

GENDER IDENTITY DISCRIMINATION *IS* SEX
DISCRIMINATION: PROTECTING TRANSGENDER
STUDENTS FROM BULLYING AND HARASSMENT USING
TITLE IX

*Devi M. Rao**

INTRODUCTION	246
I. TITLE IX’S APPLICATION TO STUDENT-ON-STUDENT HARASSMENT	246
A. The Basics: Title IX’s Prohibition on Sex-Based Harassment.....	246
B. The Problem: Harassment of Transgender Students	249
II. TRANSGENDER PLAINTIFFS MAY BRING CLAIMS ALLEGING DISCRIMINATION BASED ON GENDER NONCONFORMITY UNDER BOTH TITLE VII AND TITLE IX.....	252
A. Title VII Prohibits Discrimination Against Transgender Individuals for Failing to Conform to Gender Stereotypes	252
B. Title IX Prohibits Discrimination For Failing to Conform to Gender Stereotypes.....	254
C. Weaknesses in the Current Approach.....	255
III. THE WAY FORWARD: DISCRIMINATION ON THE BASIS OF GENDER IDENTITY IS <i>PER SE</i> SEX DISCRIMINATION	258
A. Courts and OCR Have Not Yet Addressed Whether Gender Identity Discrimination Constitutes Sex Discrimination Under Title IX	258
B. Courts and Agencies in a Variety of Contexts Have Recognized that Gender Identity Discrimination Constitutes Per Se Sex Discrimination.....	260
IV. COURTS SHOULD RECOGNIZE AND OCR SHOULD ACKNOWLEDGE THAT TITLE IX <i>PER SE</i> APPLIES TO DISCRIMINATION ON THE BASIS OF GENDER IDENTITY.	265
A. The Benefits of This Approach	266
B. What Should a Per Se Rule Look Like in the School Context? ...	267
CONCLUSION.....	269

* J.D., Columbia Law School; B.A., University of California, Berkeley. As a cisgender person, whose gender identity is consistent with my birth sex, it is not my intention to supplant trans voices, but to speak alongside the existing commentators. I recognize that I possess inherent limitations as a cisgender author, but hope that this piece furthers the conversation around the law’s application to discrimination on the basis of gender identity. Special thanks to Erin Buzuvis, Katherine Franke, and Lara S. Kaufmann for their generous and thoughtful comments on this paper, and to the staff and editors at the Wisconsin Journal of Law, Gender & Society.

INTRODUCTION

Recently, there has been a tremendous amount of media attention focused on the issue of bullying in schools. But what many of these accounts fail to recognize is that much of what people might refer to as “bullying” is actually harassment that is prohibited by federal civil rights laws. One such law is Title IX, which bans sex discrimination in education. This prohibition includes sex-based harassment, and may, in practice, cover much of the harassment that lesbian, gay, bisexual, and transgender (LGBT) students face in schools.

This paper examines judicial decisions that open the door for Title IX’s *per se* application to discrimination on the basis of gender identity. Focusing on this question through the lens of student-on-student harassment, this paper explains why the reasoning of those cases should apply in the Title IX context. Part I briefly explains the history of Title IX and its application to sex-based harassment, and introduces the problem of harassment that transgender students face in school. Part II provides an overview of the current case law under Title VII and Title IX related to discrimination based on gender nonconformity and explains the weaknesses inherent in this approach. Next, Part III outlines recent Title VII and Equal Protection Clause cases and administrative decisions holding that discrimination against transgender individuals on the basis of gender identity constitutes *per se* sex discrimination. Finally, Part IV looks to the future, arguing that Title IX jurisprudence should incorporate the case law discussed in Part III and recognize transgender discrimination as *per se* sex discrimination. Part IV also offers a suggestion for how such a rule should look in practice, focusing on student-on-student harassment in schools and comparing the educational and employment contexts.

I. TITLE IX’S APPLICATION TO STUDENT-ON-STUDENT HARASSMENT

A. The Basics: Title IX’s Prohibition on Sex-Based Harassment

Title IX of the Education Amendments of 1972 (“Title IX”) prohibits sex discrimination in any educational program or activity receiving federal financial assistance.¹ It provides in pertinent part that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”² In enacting Title IX, Congress intended both to “avoid the use of federal resources to support discriminatory practices” and to “provide individual citizens effective protection against those practices.”³ This prohibition of discrimination is broad; indeed, the Supreme Court has admonished that the statute should

1. 20 U.S.C. §§ 1681-1688 (2012).

2. 20 U.S.C. § 1681(a).

3. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

receive “a sweep as broad as its language.”⁴ It applies to, among other things, education programs, admissions, housing, facilities, access to classes, financial assistance, employment assistance, health benefits, and pregnancy.⁵ Because Title IX and its older, more famous cousin, Title VII, both prohibit sex discrimination, courts routinely look to the more substantial body of law developed in the employment context when assessing Title IX claims.⁶

Although Title IX is most well known for prohibiting sex discrimination in athletics, it also provides the primary cause of action against sex-based harassment in education.⁷ Title IX applies to harassment of students⁸ by school employees, other students, and third parties.⁹ It prohibits harassment of both male and female students, and bans such conduct even if the harasser and target are the same sex.¹⁰

4. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

5. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 34 C.F.R. § 106 (2013).

6. See, e.g., *Jennings v. Univ. of N. C.*, 482 F.2d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”).

7. There are other legal claims available to challenge sexual harassment. Federal constitutional claims, such as those alleging a violation of the Equal Protection Clause, may be brought against state actors pursuant to 42 U.S.C. § 1983, while employment claims may also be brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and, if applicable, Executive Order 11246, 60 C.F.R. § 20.3, which prohibits employment discrimination by entities receiving federal contracts. Claims may also be available under state law, including both state constitutional and statutory provisions.

8. Title IX also protects non-students who are harassed “under any education program,” such as a high school student athlete on a college recruitment trip. On its face, Title IX says that “no person”—not “no student”—shall be subject to sex discrimination. 20 U.S.C. § 1681(a). And the Supreme Court held that Title IX applied to employees as well as students observing that “[b]ecause [Title IX] neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these ‘persons’ unless other considerations counsel to the contrary. After all, Congress easily could have substituted ‘student’ or ‘beneficiary’ for the word ‘person’ if it had wished to restrict the scope of [Title IX].” *N. Haven*, 456 U.S. at 521. Indeed, the U.S. Department of Education’s Office for Civil Rights (OCR) has taken the position that “Title IX also protects third parties from sexual harassment or violence in a school’s education programs and activities.” U.S. Dep’t of Educ. Office for Civil Rights, Dear Colleague Letter: Sexual Violence 4 n.11 (Apr. 4, 2011) [hereinafter, April 2011 Dear Colleague Letter], available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

Courts have not directly addressed the issue.

9. See U.S. Dep’t of Educ. Office for Civil Rights, Dear Colleague Letter: Harassment and Bullying 1 n.4 (Oct. 26, 2010) [hereinafter, October 2010 Dear Colleague Letter], available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

10. October 2010 Dear Colleague Letter, *supra* note 9, at 7; *cf.* *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-79 (1998) (noting “Title VII’s prohibition of discrimination ‘because of . . . sex’ protects men as well as women”) (holding “that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex”).

