

# Gender Identity Discrimination in Public Education: A Legal Analysis

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April 13, 2016

Congressional Research Service

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[www.crs.gov](http://www.crs.gov)

R44471

## Introduction

In recent years, there has been debate about whether certain legal rights and protections should be extended to individuals who are transgender. The controversy over this issue has emerged at both the federal and state levels, and has raised questions about the scope of antidiscrimination laws in a number of contexts, including public accommodations, employment, and education. Front and center in this debate is the highly contentious subject of transgender access to shared facilities such as bathrooms and locker rooms. Recently, this dispute over lesbian, gay, bisexual, and transgender (LGBT) rights, has generated legal battles and prompted a number of state and local governments to consider or to enact laws restricting access to such shared facilities. Prominent examples of this controversy include the defeat of an antidiscrimination ordinance in Houston over concerns about transgender individuals' access to public restrooms and a North Carolina law that requires individuals to use public restrooms and school restrooms that correspond to their biological sex as stated on their birth certificates.<sup>1</sup>

Against this backdrop, the federal Department of Education (ED) began addressing gender identity discrimination in public education. Specifically, ED has adopted the position that discrimination against transgender students by public elementary, secondary, and postsecondary schools may, under certain circumstances, be a violation of federal law. Indeed, ED has issued guidance clarifying the circumstances under which gender identity discrimination may be unlawful, and has pursued enforcement action against schools that it has found to have engaged in unlawful discrimination.<sup>2</sup> ED's actions, though, have raised questions about the agency's legal authority to establish nondiscrimination policies regarding transgender students. This report will examine ED's authority under current law, as well as describe recent enforcement efforts, litigation, and proposed legislation.

## Current Law

Currently, ED's legal authority to address gender identity discrimination appears to derive from a number of legal sources, including statutory provisions, regulations, and case law in some federal circuits. ED has also issued guidance based on its interpretation of these legal sources, each of which is described in more detail below.

Under current law, no federal civil rights statute explicitly prohibits discrimination in schools on the basis of gender identity, although several federal laws bar discrimination in education on other grounds, and multiple states and localities have enacted laws that forbid gender identity discrimination in a variety of contexts.<sup>3</sup> However, there may be instances in which gender identity discrimination could be a form of sex discrimination that violates federal law.<sup>4</sup>

Several federal laws forbid discrimination on the basis of sex, including Title VII of the Civil Rights Act of 1964,<sup>5</sup> which prohibits, among other things, sex discrimination in employment, and

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<sup>1</sup> City of Houston, Texas, Ordinance No. 2014-530, [http://www.houstontx.gov/equal\\_rights\\_ordinance.pdf](http://www.houstontx.gov/equal_rights_ordinance.pdf); 2016 N.C. ALS 3.

<sup>2</sup> U.S. Department of Education, *Office for Civil Rights*, Dear Colleague Letter, October 26, 2010, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

<sup>3</sup> See, e.g., 42 U.S.C. §§2000c et seq.; 20 U.S.C. §§1701 et seq.; Cal Ed Code §220; Conn. Gen. Stat. §10-15c.

<sup>4</sup> *Schwenk v. Hartford*, 204 F.3d 1187 (9<sup>th</sup> Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566 (6<sup>th</sup> Cir. 2004). But see *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10<sup>th</sup> Cir. 2007).

<sup>5</sup> 42 U.S.C. §§2000e et seq.

Title IX of the Education Amendments of 1972,<sup>6</sup> which bars sex discrimination in federally funded education programs or activities, a category that includes virtually all public elementary and secondary schools. The Title IX regulations further expand the scope of this prohibition against discrimination.<sup>7</sup>

Initially, federal courts ruled that these statutory prohibitions on sex discrimination did not protect individuals on the basis of gender identity.<sup>8</sup> However, in the years since the Supreme Court's landmark ruling in *Price Waterhouse v. Hopkins*,<sup>9</sup> several courts have held that Title VII and Title IX protect against gender identity discrimination. In *Price Waterhouse*, a case involving a female senior manager who had been denied a partnership in part for being too masculine, the Court ruled that gender stereotyping is a form of discrimination on the basis of sex.<sup>10</sup> Since this ruling, several federal appellate courts have applied the *Price Waterhouse* decision to rule in favor of transgender individuals who allege sex discrimination on the basis of gender nonconformity,<sup>11</sup> including at least one that ruled that the firing of a transgender employee by a state agency violated the Equal Protection Clause of the Constitution.<sup>12</sup>

