PROTECTING TRANSGENDER STUDENTS: APPLICATION OF TITLE IX TO GENDER IDENTITY OR EXPRESSION AND THE CONSTITUTIONAL RIGHT TO GENDER AUTONOMY

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INTRODUCTION

Susan began her fifth-grade year in September, 2007. Her use of the girls' restroom went smoothly until a male student followed her into the restroom on September 28 and called her a fag and again disrupted her use of the girls' restroom on October 3. The male student entered the restroom at the instigation of his grandfather, his guardian, who told him that Susan was really a boy and shouldn't be allowed to use the female restroom. The male student's grandfather urged him to enter the girls' restroom because he disagreed with the sexual orientation anti-discrimination law and told his grandson that if Susan could use the restroom as a boy, then the male student could use that restroom as well. The grandfather had a political or religious objection to the sexual orientation nondiscrimination law. The male student's conduct was a violation of serious school policies. No other students expressed discomfort with or objected to Susan's use of the girls' restroom.

After the two incidents in which the male student followed Susan into the girls' restroom, the school terminated her use of the girls' restroom over Susan's and her parents' objections….The school continued to exclude Susan from the girls' restroom and forced her to use a separate restroom during her sixth grade year at Orono Middle School.

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[A]t the time that the school terminated Susan's use of the girls' restroom, Susan "was living full-time as a female in [the] school environment." The School Counselor, Director of Special Services, Principal, Acting Principal, and Susan's fifth grade teacher all testified that Susan looked and acted like a typical fifth grade girl. In fact, transgender children who undergo social role transition prior to puberty appear indistinguishable from their peers with the same gender identity who are not transgender. It is therefore unsurprising that everyone involved agreed that Susan could not use the boys' restroom in fifth or sixth grades….Superintendent Clenchy reasoned that in such cases, the victim of the harassment did not do anything wrong and the school is obligated to stop the harassing behavior and teach tolerance and respect for other students.[1]

Susan Doe's claim for discrimination under the Maine Human Rights Law was rejected by the trial court, and is on appeal at the time of this writing. Susan's case is an exemplar of an issue that young transgender students face when in school regarding usage of restrooms. This article will address two key points. First, transgender students have a right to use the bathroom appropriate to their gender identity under Title IX of the Education Amendments of 1972,[2] which prohibits sex discrimination in schools. Second, transgender students have certain rights under the U.S. Constitution that may provide relief.

I. TITLE IX AS APPLIED TO TRANSGENDER STUDENTS

A. Title IX – Background

Transgender students should have a right to use the bathroom appropriate to their gender identity under Title IX of the Education Amendments of 1972.[3] This statute governs most schools that receive federal funds, which includes all public schools. While many people are familiar with Title IX as a statute that requires equality of the sexes in athletic programs, it is more generally a statute that provides for equality of the sexes in all school programs. It also prohibits harassment based on sex.[4]

Title IX states, in pertinent part:

"No person in the United States shall, **on the basis of sex,** be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. . ."[5]

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1. Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 1-7, Doe v. Clenchy (Me. Super. Ct. Jan. 30, 2012)(No. CV-09-201), *available at* http://www.glad.org/uploads/docs/cases/doe-v-clenchy/2012-01-30-doe-v-clenchy-motion-for-summary-judgment.pdf.

2. *See* 20 U.S.C. § 1681 (2001).

3. *Id.*

4. *Id.*

5. *Id* (emphasis added).

Does the meaning of "sex" in Title IX include transgender people, and, if so, does the prohibition on sex discrimination require the school to respect a student's gender identity to the extent of allowing them[6] to wear clothing appropriate to their gender identity, requiring teachers and students to use the student's chosen name rather than the name on a birth certificate, and the use of bathrooms and dressing rooms consistent with their gender identity?

The United States Department of Justice has indicated that Title IX's prohibition on sex discrimination extends to a right to be free of discrimination based on both sexual harassment and gender stereotyping.[7] Some federal courts have agreed.[8] Some federal courts have even recognized that discrimination based on sexual orientation in the school context is a violation of the Equal Protection Clause.[9] However, federal courts have had differing opinions about Title IX claims that include or border too closely on sexual orientation discrimination. While some have ruled that such claims are not recognized,[10] others have explicitly recognized that Title IX claims include sexual orientation.[11] For example, in *M.D. v. School Board of Richmond*, Plaintiff was a six-year-old African-American child in elementary school.[12] Other children persistently teased him on the basis of his race and perceived sexual orientation, insinuating that he was gay. He was subjected to severe bullying,

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6. There is grammatical controversy regarding the use of the gender-neutral plural pronoun "them" and "their" with regard to a singular subject. Some prefer the construction "his or her." This article will use the plural pronoun in appropriate contexts because it makes reading comprehension easier and because it is gender-neutral.

7. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 2-3 (2001) *available at* http://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf; *see also* Memorandum of Law in Support of the United States' Motion to Intervene at 1-2, 8, Sullivan v. Mohawk Cent. Sch. Dist. (N.D.N.Y. Jan. 14, 2010)(No. 6:09-CV-943), *available at* http://www.justice.gov/crt/about/edu/documents/mohawkmotion.pdf.

8. Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 822-23 (C.D. Ill. 2008); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 963 (D. Kan. 2005); Snelling v. Fall Mountain Reg'l Sch. Dist., No. CIV. 99-448-JD, 2001 WL 276975, at *3-5 (D.N.H. Mar. 21, 2001); Montgomery v. Local Sch. Dis. No. 709, 109 F. Supp. 2d 1081, 1091-92 (D. Minn. 2000) (holding that harassment based on "stereotyped expectations of masculinity is prohibited by Title IX).

9. *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446, 454-55 (7th Cir 1996); Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1137 (9th Cir. 2003).

10. *See, e.g.*, M.D. v. Sch. Bd. of Richmond, No. 3:13CV329-HEH, 2013 U.S. Dist. LEXIS 76936, at *10 (E.D. Va. May 31, 2013). Interestingly, the court in *M.D.* relied on a Seventh Circuit Title VII case that denied relief based on sexual orientation discrimination in the employment context. *See* Spearman v. Ford Motor Co., 231 F.3d 1080,1084 (7th Cir. 2000). However, the *M.D.* court ignored Seventh Circuit precedent which found protection for sexual orientation discrimination in the context of schools under Title IX. *See Nobozny*, 92 F.3d at 454-55.

11. *See, e.g.*, Theno v. Tonganoxie Unified Sch. Dist. No. 464, 394 F. Supp. 2d 1299, 1301 (D. Kan. 2005) ($250,000 jury verdict under Title IX for peer harassment of student on the basis of sexual orientation).

12. *M.D.*, 2013 U.S. Dist. LEXIS 76936, at *2.

leading to extreme emotional damage and a fear of school, even after he later enrolled in a new school. The United States District Court for the Eastern District of Virginia held that harassment based on actual or perceived sexual orientation is not generally actionable under Title IX. Instead, the discrimination must be based on the plaintiff's gender. It dismissed the sexual orientation discrimination claims because the plaintiff's claim was based on other student's incorrect perception of his sexual orientation, not his gender.

To the contrary, however, in *Flores v. Morgan Unified School District*,[13] the student plaintiffs recounted a series of incidents, including anti-gay remarks and physical abuse, which teacher and administrators failed to stop or provide adequate disciplinary action. One student found pornography and notes to the effect of "Die, dyke bitch" inside her locker. When she showed one note to an assistant principal, and asked to be reassigned to a new locker, the administrator allegedly replied, "Yes, sure, sure, later. You need to go back to class. Don't bring me this trash any more. This is disgusting." During the conversation, the administrator allegedly asked the student, "Are you gay?" When she answered, "No, no. I'm not gay," she was asked, "Why are you crying, then?" Another student was beaten so severely by six other students that he had to be treated for badly bruised ribs, who said, "Faggot, you don't belong here" while he was being beaten. Administrators punished only one student, and the victim was transferred to another school.

The administrators argued they were entitled to qualified immunity as state officials because the law at the time of the alleged constitutional violation was not clearly established. They argued that no Supreme Court or Ninth Circuit case had yet established a student's right under the Equal Protection Clause of the Fourteenth Amendment to be protected by school administrators from peer sexual orientation harassment. The court held, however, that the defendants had "fair warning" that their conduct was unlawful because, as early as 1990, the Ninth Circuit had established the underlying proposition that state employees who treat individuals differently on the basis of their sexual orientation violate the constitutional guarantee of equal protection.

However, these guidelines, memoranda, and cases do not go far enough. They do not explicitly cover the other interests of transgender students in asserting their gender identity beyond bullying.

B. The Analogy Between Title IX and Title VII

In arguing that Title IX applies to transgender students, there is an argument to be made that "sex," as used in Title IX, has a similar meaning to "sex" as used in Title VII of the Federal Civil Rights Act of 1964 (Title VII).[14]

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13. *Flores*, 324 F.3d at 1132-33.

14. *See, e.g.*, Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1991) ("Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.' 477 U.S. 57, 64, 106 S. Ct. 2399,

Title VII[15] protects employees from discrimination based on race, color, sex, national origin and religion. If that analogy holds, then discrimination based on gender identity should also be prohibited by Title IX.[16]

Many federal courts have held that Title VII protects transgender employees.[17] However, this legal state of affairs is far less encouraging than it sounds. No court has held that the prohibition of sex discrimination in Title VII allows a transgender employee to use a public restroom consistent with the individual's gender identity. In fact, two courts have explicitly held to the

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2404, 91 L. Ed.2d 49 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student"). *But cf.* Jackson v. Birmingham Bd, of Educ., 544 U.S. 167, 175 (2005) ("Title VII, however, is a vastly different statute from Title IX, see *Gebser*, 524 U.S., at 283-284, 286-287, 118 S. Ct. 1989, and the comparison the Board urges us to draw is therefore of limited use").