Sex-based harassment includes both sexual harassment and gender-based harassment.¹¹ Sexual harassment is unwelcome conduct of a sexual nature.¹² It can include sexual comments, jokes, explicit pictures or photos, calling students sexually charged names, and spreading sexual rumors.¹³ Sexual assault and violence are types of sexual harassment, and are therefore covered by Title IX.¹⁴ Title IX's prohibition on sex discrimination extends to gender-based harassment—harassment based on either a person exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity.¹⁵ The law does not explicitly apply to discrimination and harassment based on sexual orientation, which most courts have concluded is different from discrimination based on sex.¹⁶

Individuals looking for relief under Title IX have two options. First, they can file a lawsuit. Following two Supreme Court decisions in the late 1990s involving sex-based harassment under Title IX, *Gebser v. Lago Vista Independent School District*¹⁷ and *Davis v. Monroe County Board of Education*,¹⁸ a plaintiff seeking money damages needs to show that (1) the harassment was based on sex or gender;¹⁹ (2) the harassment was sufficiently

11. See October 2010 Dear Colleague Letter, *supra* note 9-10.

12. See *id.* at 6.

13. See *id.*

14. April 2011 Dear Colleague Letter, *supra* note 8 at 1.

15. October 2010 Dear Colleague Letter, *supra* note 10 at 7-8; see also, e.g., *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000).

16. See, e.g., *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011). But see, e.g., *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000) (because "Plaintiff was targeted by his classmates due to his perceived sexual status as a homosexual and was harassed based on those perceptions . . . it 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").

17. 524 U.S. 274 (1998).

18. 526 U.S. 629 (1999).

19. The Court in *Davis* itself used "on the basis of sex" and "on the basis of gender" interchangeably. Compare *Davis*, 526 U.S. at 651 ("It is not necessary . . . to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity.") with *id.* at 650 ("The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender.").

Even the dissent used "on the basis of gender." See *id.* at 663 (Kennedy, J., dissenting). For an overview of the evolution of theories surrounding sex and gender, see Demoya R. Gordon, Comment *Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?*, 97 CAL. L. REV. 1719 (2009); Jason Lee, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J. L. & GENDER 423, 456-59 (2012); Jody Lynce Madeira, *Law As a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for Protecting Transsexuals' Interests in Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128, 132-34 (2002); see also Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 563-64 (2007); Jillian Todd Weiss, *Transgender Identity, Textualism, and the*

severe, pervasive, and objectively offensive that it created a hostile environment; (3) an official with the authority to address the harassment had actual knowledge of the harassment; and (4) the school's response to the harassment amounted to deliberate indifference. Second, plaintiffs seeking relief under Title IX may file an administrative complaint with the U.S. Department of Education's Office for Civil Rights (OCR), the federal agency tasked with enforcing Title IX.²⁰

B. The Problem: Harassment of Transgender Students

Transgender students are those whose birth sex is different from their gender identity—their internalized and deeply held sense of their own gender.²¹ For example, a transgender girl is a child whose sex was assigned as “male” at

Supreme Court: What is the “Plain Meaning” of “Sex” in Title VII of the Civil Rights Act of 1964?, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 606-16 (2009).

20. These options are not mutually exclusive, and a plaintiff does not need to exhaust administrative remedies under Title IX before filing suit. *See* <http://www2.ed.gov/about/offices/list/ocr/qa-complaints.html>. OCR has maintained that the standard articulated in *Gebser* and *Davis* applies only to private suits seeking money damages; in contrast, the separate standards set out in OCR's guidance for finding a violation would also apply to private actions for injunctive and other equitable relief. *see* U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, Preamble iv n.2 (Jan. 2001), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>; OCR also enforces federal civil rights laws that prohibit other types of discrimination in programs or activities that receive federal financial assistance, including Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin; Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability; and the Age Discrimination Act of 1975. *See About OCR*, <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html>.

21. *See* Gay, Lesbian & Straight Education Network & Nat'l Center for Transgender Equality, Model District Policy on Transgender and Gender Non-Conforming Students: Model Language, Commentary & Resources 4 [hereinafter “Model District Policy”], *available at* <http://transequality.org/Resources/Model%20District%20Trans%2nd%20GNC%20Policy%20FINAL.pdf>

[hereinafter “Model District Policy”]. Although there is considerable debate surrounding the definition of “transgender,” this paper employs a narrow conception of the term in a way that does not include all gender nonconforming people. This is not to exclude those people from identifying as transgender, but rather due to the nature of the question explored in this paper; it is widely recognized that students are protected from discrimination based on gender nonconformity under Title IX, but this paper argues that a student whose biological sex and gender identity do not match is by definition protected from discrimination on the basis of that student's gender identity under the law. For a thorough discussion of the academic theories and definitions of “sex,” “gender,” and “transgender,” *see, e.g.*, Lee, *supra* note 19, at 424 n.1; Emily Q. Shults, *Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender*, 12 Cardozo J.L. & Gender 337, 338-43 (2005); Weiss, *supra* note 19, at 581-90, 597-610.

birth, but who has a clear and persistent female gender identity.²² Transgender students may face many barriers to accessing an education, including experiencing harassment in school. For example, transgender students might be erroneously denied admission to women's colleges,²³ participation on the team sport that matches their gender identity,²⁴ the ability to wear clothing associated with the gender with which they identify,²⁵ appropriate restroom accessibility,²⁶ and locker room accessibility,²⁷ among others.²⁸ Although these problems are all deserving of academic inquiry, this paper will use the specific problem of bullying and harassment as the lens through which to focus on the issue of gender identity discrimination under Title IX.

The Gay, Lesbian and Straight Education Network's most recent National School Climate Survey illustrates the extent of harassment experienced by transgender students in school. In GLSEN's 2011 nationwide survey of LGBT students in grades 6 through 12, 44% of the total group reported feeling unsafe at school because of how they expressed their gender.²⁹ This number was nearly twice as high for transgender students, 80% of whom reported they felt unsafe at school because of their gender expression.³⁰ Three-quarters of transgender students reported experiencing verbal harassment at school; nearly one-third reported physical harassment, and 17% reported physical assault

22. The broader umbrella term "transgender" also includes a person who does not identify with either sex, or a person who identifies with gender nonconforming expression, but does not identify as a member of the opposite sex. See 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, 10-11 (2011).

23. See Katherine Kraschel, *Trans-cending Space in Women's Only Spaces: Title IX Cannot Be the Basis for Exclusion*, 35 *Harv. J. L. & Gender* 463 (2012).

24. See Buzuvis, *supra* note 22, at 28; Jennifer V. Sinisi, Casenote, *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, 367-68 (2012).

25. See *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *6-7 (Mass. Sup. Ct. Oct. 11, 2000); see also Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 15 *COLUM. J. GENDER & L.* 90, 99-100 (2006) (discussing *Doe*).

26. Cf. *Kastle v. Maricopa County Community College District*, 325 Fed. App'x 492, 493-94 (9th Cir. 2009) (community college's ban on transgender instructor's use of women's restrooms).

27. Model District Policy, *supra* note 21, at 8-9.

28. See Shults, *supra* note 21, at 349 (listing other problems as well); see also Model District Policy *supra* note 21, at 8.

29. JOSEPH G. KOSCIW ET AL., GLSEN, *The 2011 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools 20* (2012) [hereinafter "National School Climate Survey"], available at <http://www.glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf>; For further data, see also EMILY A. GREYAK ET AL., GLSEN, *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* (2009), available at <http://glsen.org/sites/default/files/Harsh%20Realities.pdf>.

