able to use the locker room, shower, and toilet facilities in accordance with the student's gender identity,” and that “[e]very locker room should have some private, enclosed changing areas, showers, and toilets for use by any athlete who desires them.”<sup>29</sup> Further, the NCAA explains that “transgender students should not be required to use separate facilities.”<sup>30</sup> This policy recommendation is very transgender-friendly in the sense that it prohibits separation based on gender identity and affords the individual student-athlete the ability to use the locker room of his or her choosing; however, the recommendation is just that—a recommendation—which means NCAA member schools are not forced to follow all suggested policies. The NCAA recently reinforced its position on this issue when it elected to pull seven different championships that were scheduled to take place in North Carolina due to the state's controversial “HB2” law.<sup>31</sup> The NCAA stated that the law, which “requires transgender

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 20.

30. *Id.*

31. See Elisha Fieldstadt, *NCAA Pulls Seven Championships out of North Carolina Over HB2*, NBC NEWS (Sept. 13, 2016), <http://www.nbcnews.com/feature/nbc-out/ncaa-pulls-seven->

people to use restrooms at schools . . . corresponding to the sex on their birth certificates,” does not “align with its commitment to ‘promote an inclusive atmosphere for all college athletes, coaches, administrators[,] and fans.’”<sup>32</sup>

In an ideal world, all schools and teams would implement policies similar to those suggested in the NCAA’s policy recommendations so transgender athletes at all levels of sport could participate in athletics while having equal access to facilities like locker rooms. Unfortunately, this is not the case. According to Pat Griffin, a professor at the University of Massachusetts, “[m]ost schools are waiting until it’s an issue,” which prevents an athletic director or other administrator from being prepared to address the issue until a transgender student comes to him or her and says he or she wants to play on a team.<sup>33</sup>

Additionally, the lack of policy means many transgender students face extreme animosity in the school setting from peers, teachers, and other staff members regarding their gender identity.<sup>34</sup> As a result, transgender students often report feelings of “fear and anxiety” when using restrooms and locker rooms at school, especially when forced to use the restrooms and locker rooms associated with their birth sex.<sup>35</sup>

### *C. Which Locker Room Should a Transgender Student-Athlete Use?*

The issue of whether a transgender student-athlete should be allowed to use the locker room associated with his or her chosen gender identity, rather than the locker room associated with his or her birth sex, has been heavily debated as of late.<sup>36</sup> Though this issue is widely talked about in the context of a student’s use of facilities during normal school hours, it also applies to student-athletes seeking use of a locker room during participation in practice or competition.

On one hand, proponents argue that a transgender student—and therefore a student-athlete—should be allowed to use the locker room associated with his or her chosen gender identity, rather than the one associated with his or her

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championships-out-north-carolina-over-hb2-n647386.

32. *Id.*

33. Zolan V Kanno-Youngs, *NCAA Members Slow to Adopt Transgender Athlete Guidelines*, USA TODAY (Aug. 5, 2015), <http://www.usatoday.com/story/sports/college/2015/08/03/ncaa-transgender-athlete-guidelines-keelin-godsey-caitlyn-jenner/31055873/>.

34. Tobin & Levi, *supra* note 18, at 303.

35. *See id.* at 304.

36. *See generally* Melissa Silverberg, *Mother of Transgender District 211 Student Speaks out*, DAILY HERALD, <http://www.dailyherald.com/article/20151113/news/151119391/> (last updated Nov. 13, 2015).

birth sex.<sup>37</sup> One argument in support of this reasoning is that it not only provides the transgender student with reasonable accommodation but also with the ability to fully participate in the various team-building activities that often occur in a locker room.<sup>38</sup> On the other hand, critics argue that transgender students should not be allowed to use the locker room associated with their chosen sex; instead, they should use the locker room corresponding with their birth sex or be required to use a separate facility.<sup>39</sup> One argument in support of this reasoning is privacy; specifically, that discrimination of this kind is necessary to protect the privacy interests of other students who may be uncomfortable with having a transgender person changing with them in the locker room.<sup>40</sup> This locker room issue should not be taken lightly because its outcome could seriously affect the ability of transgender student-athletes to participate in team rituals that take place inside the locker room and feel like they are truly members of a team.<sup>41</sup>