15. 42 U.S.C. § 2000e-2(a) (2001).

16. *See generally*, Jillian T. Weiss, Transgender Identity, Textualism, and the Supreme Court: What is the 'Plain Meaning' of 'Sex' in Title VII of the Civil Rights Act of 1964?, 18 TEMPLE POL. & CIV. RTS. L. REV. 573 (2009) (arguing that Title VII sex discrimination includes discrimination based on gender identity).

17. The U.S. Supreme Court's decision in *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 238, 251 (1989) held that failure to promote a female employee because of perceptions that she was not sufficiently feminine constituted sex stereotyping, which is impermissible under Title IX. *See* 42 U.S.C. § 2000e-2(a) (2001). After that decision, many federal courts have found that transgender persons are protected if the discrimination took the form of "sex stereotyping" based on their gender non-conforming appearance.

These include courts in the First Circuit, Rosa v. Park West Bank, 214 F.3d 213, 215-16 (1st Cir. 2000) ("That is, the Bank . . .treat[s] . . . a woman who dresses like a man differently than a man who dresses like a woman."); Second Circuit, Tronetti v. Healthnet Lakeshore Hosp., No. 03-CV-0375E(Sc), 2003 U.S. Dist. LEXIS 23757, at *12 (W.D.N.Y. Sept. 26, 2003) ("Tronetti, however, is not claiming protection as a transsexual. Rather, Tronetti is claiming to have been discriminated against for failing to 'act like a man.'"); Third Circuit, Mitchell v. Axcan Scandipharm, No. 05-243, 2006 U.S. Dist. LEXIS 6521, at *5 (W.D. Pa. Feb. 21, 2006) (holding that a 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"); Fifth Circuit, Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653, 659-661 (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 [a] 'macho' female who . . . is perceived by others to be in nonconformity with traditional gender stereotypes."); Sixth Circuit, Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.); Ninth Circuit, (Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) ("[T]he perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like one.'") 204 F.3d 1187, 1198-1203 (9th Cir. 2000); Kastl v. Maricopa County, 325 F. App'x. 492, 493 (9th Cir. 2009) ("After *Hopkins* and *Schwenk,* it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women."); and the Eleventh Circuit, Glenn v. Brumby, 663 F.3d 1312, 1316-1318 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . [A]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.").

contrary.[18] Thus, a transgender student seeking to invoke the protections of Title IX cannot point to any Title VII case law requiring recognition of their gender identity for purposes of bathrooms or dressing rooms, or, for that matter, use of chosen names and proper pronouns. In addition, as discussed in Section C below, the legal theory used to protect transgender employees under Title VII may pose problems for the very different context of transgender students.[19]

C. The Problem with Title VII's "Gender Stereotyping" Theory

It is tempting to use the analogy between Title IX and Title VII in order to provide Title IX protection to transgender students. However, Title VII cases are problematic for transgender students because they are generally based upon the legal theory of "gender stereotyping." Gender stereotyping theorizes transgender people's gendered behavior as not conforming to their perceived birth sex, rather than as having a protected "gender identity."[20] It is important to note here that there is a difference between transgender identity and transsexual identity. The former is an umbrella identity that includes any type of gender identity or expression that does not conform to the social expectations for one's sex assigned at birth.[21] The latter is a more specific term that refers to one who is or desires to be a member of the sex opposite to that assigned at birth. The importance of this distinction lies in the fact that many transgender people do not desire to transition from one sex to another, may have fluid or combined gender identities, and do not claim membership in the opposite sex. Transsexual people, by contrast, identify strongly with the sex opposite to that assigned at birth, and take medical and legal steps to assert this identity.

It is encouraging that two federal district courts and the Equal Employment Opportunity Commission (EEOC) have ruled that discrimination based on transsexual status is literally discrimination based on sex, rather than improper stereotyping of gender roles. In *Ulane v. Eastern Airlines*,[22] the

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18. Goins v. W. Grp., 635 N.W.2d 717, 725 (Minn. 2001); Hispanic AIDS Forum v. Bruno, 792 N.Y.S.2d 43, 47 (N.Y. App. Div. 2005). *See also* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224-1225 (10th Cir. 2007).

19. *See infra* Section C.

20. The quoted portions of the federal cases protecting transgender people set forth in Footnote 8 above specifically state that transgender people are protected because they do not conform to stereotypes of their perceived birth sex. *See supra* note 8 and accompanying text. In *Smith v. City of Salem*, 369 F.3d 912, 918 (6th Cir. 2004), the Sixth Circuit originally ruled that discrimination based on gender non-conforming conduct and transsexual status were both protected from discrimination by federal law. It subsequently amended its opinion to take out the line "We find both bases of discrimination actionable pursuant to Title VII," and its final opinion ruled for the plaintiff only on gender non-conforming conduct. Smith v. City of Salem, 378 F.3d 566, 571 (2004).