30. National School Climate Survey, *supra* note 29, at 89.

“sometimes,” “often,” or “frequently” based on their gender expression.³¹ Another survey by the National Center for Transgender Equality and the National Gay and Lesbian Task Force found that of respondents who expressed a transgender identity or were gender non-conforming while in grades K-12, over two-thirds reported experiencing harassment, over one-third reported being physically assaulted, and 12% reported experiencing sexual violence.³² This is perhaps not unsurprising given the significant body of research and scholarship observing that much of the bullying and harassment that young people face center on enforcing society’s gender roles and expectations.³³

School-based harassment and violence can have terrible, lifelong consequences. The GLSEN survey found that students were three times more likely to have missed school in the past month if they had experienced severe victimization related to how they expressed their sexual orientation or gender identity.³⁴ The joint survey found that of those who experienced harassment, nearly one-in-six (15%) said the harassment caused them to leave school entirely.³⁵ Of the respondents who reported leaving school due to harassment, nearly half reported experiencing homelessness.³⁶ Over half of the respondents who were harassed, physically or sexually assaulted, or expelled because of their gender identity/expression had attempted suicide.³⁷

The existing Title IX case law regarding harassment on the basis of gender nonconformity provides a disturbing picture of the type of harassment LGBT students may face. For example, in *Montgomery v. Independent School District*, the plaintiff experienced near-daily teasing from other students from elementary school through tenth grade.³⁸ They called him, among other names, “faggot,” “fag,” “gay,” “Jessica” (his name was Jesse), “girl,” “princess,” “fairy,” “homo,” “freak,” “lesbian,” “femme boy,” “gay boy,” “bitch,” “queer,” “pansy,” and “queen.”³⁹ He was also punched, kicked, knocked down, tripped, had his calculator broken, and had objects such as crayons, paper, popcorn,

31. *Id.* at 89. Of LGBT students overall, nearly two-thirds (64%) of the students reported being verbally harassed at school in the past year because of their gender expression; and 27% had been physically harassed at school, and 12% had been assaulted, because of their gender expression. *Id.* at 24-25.

32. JAIME M. GRANT, LISA A. MOTTET, AND JUSTIN TANIS, ET AL., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 33* (2011), available at http://transequality.org/PDFs/NTDS_Report.pdf.

33. See, e.g., Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation’s Schools*, 86 IND. L.J. 827, 836-37 (2011) (collecting research and academic observations).

34. National School Climate Survey, *supra* note 29, at 40-41.

35. *Injustice at Every Turn*, *supra* note 32, at 33 (leaving school in grades K-12 or in higher education settings).

36. *Id.*

37. *Id.*; see also Higdon, *supra* note 33, at 848-60 (collecting research on emotional and physical effects of bullying).

38. 109 F. Supp. 2d 1081, 1084 (D. Minn. 2000).

39. *Id.*

water, pencils, and trash thrown at him.⁴⁰ His legs, thighs, chest, crotch, and buttocks were grabbed by a fellow student, and another asked to see him naked after gym class.⁴¹ A student threw him to the ground and pretended to anally rape him.⁴² The court determined that the student stated a claim under Title IX for student-on-student harassment based on gender nonconformity, finding it plausible that “the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy.”⁴³

II. TRANSGENDER PLAINTIFFS MAY BRING CLAIMS ALLEGING DISCRIMINATION BASED ON GENDER NONCONFORMITY UNDER BOTH TITLE VII AND TITLE IX

An individual who experiences discrimination in the workplace or in school based on his or her perceived gender nonconformity may bring suit under Title VII or Title IX, respectively. Since *Price Waterhouse v. Hopkins*, a watershed Supreme Court decision in the late 1980s, it is settled law that Title VII affords a cause of action for a person who has been discriminated against based on his or her nonconformity to gender stereotypes.⁴⁴ In turn, courts have acknowledged that Title IX affords a similar cause of action for those who experience such discrimination in the educational setting. These causes of action are available to *anyone* regardless of his or her gender identity.

A. Title VII Prohibits Discrimination Against Transgender Individuals for Failing to Conform to Gender Stereotypes

Employment discrimination based on a person’s nonconformity with gender stereotypes is prohibited under Title VII. In *Price Waterhouse v. Hopkins*, the Supreme Court made it clear that sex discrimination claims premised on sex stereotyping of personal style were actionable under Title VII’s prohibition of discrimination “on the basis of sex.”⁴⁵ Ann Hopkins did

40. *Id.*

41. *Id.*

42. *See id.* Similarly, in another Title IX case, a student was called derogatory names by her classmates, including “bitch,” “dyke,” “freak,” “lesbian,” and “gothic.” *Riccio v. N. Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 222 (D. Conn. 2006). She also had a pencil and paper balls thrown at her, and a student threatened her and challenged her to fight. *Id.* at 223. *See also* *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 820 (C.D. Ill. 2008) (student was both verbally and physically harassed, “consisting predominantly of grabbing, twisting, and hitting” his testicles by other male students); *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp. 2d 952, 954-61 (D. Kan. 2005) (from seventh through eleventh grade, plaintiff was called a “faggot,” “fag,” “queer,” “gay,” and was pushed, kicked, and tormented by fellow students, who spread a rumor that he had been found masturbating in the school bathroom, and then repeatedly made fun of him for it during the five-year period of harassment).

43. *Montgomery*, 109 F. Supp. 2d at 1090.

44. 490 U.S. 228 (1989).

45. *Id.* at 237.

not make partner at the accounting firm where she worked because, despite colleagues describing her as “an outstanding professional” who had a “deft touch” and “a strong character, independence and integrity,” she was also seen by some as “macho,” that she “overcompensated for being a woman,” and should “take a course in charm school.”⁴⁶ To improve her chances for partnership in the future, she was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁴⁷ The Supreme Court stated that it did not “require expertise in psychology to know that, if an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.”⁴⁸

A decade later, in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that a male employee stated a claim under Title VII based on the conduct of his male coworkers, including subjecting him to derogatory slurs suggesting his homosexuality, humiliating sex-related actions, a physical assault, and threatening him with rape.⁴⁹ The Court noted that Title VII does not bar a claim of discrimination “because of sex” just because the target and harasser are of the same sex,⁵⁰ and that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”⁵¹

Given this precedent, since *Price Waterhouse* and *Oncale*⁵² it has become settled law that transgender employees—just like anyone else—may bring harassment claims based on gender non-conformity.⁵³ For example, in *Smith v.*

46. *Id.* at 233-35.

47. *Id.* at 234.

48. *Id.* at 256.

49. 523 U.S. 75 (1998).

50. *Id.* at 79.

51. *Id.* at 80.

52. There had been a pre-*Price Waterhouse* and -*Oncale* line of cases holding that transgender individuals could not bring claims for sex discrimination, *see, e.g., Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and there are a few more recent cases—heavily criticized—that follow that string without acknowledging that *Oncale* and *Price Waterhouse* significantly clarified the legal landscape. For discussion of these cases, *see* Turner, *supra* note 19, at 585-89; *see also* Brian P. McCarthy, Note, Trans Employees and Personal Appearance Standards Under Title VII, 50 ARIZ. L. REV. 939, 943-45, 949-50 (2008).

53. *See, e.g., Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.” (quoting *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004))); *Smith*, 378 F. 3d at 575 (“[A] label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”); *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1299 (N.D. Ga. 2010) (“This Court concurs with the majority of courts that have addressed this issue, finding that discrimination against a transgendered individual because of their failure to conform to gender stereotypes constitutes discrimination on the basis of sex.”); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (“In refusing to hire [Plaintiff] because her appearance and background did not comport with the

City of Salem, the Sixth Circuit held that a firefighter who was pushed out of her job when she notified her employer that she had been diagnosed with Gender Identity Disorder (now gender dysphoria⁵⁴) and planned to transition from male to female stated a claim under Title VII.⁵⁵ The court held that “a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”⁵⁶

B. Title IX Prohibits Discrimination For Failing to Conform to Gender Stereotypes

Looking to *Price Waterhouse*, *Oncale*, and other Title VII cases, the courts unanimously agree that Title IX prohibits harassment based on

decisionmaker’s sex stereotypes about how men and women should act and appear . . . the [defendant] violated Title VII’s prohibition on sex discrimination.”); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (“Title VII and *Price Waterhouse* . . . do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an ‘effeminate’ male or ‘macho’ female who . . . is perceived by others to be in nonconformity with traditional gender stereotypes.”); *Schroer v. Billington*, 525 F. Supp. 2d 58, 63 (D.D.C. 2007) (“Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer.”); *Mitchell v. Axcan Scandipharm*, No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 21, 2006) (holding transgender plaintiff may state a claim for sex discrimination by “showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant’s actions”); *Kastl v. Maricopa Cty. Comm. Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) (“[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait.”); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (holding transsexual plaintiff may state a claim under Title VII “based on the alleged discrimination for failing to ‘act like a man’”); *see also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007) (“The conclusion that transsexuals are not protected under Title VII *as transsexuals* should not be read to allow employers to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals.”). *Cf. Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (relying on Title VII case law and denying motion for summary judgment on Gender Motivated Violence Act claim where “the perpetrator’s actions stem from the fact that he believed that the victim was a man who ‘failed to act like’ one” and noting that for purposes of the GMVA and Title VII, “the terms ‘sex’ and ‘gender’ have become interchangeable”); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (analogizing to Title VII and concluding transsexual could state a claim for sex discrimination under the Equal Credit Opportunity Act).