Consider the following hypothetical: Sam Student was accepted to Wisconsin University on a full scholarship to play on the women's basketball team, which has a long history of success in the NCAA. Being accepted to Wisconsin University on an athletic scholarship was in and of itself a huge accomplishment for Sam, but was especially significant because of one thing: she was born male, and, after struggling with her identity for years, Sam transitioned to female in high school. Sam did not think she would be able to participate on a women's college basketball team, but the NCAA's transgender student-athlete inclusion policy allowed her to play on the team after receiving testosterone suppression therapy for more than one year.<sup>42</sup>

After everything she had overcome, Sam was ecstatic to start as point guard in her team's first game of the season at a local college. However, Sam's excitement quickly faded upon arrival at the opposing school's gym; the school had a policy requiring transgender students to use the locker rooms associated with their birth gender, so Sam was not allowed to use the women's locker room with her teammates. Not wanting to cause trouble during her first

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37. See Township High Sch. Dist. 211 Case, *supra* note 1, at 10–11.

38. Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 288 (2013).

39. See Township High Sch. Dist. 211 Case, *supra* note 1, at 10–11.

40. Tobin & Levi, *supra* note 18, at 316.

41. Skinner-Thompson & Turner, *supra* note 38, at 288.

42. See NCAA INCLUSION POLICY, *supra* note 19, at 13.

collegiate game, Sam quickly agreed to dress for the game in a separate facility, but was embarrassed and upset she could not use the same locker room as the rest of her team, especially because she knew she would miss out on pre-game rituals her team completed in the locker room. Sam wondered if this would be an issue she would face for the rest of her collegiate athletic career and whether any rules or policies would protect her ability to use the same locker room as her teammates so she could partake in pre-game team-building activities.

### III. TITLE IX: APPLICATION TO ATHLETICS AND INTERPRETATIONS

Although Sam is a fictional character, her story is a foreseeable one, especially at the intercollegiate level. The prevalence of this kind of situation in today's society begs the question as to what protections are available for students like Sam who wish to use the same locker room as the rest of her teammates. Recently, plaintiffs in a similar situation to Sam have brought this issue to the courts to have them decide whether recourse exists when they are denied equal access to locker rooms at school and during sporting events. Though lower courts have been split on these decisions, it seems that transgender student-athletes facing this type of discrimination would have recourse under Title IX, the regulation that prohibits discrimination based on sex in federally-funded athletics programs.<sup>43</sup>

#### *A. Brief History of Title IX*

Title IX of the Education Amendments Act of 1972 was “signed into law by President Richard M. Nixon to end sex discrimination in any federally funded educational” program or activity.<sup>44</sup> According to various Supreme Court interpretations, the main objectives of Title IX were to “avoid use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices.”<sup>45</sup> In 1974, the Secretary of Health, Education, and Welfare developed the regulation that implemented Title IX.<sup>46</sup> That regulation states:

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43. See Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2016).

44. Kimberly Capadona, Comment, *The Scope of Title IX Protection Gains Yardage as Courts Continue to Tackle the Contact Sports Exception*, 10 SETON HALL J. SPORT L. 415, 418 (2000).

45. Deborah L. Rhode & Christopher J. Walker, *Gender Equity in College Athletics: Women Coaches as a Case Study*, 4 STAN. J. C.R. & C.L. 1, 6 (2008).

46. *Id.*

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.<sup>47</sup>

The regulation, while banning discrimination based on sex, allows for the creation of “separate but equal” athletic programs, meaning schools can separate competitive athletic teams for male and female students, as long as those separate programs receive equal opportunities and resources.<sup>48</sup> This separation based on sex, though, creates the question of which team a transgender student-athlete should be allowed to participate on: The one based on his or her birth sex, or the one based on his or her gender identity.

### *B. Title IX Resources and Interpretations*

As of late, there has been much debate as to whether the transgender designation is included in Title IX’s definition of “sex,” that is, whether a transgender student who is denied access to certain facilities because of his or her status as a transgender individual is considered discriminated against “on the basis of sex” in violation of Title IX.<sup>49</sup> The OCR, a sub-agency of the Department of Education (DOE),<sup>50</sup> has released several different resources that attempt to answer this question. The first of these guidelines was released in a 2010 Dear Colleague Letter, which stated “[Title IX] prohibits gender-based harassment . . . [t]hus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity.”<sup>51</sup> The letter further clarified that Title IX prohibits “gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.”<sup>52</sup>

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47. Athletics, 34 C.F.R. § 106.41(a) (2016).