21. *See* Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, *in* TRANSGENDER RIGHTS 3-4 (Paisley Currah, Richard Juang & Shannon Minter eds., 2006).

22. Ulane v. Eastern Airlines, 581 F. Supp. 821 (N.D. Ill. 1983), *rev'd* 742 F.2d 1081 (7th Cir. 1984).

United States District Court for the Northern District of Illinois held that discrimination based on transsexual status was sex discrimination. The court stated:

I find by the greater weight of the evidence that sex is not a cut-and-dried matter of chromosomes, and that while there may be some argument about the matter in the medical community, the evidence in this record satisfies me that the term, "sex," as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII."[23]

However, that decision was reversed by the Seventh Circuit, and that reversal is still good law in that jurisdiction.

In *Schroer v. Billington*,[24] the United States District Court for the District of Columbia also held that discrimination based on transgender status is *per se* sex discrimination, stating:

Even if the decisions that define the word "sex" in Title VII as referring only to anatomical or chromosomal sex are still good law—after that approach 'has been eviscerated by *Price Waterhouse,' Smith,* 378 F.3d at 573—the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination "because of . . . sex."[25]

However, the court also based its conclusion on a sex stereotyping theory, so the force of the decision as to whether transgender discrimination is *per se* sex discrimination is somewhat muted. The court stated:

While I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping, I also conclude that she is entitled to judgment based on the language of the statute itself.[26]

The United States did not appeal this decision.

In *Macy v. Holder*,[27] the United States Equal Employment Opportunity Commission issued a similar opinion. With regard to various formulations of the complaint as sex discrimination, sex stereotyping, and discrimination because of gender change, the Commission stated there was no material difference among them. "Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination 'based on . . . sex,' a claim cognizable under Title VII."[28] The EEOC also held that gender stereotyping evidence is not necessary in order to prove that sex discrimination occurred against a transgender person:

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23. *Id.* at 825.

24. Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008).

25. *Id.* at 308.

26. *Id.* at 305-306.

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

28. *Id.*

Alternatively, if Complainant can prove that the reason that she did not get the job at Walnut Creek is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.[29]

The EEOC decision, while binding on EEOC personnel, is not binding on the federal courts and may be reversed.

These three opinions provide support for the theory that transgender discrimination is per se sex discrimination. However, because the first was reversed by the Seventh Circuit, the second is applicable only in the District of D.C., and the third is binding only on EEOC personnel, the Title VII analogy does not provide much certainty for a transgender student seeking to obtain recognition for gender identity under Title IX.

One might argue, against the points raised above, that it does not matter what legal theory is used to protect discrimination against transgender students, so long as it is prohibited. It is important, however, to understand that transgender identity is a real identity for transgender people. Sex discrimination is not simply a matter of avoiding harassing name-calling and assaults, but also a matter of obtaining respect for one's identity in a myriad of ways.[30] In the educational setting, there are four rights that are particularly important for transgender students, beyond freedom from harassing name-calling and assaults: 1) recognition of proper name and pronouns, 2) proper restroom and dressing room usage, 3) proper dress codes, and 4) protection from harassment that involves invasive questioning of one's identity, right to maintain such an

29. *Id.*

30. I have suggested in a previous law review article that there are eight categories of legal gender regulation that affect transgender people: 1) laws regarding sex designation on government-issued identification, such as birth certificates and driver licenses, 2) name change laws that restrict a person's right to use a name stereotypically considered of the opposite sex, 3) laws requiring or permitting sex segregation in public facilities, such as bathrooms and dressing rooms, educational settings, youth facilities, homeless shelters, drug treatment centers, foster care homes, domestic violence shelters and prisons, 4) laws requiring or permitting sex discrimination in private settings, such as employment, sports and assisted reproductive technologies, 5) policies imposing restrictions or negative consequences on the right to transition or cross-dress, such as those imposed on youth, on divorced transgender parents, on adoptive parents, in workplaces, educational institutions and prisons, 6) exclusions for transgender persons in private and government health care, 7) laws that restrict marriage and/or civil unions based on gender, including rights contingent on the validity of marriage, such as intestate inheritance, right to sue for torts to a domestic partner, alimony, child custody, visitation and support, and insurance coverage and 8) military service laws based on gender and transgender identity. Jillian T. Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for Lawrence v. Texas*, 5 TOURO J. OF RACE, GENDER & ETHNICITY, No. 1, 4-5 (2010) (citing law reviews), *available at* http://www.tourolaw.edu/JournalRGE/uploads//Issues/Vol5Issue1/Weiss_Final.pdf.

identity, medical history, and anatomical configuration.[31] It is not enough to say that one is protected from being stereotyped, but not protected from those students or administrators who deny these important rights. If disrespect for one's gender identity is legally recognized only as a form of gender stereotyping, then the school is only required to respond to certain types of bullying by students and administrators, but not to other interests essential to transgender students.[32] A school could argue that it has an obligation to protect against bullying, but not other forms of disrespect, such as use of wrong names and pronouns or use of gender-conforming restrooms and dressing rooms. Transgender students subjected to such forms of non-acceptance are experiencing discrimination, and that should be recognized by the law.