## Agency Guidance

In the wake of these legal developments, ED has issued guidance that construes Title IX's prohibition against sex bias as forbidding discrimination against transgender students when such discrimination is based on their failure to conform to gender stereotypes. Specifically, in 2010, ED issued guidance that discusses when student bullying or harassment may violate federal education antidiscrimination laws, and that clarifies a school's obligation to combat such bullying or harassment.<sup>13</sup> The guidance includes a discussion of when bullying or harassment that targets transgender students may violate Title IX. Much of ED's guidance with respect to gender identity discrimination appears to be derived from judicial developments in this area.

It is important to note, however, that Title IX may prohibit gender identity discrimination only when it constitutes a form of sex discrimination. Thus, the statute has not been construed to prohibit all forms of gender identity discrimination or harassment of students. Moreover, not all courts are in agreement that gender identity discrimination can be a form of sex discrimination prohibited by federal law.<sup>14</sup> As a result, although ED's guidance regarding gender identity

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<sup>6</sup> 20 U.S.C. §§1681 et seq.

<sup>7</sup> 34 C.F.R. Part 106.

<sup>8</sup> See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10<sup>th</sup> Cir. 2007); *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7<sup>th</sup> Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8<sup>th</sup> Cir.1982); *Holloway v. Arthur Andersen*, 566 F.2d 659 (9<sup>th</sup> Cir. 1977).

<sup>9</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion); *Id.* at 250 (White, J. concurring in judgment); *Id.* at 272 (O'Connor, J. concurring in judgment and accepting plaintiff's argument that failure to conform to gender stereotypes is discriminatory).

<sup>10</sup> *Id.* at 250.

<sup>11</sup> *Schwenk v. Hartford*, 204 F.3d 1187 (9<sup>th</sup> Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566 (6<sup>th</sup> Cir. 2004). See also, *Fabian v. Hosp. of Cent. Conn.*, 2016 U.S. Dist. LEXIS 34994 (D. Conn. Mar. 18, 2016); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006). But see *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10<sup>th</sup> Cir. 2007).

<sup>12</sup> *Glenn v. Brumby*, 663 F.3d 1312 (11<sup>th</sup> Cir. 2011).

<sup>13</sup> U.S. Department of Education, *Office for Civil Rights*, Dear Colleague Letter, October 26, 2010, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

<sup>14</sup> See, e.g., *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 672-72 (W.D. Pa. 2015) (holding that "the University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's (continued...)").

discrimination is currently supported by at least some judicial decisions, the case law in this area is not fully settled.

## Enforcement Efforts

In recent years, both ED and the Department of Justice (DOJ) have been active in pursuing enforcement efforts regarding transgender students. ED's Office for Civil Rights (OCR) is the lead agency responsible for investigating Title IX complaints and conducting compliance reviews. If OCR finds that a Title IX violation has occurred, the agency is statutorily required to seek an informal resolution.<sup>15</sup> If informal resolution fails, then OCR may seek to suspend or terminate the institution's federal funding.<sup>16</sup> Notably, suspension or termination of federal funding is currently the only enforcement mechanism available to ED when the agency cannot reach a voluntary resolution agreement with an institution that it has found to be noncompliant. It appears that this penalty has rarely, if ever, occurred in the Title IX context, but the threat of losing federal funding seems to motivate institutions to reach compliance agreements with ED.<sup>17</sup> In addition to OCR, the Civil Rights Division (CRD) at DOJ plays a significant role in enforcing laws that prohibit sex discrimination in education, primarily via litigation.<sup>18</sup>

The enforcement efforts of ED and DOJ have resulted in a number of settlements in recent years, including agreements regarding use of shared facilities such as restrooms and locker rooms. For example, in a 2013 case involving Arcadia Unified School District, a transgender male student alleged that the school district had violated Title IX by denying him access to facilities consistent with his male gender identity. Under an agreement reached with ED and DOJ, the school district agreed to take a number of steps to establish a nondiscriminatory environment for students who are transgender, including providing the student with access to school facilities consistent with his gender identity.<sup>19</sup>