48. Buzuvis, *supra* note 9, at 5–6.

49. *See* Levasseur, *supra* note 17, at 989–91.

50. *See About OCR*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last visited May 15, 2017).

51. Russlynn Ali, Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T EDUC. 7–8 (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

52. *Id.* at 8.

Then, in 2014, the OCR released a document of questions and answers on Title IX and sexual violence. According to the OCR, Title IX protects all students, including “straight, gay, lesbian, bisexual[,] and transgender students[,]” from sexual violence.<sup>53</sup> Additionally, the OCR explained 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 and femininity.”<sup>54</sup> In April 2015, the OCR published its *Title IX Resource Guide*, which specifically explained the scope of Title IX as protecting “students, employees, applicants for admission and employment, and other persons from all forms of sex discrimination, including discrimination based on gender identity.”<sup>55</sup> Further, the guide provides that Title IX protects all students from sex-based harassment, which, according to the OCR, includes gender-based harassment, or “harassment based on gender identity or nonconformity with sex stereotypes.”<sup>56</sup>

Additionally, in 2015, the Department of Justice (DOJ) affirmed Title IX protection for transgender students in a brief it filed on behalf of a young plaintiff seeking access to the men’s restroom at his school in Virginia.<sup>57</sup> According to the DOJ, the boy was denied equal treatment and benefits and was subjected to discrimination on the basis of sex in violation of Title IX when the District banned his use of the men’s restroom because the school board did not find him to be “‘biologically’ male.”<sup>58</sup> The DOJ specifically stated that Title IX is “broad and encompasses gender identity, including transgender status.”<sup>59</sup> Moreover, the DOJ found that a “public interest” exists in \_\_\_\_\_ guaranteeing \_\_\_\_\_ “all students, including transgender students, have the opportunity to learn in an environment free from sex discrimination.”<sup>60</sup>

In a May 2016 Dear Colleague Letter co-authored by the OCR and DOJ

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53. Catherine E. Lhamon, Assistant Secretary for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T EDUC. 5 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

54. *Id.*

55. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T EDUC., *TITLE IX RESOURCE GUIDE 1* (Apr. 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

56. *Id.* at 15.

57. Dawn Ennis, *Department of Justice Affirms Title IX Protection for Trans Students*, ADVOCATE (June 30, 2015), <http://www.advocate.com/politics/transgender/2015/06/30/department-justice-affirms-title-ix-protection-trans-students>.

58. *Id.*

59. *Id.*

60. *Id.*

(2016 Letter), the departments clarified they “treat a student’s gender identity as the student’s sex for purposes of Title IX and its [related] implementing regulations.”<sup>61</sup> Specifically, “[t]his means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.”<sup>62</sup> The departments describe a school’s Title IX obligations as requiring them to provide transgender students equal access even when “other students, parents, or community members raise objections or concerns” to such participation.<sup>63</sup> In addition, the Letter explains that when it comes to restrooms and locker rooms, schools must permit transgender students to use the facilities that are consistent with their gender identity, and cannot require transgender students to use single-user facilities unless all students who seek additional privacy are allowed to use those same facilities.<sup>64</sup> In addition to the Dear Colleague Letter, the DOE released a supplemental document containing examples of policies and emerging practices that can be used to support transgender students in the school setting, especially when it comes to allowing transgender students to use the facilities consistent with their gender identity.<sup>65</sup>

Most recently, in February of 2017, the DOJ and DOE, in conjunction with the Trump administration, published a new Dear Colleague Letter that officially withdrew the statements contained in the 2016 Letter (2017 Letter).<sup>66</sup> According to the letter, the primary reasoning for the withdrawal is that the 2016 Letter did not “contain extensive legal analysis or explain how the positions is consistent with the express language of Title IX,” moreover, they did not “undergo any formal public process.”<sup>67</sup> Further, the DOJ and DOE ex-

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61. Catherine E. Lhamon, Assistant Secretary for Civil Rights & Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T EDUC. & U.S. DEP’T JUSTICE 2 (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

62. *Id.*

63. *Id.*

64. *Id.* at 3.

65. See U.S. DEP’T EDUC., EXAMPLES OF POLICIES AND EMERGING PRACTICES FOR SUPPORTING TRANSGENDER STUDENTS 7 (May 2016), <http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf> [hereinafter EXAMPLES OF POLICIES AND EMERGING PRACTICES].