The current state of Title IX law is not sufficiently robust to make clear whether transgender students are entitled to protection for forms of address, dress codes, facilities usage appropriate to their gender identity, and protection from invasive questioning. However, lawyers representing transgender students against a public school should present a Title IX theory, particularly if there are issues of sexual harassment or gender stereotyping present. In addition, the argument should also be made that "sex" includes gender identity.[33] I am hopeful that courts would accept such arguments. The Title IX argument, however, should not be the sole federal cause of action. There is another source of legal authority that may provide protection for transgender students: the United States Constitution.

II. CONSTITUTIONAL RIGHTS OF TRANSGENDER STUDENTS

A. The Right of Gender Autonomy

There is an alternate federal law theory that can and should be used, in addition to Title IX, in favor of transgender student rights. In cases involving state action, such as those involving public schools, there may be protections in the U.S. Constitution for a right of "gender autonomy" that should also be invoked. The Supreme Court has recognized that deprivation of constitutional rights may be raised pursuant to 42 U.S.C. § 1983 in Title IX cases.[34] The trend of the law suggests there is an emerging constitutional right to "gender

31. *Id.*

32. *See, e.g.*, Goins v. W. Grp., 635 N.W.2d 717, 725 (Minn. 2001) (holding in the context of the Minnesota Human Rights Act that designation of employee restroom use based on biological sex is not discriminatory against transgender employees).

33. *See* Jillian T. Weiss, *Transgender Identity, Textualism, and the 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 (2009) (reviewing the history of the terms "sex," "gender" and "transgender," and discussing federal cases holding sex discrimination to include transgender persons).

34. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257-58 (2009) ("Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights").

autonomy," which would prohibit restrictions based on gender identity. In law review articles in 2001[35] and 2010,[36] I suggested that there is a right to "gender autonomy," that protects people with transgender and transsexual identity,[37] as well as those of traditional gender identity, from restrictions based on gender identity. This right to "gender autonomy" is the right of self- determination of one's gender, free from state control, and the right to self-identify as that gender, free from state contradiction.[38]

There is a constellation of eight issues located within this right,[39] based on two strands of constitutional jurisprudence dealing with gender autonomy. The first strand is a right of self-determination of gender, descending from the right to privacy cases.[40] These cases promote self-determination of private decision-making of important life choices.[41] The second strand of constitutional jurisprudence is a right of self-identification of gender, descending from other privacy cases that promote protection of sensitive information from government interference.[42]

B. Other Constitutional Provisions Have Been Applied to Transgender People

The courts have recognized additional constitutional principles as applicable to transgender people. There is a First Amendment right of transgender students to dress in accord with their gender identity,[43] an Eighth

35. Jillian T. Weiss, *The Gender Caste System: Identity, Privacy and Heteronormativity*, 10 LAW & SEXUALITY 123 (2001).

36. Weiss, *supra* note 30.

37. "Transgender" is an umbrella term.

38. Weiss, *supra* note 30, at 6-7.

39. *See supra* note 30.

40. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Lawrence v. Texas, 539 U.S. 558 (2003).

41. Weiss, *supra* note 35, at 167.

42. Weiss, *supra* note 35, at 171. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 80 (1976) (noting that state recordkeeping requirements can violate the right to privacy with regard to medical patients undergoing abortion); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982) (noting that the Constitution protects against the compelled disclosure of political associations and beliefs based on First Amendment freedom of group association). *See also* Powell v. Schriver, 175 F.3d 107, 113-14 (2d Cir. 1999) (finding that a prisoner had a privacy interest based on the Eighth Amendment in keeping his transsexual status from other inmates); Moore v. Prevo, 379 Fed. App'x 425, at *9-10 (6th Cir. 2010) (Fourteenth Amendment right to keep medical information regarding HIV status private); Doe v. Delie, 257 F.3d 309, 323 (3d Cir. 2001) (holding the same); Ferguson v. City of Charleston, 532 U.S. 67, 76(2001) (disclosure of blood or urine tests subject to Fourth Amendment examination); Whalen v. Roe, 429 U.S. 589, 598 , n. 24 (1977) (disclosure of name on a list of medical drug users implicates Fourth Amendment); O'Connor v. Pierson, 426 F.3d 187, 202 (2d Cir. 2005) (release of past medical records subject to privacy rights examination).