Likewise, in *J.L. v. Mohawk Central School District*, DOJ intervened in a lawsuit filed by a transgender male student who alleged that the school district had violated Title IX and the Equal Protection Clause of the U.S. Constitution by failing to take action to remedy harassment based on gender stereotypes.<sup>20</sup> The school district and DOJ eventually reached a court-approved settlement agreement that provided a number of remedies to address discrimination on the basis of sex, gender identity, gender expression, and sexual orientation.<sup>21</sup>

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prohibition of sex discrimination.”); *G.G. v. Gloucester County Sch. Bd.*, 2015 U.S. Dist. LEXIS 124905, \*19 (E.D. Va. Sept. 17, 2015) (finding that the Title IX regulations permit schools “to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable.”).

<sup>15</sup> 20 U.S.C. §1682.

<sup>16</sup> *Id.*; 34 C.F.R. §100.8, as incorporated by 34 C.F.R. §106.71. A suspension or termination of funding must be limited to the particular program, or part thereof, that is out of compliance with Title IX.

<sup>17</sup> This conclusion is based on a lack of reported cases involving a loss of federal funding.

<sup>18</sup> U.S. Department of Justice, *Educational Opportunities Cases*, <https://www.justice.gov/crt/educational-opportunities-section>.

<sup>19</sup> U.S. Department of Justice, *Educational Opportunities Cases*, <http://www.justice.gov/crt/about/edu/documents/casesummary.php#arcadia>.

<sup>20</sup> *J.L. v. Mohawk Central Sch. Dist.*, No. 09-CV-943 (N.D.N.Y. March 29, 2010), 1, <http://www.justice.gov/crt/about/edu/documents/mohawksettle.pdf>; U.S. Const. amend. XIV, §1.

<sup>21</sup> *J.L.*, No. 09-CV-943 at 2-5.

More recently, ED sided with a transgender female student in Illinois who alleged that her public high school had discriminated against her when it denied her access to the girls' locker rooms.<sup>22</sup> The Illinois case is particularly notable for several reasons. First, the school district was largely supportive of the transgender student in question, officially referring to her as female and permitting her to use the girls' restrooms and participate on girls' athletic teams. Nevertheless, ED concluded that the school unlawfully discriminated on the basis of sex when it denied the transgender student unrestricted access to the girls' locker rooms.<sup>23</sup> Second, unlike other school districts that have settled with ED prior to a formal agency finding of discrimination, Township High School District 211 initially refused to do so. In response, ED indicated that it planned to pursue enforcement action if a voluntary agreement could not be reached. Faced with the potential legal battle and loss of federal funds, the school district ultimately agreed to allow the student to use the girls' locker rooms.<sup>24</sup>

## Current Litigation

As indicated above, it appears that most educational institutions that have been investigated for gender identity discrimination under Title IX have reached voluntary agreements with ED and/or DOJ rather than risk losing federal funding.<sup>25</sup> At least one Virginia school district, however, is currently involved in litigation after the school board adopted a resolution requiring students to use shared facilities that correspond with their biological sex.<sup>26</sup> The school board established this policy after a transgender male student had been permitted by his high school to use the boys' restroom. After the resolution passed, the student was barred from the boys' bathroom, and he brought suit against the school district under Title IX and the Equal Protection Clause of the Constitution.<sup>27</sup>

In its ruling in *G.G. v. Gloucester County School Board*,<sup>28</sup> however, a federal district court dismissed the student's Title IX claim (although the constitutional claim is still pending).<sup>29</sup> In doing so, the court explicitly rejected ED's informal interpretation that Title IX's prohibition against sex discrimination protects transgender students.<sup>30</sup> ED and DOJ have filed a joint brief on

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<sup>22</sup> Emma Brown, "Under Federal Pressure, Illinois School District Allows Transgender Student to Use Locker Room," *Washington Post*, December 3, 2015.

<sup>23</sup> U.S. Department of Education, *Settlement Reached with Palatine, Ill., Township High School District 211 to Remedy Transgender Discrimination*, Press Release, December 3, 2015, <http://www.ed.gov/news/press-releases/settlement-reached-palatine-ill-township-high-school-district-211-remedy-transgender-discrimination>.

<sup>24</sup> Emma Brown, "Under Federal Pressure, Illinois School District Allows Transgender Student to Use Locker Room," *Washington Post*, December 3, 2015.