66. Sandra Battle, Acting Assistant Secretary for Civil Rights & T.E. Wheeler, II, Acting Assistant Attorney General for Civil Rights, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T EDUC. & U.S. DEP’T JUSTICE 1 (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx>.

67. *Id.*

plained that the States and local school districts should be afforded the opportunity to establish educational policies like this one.<sup>68</sup> The departments did, however, state that the withdrawal of the 2016 Letter “does not leave students without protections from discrimination, bullying, or harassment,” and that “schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment.”<sup>69</sup>

Notably, the 2017 Letter did not withdraw the emerging practices and policies document that was published in addition to the 2016 Letter, which expressly supports allowing transgender students to use the facilities consistent with their gender identity.<sup>70</sup> Given the various interpretations of Title IX that advocate for prevention of discrimination based on gender identity, it seems that students could still establish a claim for relief under Title IX when denied use of the locker room that corresponds with their gender identity despite the recent withdrawal of the 2016 Letter. Courts, however, have expressed opposing views as to whether such protection exists, though more recent cases suggest that courts are moving toward providing protection for transgender individuals who experience this kind of discrimination.

#### IV. PROTECTING THE TRANSGENDER STUDENT-ATHLETE

Transgender students and student-athletes of all ages have felt the repercussions of policies that prevent them from using the locker rooms of their choosing at school and during athletic competitions. The same holds true for other transgender individuals, whether in the work place or in other areas of public accommodation—an unfortunate reality occurring as states like North Carolina continue to pass legislation that prohibit individuals from using public restrooms that do not correspond with their biological sex.<sup>71</sup> As a result, more transgender individuals have challenged regulations that restrict their access to locker rooms and other facilities in school and non-school settings alike. An examination of these cases shows that courts are leaning toward granting protection for transgender individuals under Title IX, as well as under other

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68. *See id.*

69. *Id.* at 2.

70. EXAMPLES OF POLICIES AND EMERGING PRACTICES, *supra* note 65, at 7.

71. *See* Tal Kopan & Eugene Scott, *North Carolina Governor Signs Controversial Transgender LGBT Bill*, CNN POL., <http://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/> (last updated March 24, 2016).

state-specific laws and regulations.

### A. Title IX Cases

Even though Title IX is essentially an “enforcement mechanism,” meaning that a violation of Title IX can result in the “withdrawal of federal funding from institutions that are not in compliance,” the Supreme Court recognized that it also establishes an “implied right of private action” for plaintiffs who are discriminated against on the basis of sex.<sup>72</sup> In *Franklin v. Gwinnett County Public Schools*,<sup>73</sup> the Supreme Court determined that Congress did not intend to limit the remedies available to a plaintiff who sues for violation of Title IX.<sup>74</sup> “To establish a prima facie case of discrimination [in violation of] Title IX, a plaintiff must allege[:] (1) [T]hat he was subjected to discrimination in an education program; (2) that the program receives federal assistance; and (3) that the discrimination was on the basis of sex.”<sup>75</sup> For transgender individuals, it is the third prong—that the discrimination was “on the basis of sex”—that often creates the biggest hurdle for them, as some courts do not think that “transgender” is a protected category under Title IX,<sup>76</sup> while others have found that Title IX should be extended to protect transgender individuals discriminated against based on their gender identity.<sup>77</sup> The following cases exemplify how different courts determined whether “transgender” qualified as a protected category under Title IX.

#### 1. *Ray v. Antioch Unified School District*

In *Ray v. Antioch Unified School District*,<sup>78</sup> the Northern District of California heard a case brought by the mother of a young school-aged boy against the school district after one student, whose parents were also named defendants in the case, assaulted and battered the boy.<sup>79</sup> The boy sustained several injuries from the beating, including “a concussion, hearing impairment

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72. *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 673 (W.D. Pa. 2015).

73. 503 U.S. 60 (1992).

74. *Id.* at 76.

75. *Johnston*, 97 F. Supp. 3d at 674.

76. *Id.* at 676–77.

77. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016). *See also Township High Sch. Dist. 211 Case*, *supra* note 1, at 12–13.