43. Doe v. Yunits, No. 00-1060-A, 2000 Mass. Super. LEXIS 491 (Mass. Super. Oct. 11, 2000), *aff'd sub nom.*, Doe v. Brockton Sch. Comm'n, No. 2000-J-638, 2000 Mass. App.

Amendment right of transgender inmates to dress and obtain medical treatment in accord with their gender identity,[44] and a right to be free from employment discrimination based on transgender status by government employers under the Equal Protection Clause.[45] I would also point to the explicitly heightened scrutiny accorded to analysis of sexual orientation-based restrictions by some courts, analogizing this reasoning to that of gender identity.[46] The "heightened scrutiny" standard is a form of "rational basis with bite," and is generally considered to be somewhat lower than the intermediate level of scrutiny.[47] One court has articulated a three-pronged test for heightened scrutiny.[48] The law "must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest."[49] This is a lesser standard than the "substantially related to important governmental interests" test for "intermediate scrutiny."[50]

Analysis of other constitutional rights that have been applied to transgender people sheds some useful light on the contours of the right to gender autonomy. The Eighth Amendment right to medical care, for example, is an interesting analogy (though un-incarcerated public school students cannot assert Eighth Amendment violations, of course). The primary argument here is that if the recognition of transgender medical standards is strong enough to overcome the robust penological interests of the state in the prison context, then the logically weaker state interests in the school context are less likely to overcome the student's medical need for appropriate treatment for gender identity disorder, including recognition of their gender identity.

LEXIS 1128 (Mass. App. Ct. Nov. 30, 2000). *See also* Jeffrey Kosbie*, (No) State Interests In Regulating Gender: How Suppression Of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. OF WOMEN & L. 187, 241-254 (2013).

44. Kosilek v. Spencer, 889 F. Supp. 2d 190, 230 (D. Mass. 2012); Fields v. Smith, 653 F.3d 550 (7th Cir. 2011), *cert. denied*, Smith v. Fields, 132 S. Ct. 1810 (2012).

45. Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011). *See also* Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1089 (D. Minn. 2000) (finding that sexual orientation discrimination in public schools is covered by the Equal Protection Clause).

46. *See, e.g.*, Witt v. United States Dep't of the Air Force, 739 F. Supp. 2d 1308, 1313 (W.D. Wash. 2010) (applying heightened scrutiny to military "Don't Ask, Don't Tell" policy); Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 965 (C.D. Cal. 2010) (same), *vacated*, 658 F.3d 1162, 1166 (9th Cir. 2011) (mootness based on statutory repeal).

47. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359 n. 26 (2008) (CITING JEFFREY SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 104 (Greenwood Press, 2001)); *see also* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans , 32 IND. L. REV. 357, 361-63, 370 (1999) (discussing various rational basis claims); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for aNewer Equal Protection*, 86 HARV. L. REV. 1, 18-19 (1972).

48. *Witt*, 739 F. Supp. 2d at 1313.

49. *Id.*

50. *Id.*

The Equal Protection Clause argument, set forth above, is another constitutional right that has been applied to transgender people, though, again, discrimination in employment does not specifically translate to a right to gender autonomy that would protect the student's right to recognition of name, dress and restroom/dressing room usage. However, if a court were to employ the use of heightened scrutiny based on gender, or the more stringent test of "intermediate scrutiny," as the Eleventh Circuit did in the case of *Glenn v. Brumby*,[51] then there is a good argument to be made that concerns about restroom usage require a great deal of evidence in order to pass muster under heightened scrutiny.

A third constitutional right has been applied to transgender people. The First Amendment jurisprudence applicable to transgender students is particularly interesting, because the status of the First Amendment as a fundamental right would presumably impose a "strict scrutiny" analysis on transgender student restrictions.[52] This requires the state show a compelling interest in a law narrowly tailored to achieve that interest.[53] In *Doe v. Yunits*,[54] the Massachusetts Superior Court imposed a preliminary injunction, permitting the transsexual student plaintiff to wear clothing of her female gender identity, despite the school's assertions of harm to the public interest and disruption to the learning process.[55] The Court found that the student plaintiff was likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she was expressing her identification with that gender.[56] The Court also found that the student's ability to express herself and her gender identity through dress was important to her health and well-being, as attested to by her treating therapist.[57] Therefore, the Court held that the student's expression is not merely a "personal preference but a necessary symbol of her very identity."[58] The recognition of the student's right to express their gender identity through dress comes closest to recognizing their other interests in gender autonomy, namely, recognition of name and restroom/dressing room usage.

The Constitutional right of gender autonomy as applied to transgender people is strengthened by seeing it in the context of other constitutional provisions that have been applied to transgender people. As shown above, the First Amendment, the Eighth Amendment and the Equal Protection Clause have all been applied to transgender people. As we have discussed above, these

51. Glenn v. Brumby, 663 F.3d 1312, 1320-21 (11th Cir. 2011).

52. *See, e.g.*, Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 509-510 (1969).