54. See Camille Beredjick, *DSM-V To Rename Gender Identity Disorder “Gender Dysphoria”*, THE ADVOCATE, (July 23, 2012, 8:04 AM), <http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>.

55. 378 F.3d at 575

56. *Id.*

nonconformity with sex stereotypes.⁵⁷ For example, in *Montgomery*, the Title IX harassment case described in section I.B., the court rejected defendants' argument that the complaint must be dismissed because the law does not protect individuals based on sexual orientation, finding it likely that "the students began tormenting [plaintiff] based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy."⁵⁸

C. Weaknesses in the Current Approach

The current framework—in which transgender students are protected from discrimination and harassment only based on gender stereotypes, just like everybody else—is bad for individuals and as a matter of policy. First, it requires plaintiffs to construct a narrative that focuses not on who they are—transgender—but rather on how they act. This model forces transgender students to plead, and eventually prove at trial, that the person who was discriminating against them was doing so because of that person's belief that the student did not conform to gender stereotypes. The plaintiff is neither encouraged to, nor penalized for, stating that he or she is transgender. Rather, in such cases, the court "treats the plaintiff's transgender status as a neutral element in a Title VII suit" that does not "spoil what would otherwise be an actionable sex-stereotyping claim."⁵⁹ This approach asks "the court to ignore the plaintiff's transgender status altogether."⁶⁰ In this way, the gender nonconformity approach counsels for a legal strategy of covering—in which "the underlying identity is not altered, but hidden."⁶¹

57. See, e.g., *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011) ("[H]arassment based on nonconformity with sex stereotypes is legally cognizable under Title IX." (quoting *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006))); *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1115 n.1 (E.D. Cal. 2011) ("Harassment based on an individual's nonconformity with sexual stereotypes or 'norms' can constitute sexual harassment."); *Seiwert v. Spencer-Owen Comm. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007) (denying summary judgment to defendants and noting that "[i]f an individual is being harassed because of a failure to adhere to specific sexual stereotypes, and not because of his sexual orientation, he has an actionable claim"); *Snelling v. Fall Mountain Reg'l Sch. Dist.*, No. CIV. 99-448-JD, 2001 WL 276975, at *4 (D.N.H. Mar. 21, 2001) (denying summary judgment where plaintiffs alleged "the harassment they experienced arose from the perpetrators' sex-based stereotypes of masculinity, which is actionable under Title IX"). This issue has yet to reach the circuit courts. See, e.g., *Doe v. Brimfield*, 552 F. Supp. 2d 816, 822 ("Title VII cases have been relied on to support rulings under Title IX").

58. *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

59. Lee, *supra* note 19, at 435.

60. *Id.* at 445-46.

61. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772, 837 (2002); see also Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—the Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 166 (2011) (describing such a case as representing "a pyrrhic victory, gained at the expense of judicial affirmation of transgender identities").

Second, the gender nonconformity approach puts transgender student plaintiffs in an uncomfortable and perhaps humiliating position that forces them to identify themselves as their biological sex, as opposed to their gender identity.⁶² In such cases, a court will identify the plaintiff's "anchor gender"—the gender associated with the plaintiff's birth sex—and compare that to the plaintiff's gender expression.⁶³ To illustrate, consider the case of a hypothetical transgender student I will call Ronni, a second-grader who was designated as a boy at birth, but who identifies and presents as a girl. Ronni is harassed on a near-daily basis by her peers at school, who ask her why she wears dresses because "she's a boy," ask to see what's under her skirt, and don't let her play on the girls' team for dodgeball. Students have grabbed her crotch and buttocks, pushed her down and called her a "freak." Ronni's parents reported the conduct to her school, but the administration told them it was just "kids being kids" and Ronni should "get over this phase and dress like a boy." The harassment continues, and Ronni stops going to school because she is scared and humiliated. If Ronni and her parents want to sue the school for displaying "deliberate indifference" to her harassment, she needs to argue that her peers are harassing her because she does not conform to their stereotype of what a "boy" should act like.⁶⁴ But, of course, Ronni does not consider herself to be a boy, and to plead a successful case she will need to situate herself within this gender with which she does not identify.⁶⁵ Not only is this situation untenable for many transgender plaintiffs, but it serves to reify the gender binary in which there are only two options—male and female.⁶⁶

62. Cf. Jackie Barber, Casenote, Glenn v. Brumby: *Extending Protection from Sex-Based Discrimination to Transsexuals in the Eleventh Circuit*, 21 TUL. J. L. & SEXUALITY 169, 176 (2012) ("In order to recover for discrimination claims based on their gender-nonconforming conduct, as set forth in *Price Waterhouse*, transsexual plaintiffs must identify themselves as their biological sex.").

63. See Lee, *supra* note 19, at 433.

64. See *supra* Section II.B.

65. Cf. Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 666 (2009) (noting that a sex-stereotyping decision in a case brought by a transgender woman "reduces Smith's transgender identity to little more than a fashion choice to wear women's clothing"); Sue Landsittel, Comment, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1159 (2010) (noting that a sex-stereotyping claim "disregards a transgender person's gender identification by forcing a transgender woman, for example, to cast herself as male"); Lee, *supra* note 19, at 446. ("[C]ourts following this approach must characterize a transgender plaintiff not (for example) as a transgender woman but rather as a gender nonconforming man, thus producing pronounced tension between the plaintiff's authentic gender identity and the legal strategy required to win the plaintiff's case.").

66. See, e.g., Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 40 (1995) ("[T]he law continues to [...] naturalize sexual dimorphism: the assumption that homo sapiens are divided into two natural kinds—male and female."); Shults, *supra* note 21, at 339-40 (noting scholars assert "that the binary structure is unrealistic, as 'sex and gender range across a spectrum'" (quoting Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999))). For a survey of the

Third, the gender nonconformity approach, which rejects discrimination on the basis of pernicious gender stereotypes, ironically serves to highlight those very same stereotypes.⁶⁷ As one scholar characterized the problem, “[I]n order to eliminate such gender norms and stereotypes, the law must at first construct and reiterate them.”⁶⁸ It also puts courts in the position of finding that not only did plaintiff’s peers not *believe* that plaintiff met gender stereotypes, but plaintiff did not in fact conform to gender stereotypes, thus reinforcing the stereotypes the law considers so problematic. Although as a matter of law a finding regarding a plaintiff’s gender nonconformity is not necessary for a successful claim—it is only the harasser’s *belief* that this is the case that matters—as a matter of practice courts often make claims or findings about the gender nonconformity of plaintiffs in such cases.⁶⁹

Finally, the gender nonconformity approach encourages defendants to put forward an insidious defense. Until courts recognize that in the Title IX context discrimination on the basis of gender identity is *per se* sex discrimination, educational institutions may attempt to shield themselves from liability by arguing that the discrimination and harassment plaintiff experienced was not on the basis of nonconformity with gender stereotypes, but was in fact anti-transgender discrimination, which is not yet recognized as protected under Title IX.⁷⁰ Indeed, “claims of discrimination based on gender nonconformity will often rest on facts that are equally indicative of discrimination based on a person’s transgender status,”⁷¹ making a defense of discrimination based on gender identity attractive to school districts or colleges. In short, the gender nonconformity approach is harmful to plaintiffs and society as a whole because it requires courts to ignore transgender identities, requires plaintiffs to identify

feminist literature and its application to the transgender rights movement, *see* Gordon, *supra* note 19.