78. 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

79. *Id.* at 1166–67.

in one ear, severe and permanent headaches, and severe psychological injury.”<sup>80</sup> The plaintiffs alleged the boy was harassed based on the perception that he was homosexual (which the students thought because his mother was a transgender woman) and sued the defendants for discrimination based on sex in violation of Title IX.<sup>81</sup> The court dismissed the district’s motion to dismiss the case, finding harassment due to a victim’s perceived sexuality is sexual harassment for Title IX purposes: “[I]t is reasonable to infer that the basis of the attacks was a perceived belief about Plaintiff’s sexuality, i.e.[,] that Plaintiff was harassed *on the basis of sex*.”<sup>82</sup> This case is important because it suggests the definition of “sex” for Title IX purposes encompasses more than the standard male and female gender markers, a limitation used against many transgender individuals bring Title IX claims for discrimination on the basis of sex.

## 2. *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*

More recently, *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*<sup>83</sup> addressed whether the University, as a recipient of federal funds, violated Title IX when it prohibited Johnston, a transgender male, from using the male restrooms and locker rooms on campus.<sup>84</sup> Johnston initially applied to the university as a female, but “consistently lived as male” upon starting school.<sup>85</sup> To reflect this, Johnston requested that the school change his sex to “male” on his records, and used the men’s restrooms and locker rooms on campus.<sup>86</sup> After using the men’s locker room several times for a gym class, Johnston was asked to use a unisex locker room; however, he continued to use the men’s locker room until the campus police issued him a citation for disorderly conduct.<sup>87</sup> Johnston then received a second citation for continuing to use the men’s locker room despite receipt of the first citation.<sup>88</sup> The school barred Johnston from using the sports center and required him to attend a disciplinary hearing, yet Johnston continued to use the men’s facilities

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80. *Id.* at 1167.

81. *Id.*

82. *Id.* at 1170.

83. 97 F. Supp. 3d 657 (W.D. Pa. 2015).

84. *Id.* at 661.

85. *Id.* at 662.

86. *Id.* at 662–63.

87. *Id.* at 663.

88. *Id.*

on campus and was eventually placed on an interim suspension for failure to comply with school orders.<sup>89</sup> The campus police filed a criminal complaint against him for indecent exposure, criminal trespass, and disorderly conduct.<sup>90</sup> Johnston pled guilty to reduced charges and received a six-month probation and a \$600 fine as punishment.<sup>91</sup>

Johnston alleged he suffered emotional distress from the incidents<sup>92</sup> and filed a five-count claim, including one alleging “discrimination and retaliation on the basis of sex in an education program or activity receiving federal funds” in violation of Title IX.<sup>93</sup> Upon review, the court found Johnston failed to state a claim for discrimination under Title IX because the university’s policy for requiring students to use the facilities based on their natal sex, rather than on their gender identity, does not amount to sex discrimination.<sup>94</sup> In its decision, the court explained that “Title IX does not prohibit discrimination on the basis of transgender itself because [that] is not a protected characteristic under [Title IX].”<sup>95</sup> Here, the court took the opposite view of the court in *Ray* and found that, in Title IX, “‘on the basis of sex’ . . . means nothing more than male and female, under the traditional binary conception of sex consistent with one’s birth or biological sex.”<sup>96</sup> Further, it explained that determining whether transgender should be protected category under Title IX is up for Congress to decide, not the court.<sup>97</sup>

### 3. *Township High School District 211 Case*

In the *Township High School District 211* case, the OCR found that a school district’s decision to deny a transgender female student access to the women’s locker rooms at school amounted to discrimination on the basis of sex in violation of Title IX.<sup>98</sup> In that case, Student A, the plaintiff, transitioned from male to female during middle school and experienced various forms of

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89. *Id.* at 663–64.

90. *Id.* at 664.

91. *Id.*

92. *Id.*

93. *Id.* at 666.

94. *Id.* at 672–73.

95. *Id.* at 674.

96. *Id.* at 676.

97. *Id.* at 676–77.

98. *Township High Sch. Dist. 211 Case*, *supra* note 1, at 1.

harassment when she used the men's locker rooms at schools.<sup>99</sup> For high school, the district agreed to treat Student A as a female in all respects, except that it denied her request for permission to use the women's locker rooms at school,

including a request for the opportunity to change privately within the women's locker rooms in a separate restroom stall or curtained-off area.<sup>100</sup> Instead, the district and school required her to use a separate locker room for all of her physical education classes and athletics events.<sup>101</sup>