<sup>25</sup> This conclusion is based on a lack of reported cases involving a loss of federal funding.

<sup>26</sup> *G.G. v. Gloucester County Sch. Bd.*, 2015 U.S. Dist. LEXIS 124905 (E.D. Va. Sept. 17, 2015).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Although regulations are legally binding, informal guidance is not. In the event of a legal challenge, the amount of deference that an agency's interpretation of its own statute will receive from a reviewing court "has been understood to vary with the circumstances." *United States v. Mead Corp.*, 533 U.S. 218, 228, 236-37 (2001). Although courts will generally defer to an agency's interpretation of an ambiguous statute, such deference is typically warranted only in instances where that interpretation was formally established with the force of law. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Where an interpretation is presented informally, a lesser form of deference will generally apply. Indeed, in *Skidmore v. Swift & Co.*, the Supreme Court held that the deference granted to an agency's informal interpretation "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." 323 U.S. 134, 140 (1944).

behalf of the student, who is currently appealing the decision to the U.S. Court of Appeals for the Fourth Circuit.<sup>31</sup> Ultimately, the appellate court's pending decision may inform the degree of deference that other courts will grant to ED's gender identity discrimination guidance in future legal challenges.

As the case in Virginia demonstrates, there is a legal dispute as to whether states and localities that enact laws barring transgender students from using shared facilities that conform to their gender identity are in conflict with federal law. Indeed, ED is reportedly investigating whether schools in North Carolina that comply with the new state law are violating Title IX,<sup>32</sup> and the agency may decide to pursue enforcement action if it determines that such a violation has occurred.<sup>33</sup> Thus, states and localities that require students to use shared facilities that conform with their biological sex at birth may be at risk of losing federal funding, and it seems likely that additional legal battles may ensue as a result.

## Proposed Legislation

In an apparent response to the current debate about transgender students, legislators in the 114<sup>th</sup> Congress have introduced several proposed bills that would address gender identity discrimination in education. These bills include the Student Non-Discrimination Act (SNDA; H.R. 846/S. 439) and the Equality Act (H.R. 3185/S. 1858).

Under SNDA, discrimination on the basis of actual or perceived sexual orientation or gender identity would be prohibited in public elementary and secondary schools. The stated purpose of the legislation is to ensure that students are free from discriminatory conduct such as harassment, bullying, intimidation, and violence. SNDA appears to be patterned on Title IX, although it would differ from Title IX in several important respects. For more information on SNDA, see CRS Report R42652, *The Student Non-Discrimination Act (SNDA): A Legal Analysis*, by (name redacted)

Broader in scope than SNDA, the Equality Act would offer legal protections for LGBT individuals in a wide array of areas, including public accommodations, employment, and housing. Although the primary focus of the bill appears to be expanding legal rights for LGBT individuals, the proposed legislation would add sex discrimination to several existing civil rights laws as well. Specifically, the bill would add sexual orientation, gender identity, and—where not already prohibited under federal law—sex to various laws that prohibit discrimination, including Titles II, III, IV, VI, and VII of the Civil Rights Act of 1964,<sup>34</sup> as well as to the Fair Housing Act and the Equal Credit Opportunity Act,<sup>35</sup> among others.

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<sup>31</sup> Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, *G.G. v. Gloucester County Sch. Bd.*, 2015 U.S. Dist. LEXIS 124905 (E.D. Va. Sept. 17, 2015) (No. 15-2056), <https://www.justice.gov/crt/file/788971/download>.

<sup>32</sup> Juliet Eilperin, "Federal Agencies Review Funding to N.C. in Wake of New LGBT Law," *Washington Post*, April 4, 2016.

<sup>33</sup> Although the governor of North Carolina subsequently signed an executive order that relaxed some of the requirements under the so-called "bathroom bill," the provisions regarding use of shared facilities in public schools remains intact. Exec. Order No. 93, <https://governor.nc.gov/document/executive-order-no-93-protect-privacy-and-equality>.

<sup>34</sup> 42 U.S.C. §§2000a et seq., 2000b et seq., 2000c et seq., 2000d et seq., 2000e et seq.

<sup>35</sup> 42 U.S.C. §§3601 et seq.; 15 U.S.C. §§1691 et seq.

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