67. *See, e.g.*, Glazer & Kramer, *supra* note 65, at 663 (“[A] likely effect of battling conduct that is taken to be constitutive of group membership is the reinforcement of stereotypes that have come to define members of particular groups.”); Lee, *supra* note 19, at 444 (“[T]he approach requires that courts construct the very sex stereotypes that the doctrine purports to disdain.”).

68. Laura Grenfell, *Embracing Law’s Categories: Anti-Discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51, 53 (2003).

69. *See, e.g.*, Theno v. Tonganoxie Unified Sch. Dist. No. 464, et al., 394 F. Supp. 2d at 1304-07 (“The evidence revealed that plaintiff did not conform to his peers’ stereotypical expectations concerning how a teenage boy should act, particularly in the relatively small rural community of Tonganoxie, Kansas.”) *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000) (plaintiff pled “facts from which a reasonable fact-finder could infer that he suffered harassment due to his failure to meet masculine stereotypes”); *see also* Lee, *supra* note 19, at 445 (“[M]any courts seem to . . . make broad, descriptive claims about the actual gender nonconformity of their respective transgender plaintiffs.”).

70. Defendants have already put forward similar arguments in Title IX cases brought by gay and lesbian students, arguing that the harassment suffered by the plaintiff “were of a sexual orientation nature and not gender specific.” *Riccio v. N. Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 222 (D. Conn. 2006); *see also Montgomery*, 109 F. Supp. 2d 1081 (rejecting the defense).

71. *See* Lee, *supra* note 19, at 440.

with their birth sex over the gender with which they identify, reinforces stereotypes, and incentivizes harmful defenses.

III. THE WAY FORWARD: DISCRIMINATION ON THE BASIS OF GENDER IDENTITY IS *PER SE* SEX DISCRIMINATION

If the last Part provided a somewhat dim view of the gender nonconformity approach as applied to transgender students, this Part will highlight another option. The good news is that a number of courts have moved beyond the gender nonconformity theory to recognizing that discrimination on the basis of gender identity necessarily constitutes sex discrimination.⁷² Although the case law and OCR are silent as to whether discrimination on the basis of gender identity is actionable under Title IX, courts and the Equal Employment Opportunity Commission (EEOC) have examined this question in the context of Title VII. Title VII case law is particularly instructive because courts routinely look to Title VII decisions in the Title IX context.⁷³

A. Courts and OCR Have Not Yet Addressed Whether Gender Identity Discrimination Constitutes Sex Discrimination Under Title IX

Neither courts nor OCR have explored whether Title IX's prohibition of discrimination "on the basis of sex" includes discrimination on the basis of gender identity.⁷⁴ Although courts have analyzed Title IX's application to men,

72. For literature discussing this line of cases, see, e.g., Amanda S. Eno, Note, *The Misconception of "Sex" in Title VII: Federal Courts Reevaluate Transsexual Employment Discrimination Claims*, 43 TULSA L. REV. 765 (2008); Mary Kristen Kelly, Note, *(Trans)forming Traditional Interpretations of Title VII: "Because of Sex" and the Transgender Dilemma*, 17 DUKE J. GENDER L. & POL'Y 219 (2010); McCarthy, *supra* note 52, at 947-49; Leena D. Phadke, Comment, *When Women Aren't Women and Men Aren't Men: The Problem of Transgender Sex Discrimination Under Title IX*, 54 U. KAN. L. REV. 837 (2006); Amanda Raflo, Note, *Evolving Protection for Transgender Employees Under Title VII's Sex Discrimination Prohibition: A New Era Where Gender is More than Chromosomes*, 2 CHARLOTTE L. REV. 217 (2010); Kevin Kevin Schwin, Note, *Toward a Plain Meaning Approach to Analyzing Title VII: Employment Discrimination Protection of Transsexuals*, 57 CLEV. ST. L. REV. 645, 667-69 (2009); Shawn D. Twing & Timothy C. Williams, *Title VII's Transgender Trajectory: An Analysis of Whether Transgender People Are a Protected Class Under the Term "Sex" and Practical Implications of Inclusion*, 15 TEX. J. C.L. & C.R. 173 (2010).

73. See, e.g., *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) (Title IX sexual harassment case citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the case that initially established employer liability for sexual harassment in the workplace under Title VII); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 229, 647 (1999) (Title IX case referencing Title VII law and EEOC guidance); see also *Mabry v. State Bd. of Comm. Colleges & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987) ("Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX's substantive standards.").

74. For a discussion of Title IX's coverage of discrimination based on gender identity under the *Price Waterhouse* sex stereotyping theory, see Tina Sohaili, *Securing Safe*

women, students, employees, teachers, coaches, and parents, there is almost no case law that explicitly deals with Title IX's application to transgender individuals or harassment based on a student's gender identity.

Only one reported case discusses Title IX's application to a transgender plaintiff. In *Miles v. New York University*, the court rejected the university's defense that Title IX did not apply to a male-to-female transsexual employee—who was the subject of sexual harassment by her boss—by virtue of her being transgender.⁷⁵ In other words, the court held that Title IX banned sexual harassment in education, and that there was no exception to this rule just because the target of the harassment happened to be transgender. This case does not begin to answer the question of whether discriminating against a person because of that person's gender identity constitutes sex discrimination under Title IX.⁷⁶

OCR avoided taking a position on the question of whether gender identity discrimination by definition constitutes sex discrimination in its recent guidance document on bullying and harassment that discussed Title IX's application to LGBT students. OCR explained:

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. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target. Although Title IX does not prohibit discrimination based solely on *sexual orientation*, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also . . . be subjected to forms of sex discrimination prohibited under Title IX. The fact that

Schools: Using Title IX Liability to Address Peer Harassment of Transgender Students, 20 TUL. J. L. & SEXUALITY 79, 90-95 (2011).

75. See *Miles v. New York Univ.*, 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (“The simple facts are . . . that Professor Eisen was engaged in indefensible conduct directed at plaintiff which caused her to suffer distress and ultimately forced her out of the doctoral program in her chosen field. There is no conceivable reason why such conduct should be rewarded with legal pardon just because, unbeknownst to Professor Eisen and everyone else at the university, plaintiff was not a biological female.”).

76. In a short, unreported decision, the Ninth Circuit held that the transgender plaintiff stated a prima facie case of gender discrimination under Title VII on the theory that her employer, a community college district, banned her from the women's restroom and did not renew her contract due to impermissible gender stereotypes. *Kastl v. Maricopa County Comm. Coll. Dist.*, 325 Fed. App's 492, 494 (9th Cir. 2009). However, the court went on to hold that plaintiff's Title VII, Title IX, and Equal Protection claims all failed because her employer proffered evidence that it banned her from using the women's restroom because of safety concerns, and she failed to proffer evidence that the safety concerns were pretextual. *See id.*

the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment and gender-based harassment.⁷⁷

OCR is clear that Title IX applies to students who are or are perceived to be LGBT on an equal basis, and those students can bring claims for harassment based on nonconformity with gender stereotypes. Significantly, although OCR takes the position that Title IX does not cover harassment based on *sexual orientation*, it says nothing regarding harassment based on gender identity. Therefore, OCR leaves open the possibility that discrimination based on gender identity is sex discrimination for the purposes of Title IX.