The plaintiff subsequently filed a complaint with the OCR, alleging the district discriminated against her on the basis of sex because of her gender identity and gender nonconformity.<sup>102</sup> After its investigation, the OCR determined that Student A "not only received an unequal opportunity to benefit from the District's education program, but . . . also experienced an ongoing sense of isolation and ostracism throughout her high school enrollment."<sup>103</sup> In its defense, the district offered two privacy concerns: (1) That allowing Student A in the women's "locker room would expose female students to being observed in a state of undress by a biologically male individual" and (2) "that it would be inappropriate for young female students to view a naked male in the locker room in a state of undress."<sup>104</sup> The OCR dismissed these concerns, finding that the district could still allow plaintiff to use the women's locker room

while maintaining privacy by installing privacy curtains in the locker rooms.<sup>105</sup> The OCR held that the district clearly violated Title IX,<sup>106</sup> and implemented several requirements for the school to complete as part of the agreement to resolve the case, including allowing Student A to use the women's locker rooms for the remainder of her high school education.<sup>107</sup>

A group of parents then attempted to enjoin the District's new inclusive policy that accommodated Student A's right to use the women's locker room.<sup>108</sup> The parents argued that the new policy "violated their children's

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99. *Id.* at 2.

100. *Id.*

101. *Id.* at 3.

102. *Id.* at 1.

103. *Id.* at 10.

104. *Id.* at 11.

105. *Id.* at 12.

106. *Id.* at 13.

107. Agreement to Resolve at 2, *supra* note 4.

108. See Erin Buzuvis (EBUZ), *Illinois Parents Fail to Block Transgender Student's Use of Locker Room; Judge in Texas Reaffirms Nationwide Injunction Against OCR's Transgender Guidance*,

constitutional right to privacy,” but the magistrate did not find this argument convincing.<sup>109</sup> The group of parents also attempted to challenge the DOE’s guidance letter that the OCR used to reach its initial conclusion.<sup>110</sup> Again, the magistrate found this argument unconvincing, and even “noted that many courts are adopting broader understanding of sex discrimination as defined by Title IX and other civil rights laws to encompass discrimination targeting transgender individuals.”<sup>111</sup> Therefore, the District’s policy allowing Student A to use the women’s locker room stands.<sup>112</sup>

#### 4. *G.G. ex rel. Grimm v. Gloucester County School Board*

The holding from *Johnston* was distinguished by the Fourth Circuit in *G.G. ex rel. Grimm v. Gloucester County School Board*.<sup>113</sup> In that case, the plaintiff was a male student who was diagnosed with Gender Dysphoria at a young age, and subsequently underwent hormone therapy and changed his name to a “traditionally male name.”<sup>114</sup> Prior to his sophomore year of high school, the student’s school took certain steps to ensure he would be treated as a male in school and granted him permission to use the male restrooms.<sup>115</sup> The plaintiff used the men’s restroom without issue until some members of the school board voiced concern about him using it, which ultimately ended in the board passing a policy that barred him from using the men’s restroom at school.<sup>116</sup> The plaintiff sued the board, claiming it “impermissibly discriminated against him in violation of Title IX and the Equal Protection Clause.”<sup>117</sup>

The main point of contention in this case was whether “discrimination based on gender identity is barred under Title IX.”<sup>118</sup> The school board argued

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TITLE IX BLOG (Oct. 21, 2016, 12:58 PM), <http://title-ix.blogspot.com/2016/10/illinois-parents-fail-to-block.html>.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. 822 F.3d 709, 723 n.9 (4th Cir. 2016).

114. *Id.* at 715.

115. *Id.*

116. *Id.* at 716.

117. *Id.* at 715.

118. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 742 (E.D. Va. 2015).

the DOE regulation that permits schools to provide separate facilities “on the basis of sex”<sup>119</sup> allowed them to create and enforce their policy.<sup>120</sup> The plaintiff, on the other hand, claimed that enforcing this policy and only permitting him to use the restroom associated with his birth sex was discrimination on the basis of sex and therefore a Title IX violation.<sup>121</sup> The DOE wrote an interpretation for this regulation to clarify this discrepancy: “When a school elects to separate or treat students differently on the basis of sex . . . a school must treat transgender students consistent with their gender identity.”<sup>122</sup> The court, however, held that this interpretation should not be given controlling weight because the regulation itself was clear that the school could provide sex-segregated facilities for its students.<sup>123</sup> Therefore, the court found the school board’s bathroom policy did not violate Title IX because there was no discrimination on the basis of sex.<sup>124</sup>