53. *Id.*

54. Doe v. Yunits, No. 00-1060-A, 2000 Mass. Super. LEXIS 491 (Mass. Super. Oct. 11, 2000), *aff'd sub nom.*, Doe v. Brockton Sch. Comm'n, No. 2000-J-638, 2000 Mass. App. LEXIS 1128 (Mass. App. Ct. Nov. 30, 2000).

55. *Doe v. Yunits,* 2000 Mass. Super. LEXIS 491.

56. *Id*. at 10.

57. *Id.*

58. *Id.*

applications have involved the use of heightened scrutiny and intermediate scrutiny. The use of these higher levels of scrutiny shows that transgender people are considered, in certain contexts, a protected class.

III. STATE INTERESTS IN PROHIBITING RECOGNITION OF STUDENT GENDER IDENTITY

It is difficult to understand the state interest involved in school regulations that prohibit a transgender student from asserting their gender identity, and impose a contrary state-mandated gender on that student. In a case involving a transgender student, a key issue that should be asserted in any complaint involving a state actor, such as a public school, is the absence of such an interest. The state actor, however, will likely assert at least two interests, one relating to good order and discipline, and the other relating to privacy interests of other students.

The plaintiff may then question whether, pursuant to the Equal Protection and Due Process interests, there is a rational nexus between these asserted state interests, and the regulations, policies or practices that deny the gender identity of a transgender student in regard to forms of address, dress codes, and facilities usage. With regard to First Amendment interests, the plaintiff may assert that the proper standard of review is strict scrutiny, and question whether these state interests are sufficiently compelling and the regulations narrowly tailored to the asserted interests. The plaintiff may also question, in each instance, whether there is sufficient evidence to show harm to such interests so as to require the denial of gender autonomy to the student.

With regard to the asserted state interest in good order and discipline in the school, this interest closely resembles the good order and discipline arguments made by the U.S. military in court cases decided prior to the repeal of the "Don't Ask, Don't Tell" policy that prohibited military personnel from publicly acknowledging their gay, lesbian or bisexual identity.[59] The federal courts faced with these questions decided that the evidence of harm to such interests was lacking.[60] To the extent that a "good order" based restriction is made in the First Amendment context, it is likely to fail unless the school authorities can legitimately show that there is "substantial interference" with the work of the school, rather than mere concern about controversy.[61]

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59. 10 U.S.C. § 654 (2001) (repealed 2010).

60. These courts explicitly applied heightened scrutiny based on sexual orientation, but whether or not heightened scrutiny would be applied to student gender identity, the defendant did not meet the basic evidentiary requirement of demonstrating any harm to state interests. *See* Witt v. United States Dep't of the Air Force, 739 F. Supp. 2d 1308, 1316 (W.D. Wash 2010) (finding that applying the "Don't Ask Don't Tell" policy did not "significantly further the government's interest in promoting military readiness, unit morale and cohesion"); *see also* Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 965 (C.D. Cal. 2010) (same), *vacated*, 658 F.3d 1162,1167 (9th Cir. 2011) (mootness based on statutory repeal).

61. Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 509-510 (1969).

In regard to an asserted state interest in the privacy needs of other students in regard to restrooms and dressing rooms, the courts have not generally been sympathetic to the argument that the presence of transgender people in a restroom or locker room is automatically a violation of privacy. In *Cruzan v. Special School District No. 1*,[62] a woman brought an action against her employer, alleging discrimination against her on the basis of her sex and religion by allowing a transgender coworker to use the women's faculty restroom.[63] The Court found that this did not constitute sexual harassment or discrimination. "Cruzan does not assert Davis engaged in any inappropriate conduct other than merely being present in the women's faculty restroom. Given the totality of the circumstances, we conclude a reasonable person would not have found the work environment hostile or abusive."[64] In *Opilla v Lucent,*[65] a woman brought an action against her employer, citing claims of sexual harassment, hostile work environment, emotional distress, and invasion of privacy.[66] Her claims were based upon allegations that a transgender co-worker entered the women's locker room and looked at plaintiff, who was then dressed only in her underwear.[67] The Court concluded that the incident did not constitute sexual harassment or other invasion of privacy.[68]

In *Glenn v. Brumby*,[69] an equal protection case involving a transgender employee terminated from state employment on the basis of gender identity, the Court employed heightened scrutiny, and concluded that speculative concerns about use of a particular restroom is insufficient.[70]

"To support the justification that he now argues, Brumby points to a single statement in his deposition where he referred to a speculative concern about lawsuits arising if Glenn used the women's restroom. The district court recognized that this single reference, based on speculation, was overwhelmingly contradicted by specific evidence of Brumby's intent, and we agree. Indeed, Brumby testified that he viewed the possibility of a lawsuit by a co-worker if Glenn were retained as unlikely and the record indicates that the OLC, where Glenn worked, had only single-occupancy restrooms. Brumby advanced this argument before the district court only as a *conceivable* explanation for his decision to fire Glenn under rational basis review."[71]

62. Cruzan v. Special School District No. 1, 294 F.3d 981 (D. Minn. 2002).

63. *Id.* at 982.