B. Courts and Agencies in a Variety of Contexts Have Recognized that Gender Identity Discrimination Constitutes Per Se Sex Discrimination

In contexts outside of Title IX—primarily Title VII and the Equal Protection Clause—courts have begun to recognize that discrimination against a transgender person because of the person's gender identity is *per se* sex discrimination. *Schroer v. Billington* is an early case in this line.⁷⁸ Before Diane Schroer transitioned from male to female, she applied for a job with the Congressional Research Service at the Library of Congress as a Specialist in Terrorism and International Crime.⁷⁹ She was well-qualified, having graduated from two military colleges, served in special forces units in combat operations, held a Top Secret security clearance, currently worked at a private consulting firm, and received the highest interview score of all eighteen candidates.⁸⁰ Not surprisingly, she was offered the job, and accepted.⁸¹ Before the paperwork for her hiring had completely gone through, however, she invited her future supervisor out to lunch and explained that she was transgender and intended to start work not as “David,” but as “Diane.”⁸² The next day the supervisor called Diane and rescinded the job offer telling her that “based on our conversation yesterday, I’ve determined that you are not a good fit, and not what we want.”⁸³

The court determined that Schroer was entitled to judgment under Title VII based on the *Price Waterhouse* theory of sex stereotyping as well as under the theory that “discrimination on the basis of gender identity is sex discrimination.”⁸⁴ It was simple: “[t]he Library was enthusiastic about hiring David Schroer—until she disclosed her transsexuality. The Library revoked

77. October 2010 Dear Colleague Letter, *supra* note 9, at 7-8 (emphasis added).

78. 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

79. *Id.* at 295.

80. *Id.* at 295-96.

81. *Id.* at 296.

82. *Id.*

83. *Id.* at 299.

84. *Id.* at 306.

the offer when it learned that a man named David intended to become, legally, culturally, and physically, a woman named Diane. This was discrimination “because of . . . sex.”⁸⁵ The court saw “that the plaintiff before the court had a distinct transgender identity” rather than requiring her to cast herself as a gender nonconforming man or woman.⁸⁶

The court drew an analogy to religious discrimination that is particularly apt, given that both religion and gender identity can be complex and fluid:⁸⁷

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a *change* in religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of a decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that “transsexuality” is unprotected by Title VII. In other words, courts have allowed their focus on the label “transsexual” blind them to the statutory language itself.⁸⁸

The court rejected previous cases holding that Title VII’s prohibition on discrimination based on sex means only that “it is unlawful to discriminate against women because they are women and against men because they are men.”⁸⁹ It noted the expansive view of race discrimination under Title VII,⁹⁰

85. *Id.*

86. Glazer & Kramer, *supra* note 65, at 659; see also *id.* at 660 (noting that the court recognized that “transgenderism is a distinct identity, one that need not be grouped together with gender-nonconformity”).

87. For an argument that “courts should embrace an understanding of transitional identity,” including that of religious converts and transgender individuals, see *id.*

88. *Schroer*, 577 F. Supp. 2d at 306-07. For an academic discussion of *Schroer*’s analogizing sex to religion, see, e.g., Landsittel, *supra* note 65, at 1171-1177, 1172 (like gender identity, “religious identity has a deeply personal, internal genesis that lacks a fixed external referent”); Katrina McCann, *Transsexuals and Title VII: Proposing an Interpretation of Schroer v. Billington*, 25 Wis. J.L. GENDER & SOC’Y 163 (2010). Before the *Schroer* court adopted this analogy to religion, commentators made the same argument. See Chai R. Feldblum & Lisa Mottet, *Gay People Trans People, Women: Is It All About Gender?*, 17 N.Y.L. SCH. J. HUM. RTS. 623, 652 n.76 (2000).

89. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

90. *Schroer*, 577 F. Supp. 2d at 307 n.8 (“Discrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII’s prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or based on friendship that cross racial lines.”).

and summoned Justice Scalia's opinion for the unanimous Supreme Court in *Oncale*:

Male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.⁹¹

Thus, the court held that in refusing to hire Schroer *because of her transition* the Library violated Title VII's prohibition on sex discrimination.⁹²

Two recent decisions have significantly altered the legal landscape and picked up where *Schroer* left off.⁹³ In *Schroer*, the court held that discrimination against a transgender person because of that person's transition constitutes sex discrimination.⁹⁴ These decisions go farther, holding that it is not just the person's transition, but the person's identity that is protected.⁹⁵

In the 2011 case of *Glenn v. Brumby*, the Eleventh Circuit unanimously held that discrimination on the basis of a transgender person's gender nonconformity is sex discrimination that violates the Equal Protection Clause.⁹⁶ In 2007, Vandy Elizabeth Glenn told her boss at the Georgia General Assembly's Office of Legislative Counsel that she was planning on transitioning from male to female.⁹⁷ He promptly fired her, after remarking that "it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing," and describing a male in women's clothing as "unnatural."⁹⁸

91. *Id.* at 308 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)).

92. *Id.* at 308. For further discussion of this case, For further discussion of this case, see generally McCann, *supra* note 88; Navah C. Spero, Note, *Transgendered Plaintiffs In Title VII Suits: Why the Schroer v. Billington Approach Makes Sense*, 9 CONN. PUB. INT. L.J. 387 (2010).

93. Because these decisions are so recent, OCR did not have a chance to consider them when it issued its October 2010 guidance, in which it did not directly address the question whether discrimination on the basis of gender identity constituted sex discrimination *per se* for Title IX purposes. October 2010 Dear Colleague Letter, *supra* note 9, at 7-8.

94. 577 F. Supp. 2d at 306-08.

95. See Lee, *supra* note 19, at 447 (characterizing two different forms of the argument that discrimination on the basis of gender identity constitutes *per se* sex discrimination).

96. See *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) ("We conclude that a government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.").

97. *Id.* at 1314.

98. *Id.*

The court first turned to the Supreme Court's Title VII decision in *Price Waterhouse*, noting that the Court had held that discrimination on the basis of gender stereotypes is sex discrimination and had observed that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group."⁹⁹ The court focused on the nature of transgenderism, explaining why discriminating against a person because that person is transgender is necessarily sex discrimination on the basis of sex:

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. "The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.¹⁰⁰

This is an important decision.¹⁰¹ By focusing on what it means to be transgender, the court acknowledged, rather than ignored, Glenn's transgender identity and strongly suggested that any time a transgender person is discriminated against by virtue of that person's gender identity the person states a claim for sex discrimination.¹⁰² Rather than focusing on the plaintiff's transition, as the court in *Schroer* had done, the Eleventh Circuit argued that transgenderism by definition involves some measure of gender nonconformity.¹⁰³

Although the *Glenn* decision was based on the Equal Protection Clause—which covers only governmental discrimination¹⁰⁴—its reasoning would seem to apply to the context of Title VII, which prohibits discrimination in both public and private workplaces.¹⁰⁵ This is especially true since it relied on *Price Waterhouse*, a Title VII case, in reaching its decision. Further, since courts routinely use Title VII cases in interpreting Title IX, the *Glenn* decision has the potential to create ripple effects leading to greater protection for transgender individuals in the education sphere.

Even more recently, in May 2012 the Equal Employment Opportunity Commission ruled that a "complaint of discrimination based on gender identity,

99. *Id.* at 1316

100. *Id.* (quoting Turner, *supra* note 19, at 563) (internal alteration omitted).

101. For a discussion of *Glenn*'s possible application to the broader LGBT community, see Barber, *supra* note 62 at 175-76.

102. *But see id.* at 176 (reading *Glenn* as still requiring a plaintiff to identify themselves as their biological sex to state a claim).

103. See Lee, *supra* note 19, at 447.

104. See U.S. CONST. amend. XIV, § 1 ("No State shall [. . .] deny to any person within its jurisdiction the equal protection of the laws").