On appeal, the Fourth Circuit reversed the district court’s dismissal of the Title IX claim because it felt the court did not give the DOE’s interpretation appropriate weight.<sup>125</sup> Unlike the district court, the Fourth Circuit found the initial regulation was ambiguous as to “whether a transgender individual is male or female for the purpose of access to sex-segregated restrooms.”<sup>126</sup> Therefore, the Fourth Circuit held the interpretation requiring a school to “treat transgender students consistent with their gender identity” should be given controlling weight and reversed the dismissal.<sup>127</sup>

In August 2016, the Gloucester County School Board formally filed a petition for writ of certiorari with the Supreme Court of the United States.<sup>128</sup> The school board presented three questions to the Supreme Court in its petition:

1. Should this Court retain the *Auer* [*v. Robbins*] doctrine [despite] the objections of multiple Justices who have

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119. See 34 C.F.R. § 106.33 (2016).

120. *G.G. ex rel. Grimm*, 132 F. Supp. 3d at 744–45.

121. *Id.* at 743–44.

122. *Id.* at 745.

123. *Id.* at 746.

124. *Id.* at 746–47.

125. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 724, 727 (4th Cir. 2016).

126. *Id.* at 720.

127. *Id.* at 718.

128. See *Gloucester County School Board v. G.G.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/gloucester-county-school-board-v-g-g/> (last visited May 15, 2017).

[recently] urged that it be reconsidered and overruled?

2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

3. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?<sup>129</sup>

On October 28, 2016, the Supreme Court partially granted the district's petition, limiting its review to only the second and third questions presented by the district.<sup>130</sup> The Court was initially set to hear the case on March 28, 2017, but on March 6, 2017, announced it would not hear the case.<sup>131</sup> Instead, the Supreme Court remanded the case to the Fourth Circuit, largely due to the fact that in its initial ruling, the Fourth Circuit relied on the 2016 Letter that was officially withdrawn earlier this year.<sup>132</sup> On remand, the Fourth Circuit must decide whether it will hear this case again, or whether it will also remand the case back to the Virginia Trial Court.<sup>133</sup> Though, at the time of this writing, it is unknown which way the courts will decide this case, one thing is certain: the final outcome will largely impact the transgender community and our country as a whole. If the courts rule in favor of Grimm, it would effectively allow transgender individuals to use the public restrooms that correspond with their gender identity.<sup>134</sup>

### *B. Other Causes of Action*

“A loss for Grimm[, however,] does not settle the issue of transgender

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129. Petition for a Writ of Certiorari at i, *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (Aug. 29, 2016) (No. 16-273).

130. See Erin Buzuvis (EBUZ), *Supreme Court Grants Cert in Title IX Transgender Bathroom Case*, TITLE IX BLOG (Oct. 29, 2016, 8:41 AM), <http://title-ix.blogspot.com/2016/10/supreme-court-grants-cert-in-title-ix.html>.

131. See *Gloucester County Sch. Bd. v. G. G.*, No. 16-273, 2017 U.S. LEXIS 1626 (Mar. 6, 2017).

132. *Id.* at 1.

133. Pete Williams, *Supreme Court Rejects Gavin Grimm's Transgender Bathroom Rights Case*, NBC NEWS (Mar. 6, 2017), <http://www.nbcnews.com/news/us-news/u-s-supreme-court-rejects-transgender-rights-case-n729556>.

134. See generally Bryan F. Jacoutot, *What's at Stake in High Court's Trans Bathroom Ruling?*, LAW360 (Dec. 23, 2016), <https://www.law360.com/articles/875545/what-s-at-stake-in-high-court-s-trans-bathroom-ruling->.

bathroom access.”<sup>135</sup> Instead, it would simply mean plaintiffs would have to find a law other than Title IX through which to bring an unlawful discrimination claim. *Doe v. Regional School Unit 26*<sup>136</sup> did not involve a cause of action under Title IX. Rather, the young plaintiff in the case successfully established she was unlawfully discriminated against in education and in a place of public