64. *Id.* at 984.

65. Opilla v. Parker, No. A-1255-05T2, 2006 N.J. Super. Unpub. LEXIS 2751 (N.J. Super. Ct. App. Div. Sept. 29, 2006).

66. *Id.* at *1

67. *Id.*

68. *Id.* at *7.

69. Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

70. *Id.* at 1321.

71. *Id.* at 1321.

There are courts that have reached opposite conclusions about whether transgender persons may use certain restrooms,[72] but none on constitutional grounds. These cases employed statutory analysis that, interestingly, is in direct conflict, concluding that separation of restrooms by biological sex does not constitute discrimination based on sex or gender identity.

CONCLUSION

Transgender students have two potential sources of a right to use the bathroom appropriate to their gender identity. First, Title IX of the Education Amendments of 1972, *et seq.*, prohibits sex discrimination in federally-funded schools. Second, transgender students have certain rights under the U.S. Constitution that may provide relief. The Title IX argument is weak because it relies on an analogy to Title VII. In the educational setting, there are four rights that are particularly important for transgender students, beyond freedom from harassing name-calling and assaults: 1) recognition of proper name and pronouns, 2) proper restroom and dressing room usage, 3) proper dress codes, and 4) protection from harassment that involves invasive questioning of one's identity, right to maintain such an identity, medical history, and anatomical configuration. Most Title VII cases protect transgender people because they break gender stereotypes, not because their gender identity deserves recognition ipso facto. No court has held that the prohibition of sex discrimination in Title VII allows a transgender employee to use a public restroom consistent with the individual's gender identity. Thus, a transgender student seeking to invoke the protections of Title IX cannot point to any Title VII case law requiring recognition of their gender identity for purposes of bathrooms or dressing rooms, or, for that matter, use of chosen names and proper pronouns. Thus, the Title VII analogy does not provide much certainty for a transgender student seeking to obtain recognition for gender identity under Title IX.

The trend of the law suggests there is an emerging constitutional right to "gender autonomy," which would prohibit restrictions based on gender identity. "Gender autonomy" refers to the right of self- determination of one's gender, free from state control, and the right to self-identify as that gender, free from state contradiction. This right is based on two strands of constitutional jurisprudence. The first is the right of self-determination of gender, descending from the right to privacy cases, protecting private decision-making of important life choices. The second is a right of self-identification of gender, descending from other privacy cases that promote protection of sensitive information from government interference. These are also backed by decisions recognizing the constitutional rights of transgender people, such as the First Amendment right to dress in accord with their gender identity, the Eighth Amendment right of transgender inmates to dress and obtain medical treatment in accord with their gender identity, and the right under the Equal Protection Clause to be free from employment discrimination based on transgender status by government

72. *See supra* note 18.

employers. The intermediate scrutiny standard of review may also apply, given that discrimination based on transgender status is a form of sex discrimination.

Schools will likely assert at least two interests, one relating to good order and discipline, and the other relating to privacy interests of other students. An important determination will be whether, pursuant to the Equal Protection and Due Process interests, there is a rational nexus between these asserted state interests, and the regulations, policies or practices that deny the gender identity of a transgender student in regard to forms of address, dress codes, and facilities usage. The interest in good order and discipline in the school, this interest closely resembles the good order and discipline arguments made by the U.S. military in court cases decided prior to the repeal of the "Don't Ask, Don't Tell" policy that prohibited military personnel from publicly acknowledging their gay, lesbian or bisexual identity. The federal courts faced with these questions decided that the evidence of harm to such interests was lacking. To the extent that a "good order" based restriction is made in the First Amendment context, it is likely to fail unless the school authorities can legitimately show that there is "substantial interference" with the work of the school, rather than mere concern about controversy.

In regard to the asserted state interest in the privacy needs of other students in regard to restrooms and dressing rooms, the courts have not generally been sympathetic to the argument that the presence of transgender people in a restroom or locker room is automatically a violation of privacy. There are courts that have reached opposite conclusions about whether transgender persons may use certain restrooms, but none on constitutional grounds. These cases employed statutory analysis that, interestingly, is in direct conflict, concluding that separation of restrooms by biological sex does not constitute discrimination based on sex or gender identity.

When asserting the interests of transgender youth in the use of appropriate rest-room facilities, advocates should use all reasonable sources of authority. These include both Title IX and the Constitutional provisions protecting a right of gender autonomy. Title IX is an important asset, but its current weakness requires that advocates begin the task of bolstering the recognition that Constitutional rights protect the recognition of the sex and gender identity of transgender people.