105. See 42 U.S.C. § 2000e(b) (2009) (definition of "employer").

change of sex, and/or transgender status is cognizable under Title VII.”¹⁰⁶ Under facts similar to those in *Schroer*, the complainant, Mia Macy, a transgender woman, was told she would be hired for a job while presenting as a man, but when she told the prospective employer about her decision to transition from male to female, the employer changed its mind.¹⁰⁷ Macy filed an EEOC charge alleging that “she was not hired for the position as a result of making her transgender status known.”¹⁰⁸

The EEOC first noted that “[a]s used in Title VII, the term ‘sex’ encompasses both sex—that is, the biological differences between men and women—and gender.”¹⁰⁹ And when an employer discriminates against an employee because that person is transgender, “the employer has engaged in disparate treatment ‘related to the sex of the victim.’”¹¹⁰ The agency added:

This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court’s admonition that “an employer may not take gender into account in making an employment decision.”¹¹¹

The EEOC explained that recognizing that discrimination against transgender individuals is *per se* sex discrimination follows from the Supreme Court’s decision in *Price Waterhouse* because, as the Eleventh Circuit recognized in *Glenn*, “consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual.”¹¹² This application of Title VII “does not create a new ‘class’ of people covered by Title VII,” it is simply “the result of applying the plain language of a statute” prohibiting sex discrimination “to practical situations in which such characteristics are unlawfully taken into account.”¹¹³ The Commission did not

106. See *Macy v. Holder*, EEOC Appeal No. 0120120821 (EEOC Apr. 20, 2012), available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

107. See *id.* at *6.

108. *Id.* at *12.

109. *Id.* at *19 (quoting *Schwenk*, 204 F.3d at 1202, and *Smith*, 378 F.3d at 1216).

110. *Id.* at *22 (quoting *Schwenk*, 204 F.3d at 1202).

111. *Id.* at *24 (quoting *Price Waterhouse*, 490 U.S. at 244).

112. *Id.* at *31 (citing *Glenn*, 666 F.3d at 1320).

113. *Id.* at *43.

focus on Macy's identification documents, medical treatment, or anatomy, signaling that such an inquiry is unnecessary under this *per se* framework.¹¹⁴

Thus, the *Macy* decision incorporates the reasoning of both *Schroer* and *Glenn*, holding that discrimination against a transgender person is *per se* sex discrimination regardless of whether that discrimination stems from the plaintiff's gender expression, transition, or simply because the plaintiff is transgender.¹¹⁵ This decision will be binding on all federal agencies and federal contractors, and the EEOC will now accept and investigate employment discrimination complaints under Title VII based on gender identity.¹¹⁶ Although this decision is not binding on state and federal courts, the opinion of the federal agency tasked with enforcing and interpreting Title VII will likely receive respect, if not outright deference.¹¹⁷ In short, this decision represents an important turning point in legal protections for transgender people. This sea change has not gone unnoticed. For example, in July of 2012 the U.S. Department of Health and Human Services stated that the provision of the Affordable Care Act prohibiting sex discrimination "extends to claims of discrimination based on gender identity."¹¹⁸

IV. COURTS SHOULD RECOGNIZE AND OCR SHOULD ACKNOWLEDGE THAT TITLE IX *PER SE* APPLIES TO DISCRIMINATION ON THE BASIS OF GENDER IDENTITY.

There now exists a strong body of case law and administrative decisions holding that discrimination on the basis of gender identity *necessarily* constitutes sex discrimination. Although this issue has yet to be decided in the Title IX context, the reasoning of the cases under Title VII and the Equal

114. *See id.* at *44.

115. *See id.*

116. *See* Chris Geidner, *Transgender Breakthrough: EEOC Ruling That Gender-Identity Discrimination is Covered by Title VII is a "Sea Change" That Opens the Doors to Employment Protection for Transgender Americans*, Metro Weekly, Apr. 23, 2012, available at <http://metroweekly.com/news/?ak=7288>.

117. *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); *see also* *United States v. Mead Corp.*, 533 U.S. 218, 237-38 (2001) (reaffirming *Skidmore*); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore* . . . but only to the extent that those interpretations have the 'power to persuade'").

118. *See* Letter from Leon Rodriguez, Director, HHS Office for Civil Rights, to Maya Rupert, National Center for Lesbian Rights (July 12, 2012) (OCR Transaction Number: 12-000800), available at <http://www.scribd.com/doc/101981113/Response-on-LGBT-People-in-Sec-1557-in-the-Affordable-Care-Act-from-the-U-S-Dept-of-Health-and-Human-Services>.

Protection Clause would apply in the educational setting. Indeed, in a recent Title IX case the Department of Justice has taken the position in litigation, albeit somewhat obliquely, that discrimination on the basis of gender identity is by definition sex discrimination: In its complaint intervening in a case of student-on-student harassment under Title IX, the DOJ defined “gender-based harassment” to include “harassment based on gender identity.”¹¹⁹ This position comes nearly three years after OCR remained silent on the question in its October 2010 Dear Colleague Letter.¹²⁰

The law is evolving, and this should come as no surprise. As Justice Scalia observed in *Oncale*, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.”¹²¹ After all, “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”¹²² As our understanding of “sex” expands, so does the coverage afforded by Title VII and Title IX.¹²³

A. *The Benefits of This Approach*

Recognizing that discrimination based on gender identity is *per se* sex discrimination is not just inevitable, it represents sound policy. As discussed above, the gender nonconformity approach to gender identity discrimination under Title IX poses a number of problems: it buries transgender identities, requires plaintiffs to identify with their birth sex rather than their gender identity, reinforces harmful gender stereotypes, and incentivizes pernicious defenses.¹²⁴ However, recognizing a *per se* sex discrimination claim based on gender identity would help to alleviate these various difficulties posed by the current Title IX doctrine, which is insufficiently protective given the realities that transgender students face.¹²⁵

119. See *Doe v. Anoka-Hennepin Sch. Dist. No. 11*, No. 11-cv-01999, United States Complaint in Intervention, at 4 (D. Minn. Mar. 5, 2012) (“‘Gender-based harassment’ means non-sexual harassment of a person because of the person’s sex, including harassment based upon gender identity and expression.”).

120. See October 2010 Dear Colleague Letter, *supra* note 9, at 8.

121. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

122. *Id.*

123. See, e.g., Spero, *supra* note 92, at 410 (comparing evolving conception of “sex” to “arms” in the Second Amendment and observing that “[t]he writers of that amendment clearly did not contemplate handguns, let alone automatic or semi automatic weapons when they wrote the word ‘arms.’ Yet the Supreme Court recently held in *D.C. v. Heller*, 555 U.S. 570 (2008) that the right to bear arms includes handguns”); see also Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination “Because of . . . (Perceived) Sex”*, 34 N.Y.U. REV. L. & SOC. CHANGE 55, 97 (2010) (“The *Oncale* standard nonetheless leaves a crucial question unanswered: what is a ‘reasonably comparable evil’? Is discrimination against intersex individuals reasonably comparable?”).

124. See *supra* Section II.C

125. For a scholarly evaluation of this theory of discrimination, see Lee, *supra* note 19, at 451-53 (arguing that the *per se* approach “possess[es] limited efficacy with regard to what scholars have termed ‘second generation’ employment discrimination”).