accommodation on the basis of sexual orientation in violation of the Maine Human Rights Act.<sup>137</sup> Susan Doe was a young transgender female who was diagnosed with Gender Dysphoria in the fifth grade.<sup>138</sup> After she transitioned from male to female, school officials met with Susan’s parents to talk about how it could accommodate her.<sup>139</sup> The school agreed with her parents that allowing Susan to use the women’s restroom was in her best interest, both for her own sense of personal identity and for safety reasons.<sup>140</sup> The school also decided that Susan could use the unisex staff bathroom during the year if her use of the women’s bathroom ever became “an issue.”<sup>141</sup> Susan’s use of the women’s bathroom created no problems initially; however, one male student later made it an issue for the school by following her into the women’s bathroom on two occasions, claiming he was also entitled to use the women’s restroom if Susan was.<sup>142</sup> After this incident, the school decided it would be best to ban Susan from the women’s restroom and require her to use a separate, single-stall

restroom, despite her strong opposition to this plan.<sup>143</sup>

Susan’s family brought a claim for unlawful discrimination in education and in a place of public accommodation on the basis of sexual orientation under the Maine Human Rights Act,<sup>144</sup> which specifically prohibits discrimination based on sex and sexual orientation.<sup>145</sup> The court found the school’s decision to ban Susan from the bathroom constituted discrimination based on sexual orientation because she was “treated differently from other students

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135. *Id.*

136. 2014 ME 11, 86 A.3d 600.

137. *Id.* ¶ 22.

138. *Id.* ¶ 6.

139. *Id.* ¶ 7.

140. *Id.*

141. *Id.*

142. *Id.* ¶ 8.

143. *Id.*

144. *Id.* ¶ 10.

145. *See* 5 ME. REV. STAT. ANN. tit. 5, § 4612(4)(A) (2016).

solely because of her status as a transgender girl.”<sup>146</sup> The court explained: “Where, as here, 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.”<sup>147</sup> In other words, this decision should not be interpreted as requiring schools to permit students “casual access to any bathroom of their cho[osing.]”<sup>148</sup> rather, the school must assess what legitimate concerns the student has and then determine what the best course of action is for meeting those concerns.<sup>149</sup>

This case is important because it suggests that transgender student-athletes may seek relief under state statutes, if applicable, in addition to or in place of seeking relief under Title IX. These state statutes may, in fact, provide the transgender student-athletes with a better chance of success simply because the language of these statutes tends to be less ambiguous than Title IX’s “on the basis of sex” requirement. For example, in this case, the Maine Human Rights Act specifically prohibits discrimination on the basis of sexual orientation, so Doe did not have to prove that the statute applied to her the way that the plaintiffs in *Johnston* or *Grimm* had to argue Title IX applied to them as transgender individuals. Thus, moving forward, suing under state statutes will likely provide plaintiffs like the ones discussed in these cases with an additional avenue for recourse.

## V. CONCLUSION

Recent cases show that lower courts are split on whether Title IX provides transgender individuals with a cause of action, largely because of ambiguity as to whether “transgender” is a protected category under Title IX. However, both the Fourth Circuit and the OCR showed they are willing to extend Title IX to protect transgender individuals who are discriminated against in the school setting based on their gender identity. It will now be up to the Supreme Court to decide whether Title IX in fact protects the transgender community from this type of discrimination. That decision should not be taken lightly, as it has

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146. *Reg'l Sch. Unit 26*, 2014 ME 11 ¶ 22.

147. *Id.* ¶ 24.

148. *Id.*

149. *See generally id.*

the ability to seriously affect the well-being of the entire transgender community, especially transgender student-athletes who suffer from a sense of isolation from their teams. On one hand, allowing student-athletes to use the locker room they prefer to use based on their gender identity will help them feel like they are truly part of a team and living life as their true selves. On the other hand,

continuing to ban student-athletes from using those same locker rooms could not only affect the students' overall sense of well-being but also their sense of belonging.

If the Supreme Court, however, decides that "transgender" does not qualify as a protected class under Title IX, the transgender community will still have various avenues to gain the equality it seeks, such as state discrimination laws. Additionally, Congress would still have the ability to amend Title IX in such a way that "transgender" is a protected class under the statute. Though there may initially be backlash from those who oppose equal access to facilities for transgender individuals if such rulings or regulations are passed, requiring equal access will certainly have overwhelmingly positive affects on student-athletes and their teams. For example, having one uniform and mandatory stance on the issue will require schools, especially those at the intercollegiate level, to address this issue head on instead of waiting for it to become an issue to take action, as is currently the status quo.<sup>150</sup> This will undoubtedly have a positive impact on transgender student-athletes who may feel their school's lack of policy is a reflection of its lack of regard for the student's situation.<sup>151</sup>

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150. See generally Kanno-Youngs, *supra* note 33.

151. See generally *id.*