Recognizing gender identity discrimination as a form of sex discrimination would free plaintiffs to be able to choose a theory of their case that is most appropriate to their situation. Some transgender students may, for personal or political reasons, bristle at pursuing a theory that forces them to set out the ways in which their behavior does not conform to the gender stereotypes associated with their birth sex, and would prefer to identify as transgender. For such plaintiffs who find “covering”¹²⁶ their transgender identities distasteful, the *per se* approach would provide an attractive alternative that would allow them to identify themselves as—and allow courts to acknowledge them as—transgender students.¹²⁷ In contrast, other students may in fact not self-identify as transgender or embrace any specific terminology, and so may prefer instead to plead that the discrimination they faced was based on their gender expression and the ways in which they challenged gender stereotypes. Once courts recognize gender identity discrimination as *per se* sex discrimination, plaintiffs will be free to choose whatever theory best conforms to their sense of self.¹²⁸ This is because, as the EEOC acknowledged in *Macy*, “a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations,” which are “simply different ways of describing sex discrimination.”¹²⁹

Further, recognizing discrimination on the basis of gender identity as *per se* sex discrimination is essential because it would remove the shameful defense that the current law incentivizes defendants to use. Since discrimination on the basis of gender identity (and sexual orientation) are not explicitly covered under Title IX,¹³⁰ defendants may currently argue that the discrimination in question was based on anti-trans (or anti-gay) animus, rather than nonconformity with sex stereotypes. A legal framework that allows—indeed, rewards—such a defense should not be allowed to stand.

B. What Should a Per Se Rule Look Like in the School Context?

The final question to be answered is: If courts are to recognize gender identity discrimination as *per se* sex discrimination under Title IX, what form should such a rule take, and what questions should a court ask? The answer is simple: student plaintiffs should be allowed to identify themselves as

126. See Yoshino, *supra* note 61, at 772, 837.

127. See Ezie, *supra* note 61, at 166 (describing a gender nonconformity case as representing “a pyrrhic victory, gained at the expense of judicial affirmation of transgender identities”); Cf. Lee, *supra* note 19, at 445-46.

128. See Glazer & Kramer, *supra* note 65, at 666 (“[W]e favor a system of anti-discrimination laws in which the plaintiff’s sense of herself rather than the defendant’s perception of her forms the basis for an actionable discrimination claim.”).

129. See *Macy v. Holder*, EEOC Appeal No. 0120120821 (EEOC Apr. 20, 2012), *38, available at www.eeoc.gov/decisions/012010821%20Macy%20v%20DOJ%20ATF.txt.

130. See *supra* Section III.A.

transgender if the gender identity they choose and consistently present does not match their birth sex.¹³¹ Under the contrary rule:

The individual has been denied the authority to describe, or declare, and thereby create, the fact of his or her own sex, in the way that the base runner is unable to call himself or herself safe—only the umpire has that authority. The conventions of our gender schema control the first case, while the conventions of baseball control the second.¹³²

The realities of the school context—especially in elementary and secondary education—counsels for an approach that allows plaintiffs to bring *per se* gender identity claims without requiring proof of any physical or legal transition or changes. To start, there has been significant criticism of the medical model of transgenderism—an inquiry focused on a person’s diagnosis of gender dysphoria (formerly Gender Identity Disorder, or GID), hormone therapy, and/or surgical treatment—as underinclusive and stigmatizing.¹³³ This method of gauging a person’s gender identity is particularly problematic in the case of school-aged children, who are much less likely than adults who bring employment discrimination claims under Title VII to have been diagnosed with gender dysphoria or to have undergone hormone therapy or surgery (which may be contraindicated).¹³⁴ Indeed, because Title IX covers students of all ages, some students may have gender identities that do not match their biological sex, but may not yet fully understand what this means, or even identify themselves as transgender.¹³⁵ This approach is consistent with EEOC’s

131. See Landsittel, *supra* note 65, at 1174-75 (arguing for “consistency” test from religious jurisprudence under the First Amendment is appropriate for gender identity claims under Title VII). This formulation, of course, assumes that students are not barred from presenting their chosen gender identity by discriminatory school dress or grooming policies.

132. Franke, *supra* note 66, at 53.

133. See, e.g., Jonathan L. Koenig, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619 (2011); Lee, *supra* note 19, at 454-55; McCann, *supra* note 88, at 176-80; Phadke, *supra* note 72, at 856 (“[A] system that encourages and nearly requires transgender plaintiffs suing for sex discrimination to have a medical diagnosis of GID may actually perpetuate discrimination, or at the very least, stigmatize such individuals”); Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 731-39 (2005); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15 (2003). For a definition and description of gender dysphoria, see Joshua A. Jones, *Section 504 of the Rehabilitation Act of 1973: A Double-Edged Sword for the Protection of Students with Gender Identity Disorder*, 25 WIS. J.L. GENDER & SOC’Y 353 (2010).

134. See Model District Policy, *supra* note 21, at 4 (“Treatments such as hormone therapy may be unaffordable, not medically indicated, or contraindicated for many youth. Surgical treatments are generally not available for school-age transgender youth.”). In fact, the majority of all transgender people do not undergo surgeries. See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 754 (2008).

135. Cf. *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1090 (“Moreover, the Court finds important the fact that plaintiff’s peers began harassing him as early as kindergarten. It is highly unlikely that at that tender age plaintiff would have developed any

decision in *Macy*, which did not focus on Macy's identification documents, medical treatment, or anatomy.¹³⁶

Nor are gender markers on government-issued identification documents the appropriate measure of a person's gender identity. Students, like many transgender people, may find it difficult to change a gender marker on a government-issued I.D., if they have one, due to requirements relating to medical evidence, parental consent, and publication of notice of the change.¹³⁷

Let's be honest: Transgender students who are bullied and harassed by their peers in school are targeted because of who they are, not what is written on their birth certificate or is under their clothing.¹³⁸ A framework that allows for claims of gender identity discrimination—and does not inquire whether a person has been diagnosed with gender dysphoria, received medical treatment, or changed their identity documents—matches the reality of the discrimination and harassment that transgender students face in schools.

CONCLUSION

There is a growing body of case law and administrative decisions recognizing that gender identity discrimination is *per se* sex discrimination. When this holding is recognized in the Title IX context by courts and OCR, it will represent an important step forward in protecting transgender students from discrimination and harassment in schools. The current legal "fix," which allows transgender students to argue that the harassment is based on gender stereotyping, fails to fully acknowledge the nature of the discrimination and is inadequate as a matter of public policy.

Transgender students in our nation's schools should be afforded the same protection that exists for employees in the workforce. Society tells LGBT students that "it gets better," and it does. But courts and OCR can help make it better by recognizing that Title VII's *per se* prohibition on gender identity discrimination applies equally to Title IX.

solidified sexual preference, or for that matter, that he even understood what it meant to be 'homosexual' or 'heterosexual.' The likelihood that he openly identified himself as gay or that he engaged in any homosexual conduct at that age is quite low. It is much more plausible that the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy.").

136. See *supra* Part III.B.

137. See Model District Policy, *supra* note 21, at 4; see also Spade, *Documenting Gender*, *supra* note 134, at 760-76 (providing overview of rules surrounding gender reclassification on various government-issued documents). Having counseled numerous clients through the name and gender marker change in the District of Columbia, I can attest to the gauntlet-like nature of this process.

138. See *Harsh Realities*, *supra* note 29, at xi (reporting nearly 9 out of 10 transgender students had been verbally harassed in the past year at school because of their gender expression).

Some commentators have questioned the efficacy of Title IX to effectively remedy and prevent harassment.¹³⁹ However, until Congress passes the Student Non-Discrimination Act, which would explicitly prohibit discrimination in K-12 public schools on the basis of actual or perceived sexual orientation and gender identity, and until more states recognize gender identity as a protected personal characteristic under anti-discrimination statutes, Title IX provides the most comprehensive legal protection against school-based harassment based on gender identity.

139. See, e.g., Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TUL. L. REV. 387 (2002); Susan Hanley Kosse & Robert H. Wright, *How to Best Confront the Bully: Should Title IX or Anti-Bullying Statutes be the Answer?*, 12 DUKE J. GENDER L. & POL'Y 53 (2005); Elia Powers, *Weighing the Reach of a Title IX Ruling*, Inside Higher Educ., Sept. 10, 2007, available at <http://www.insidehighered.com/news/2007/09/10/colorado> (discussing cases in which Title IX provided a cause of action, but the damage had already occurred, despite school knowledge of the problems).