

HELPING SCHOOLS MAKE THE TRANSITION: THE IMPORTANCE OF ADVOCATING FOR TRANSGENDER YOUTH IN EDUCATION

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I. INTRODUCTION

On October 30, 2012, during a field office visit, Vice President Joe Biden remarked that transgender discrimination is “the civil rights issue of our time.”² It has been over 3 years since Vice President Biden made this statement, and it has become apparent that his prediction was right. Transgender discrimination is now evident not only in higher education, public accommodations, the media, and the work place, but also in our K-12 schools. This paper will show that it is time for schools to step up to the proverbial “plate.” Schools have and will continue to face legal action if they fail to stop transgender discrimination. The driver of change is not only a legal issue, but also an issue of morality. Even without the threat of expensive legal battles, schools should implement protective, inclusive measures to ensure transgender student safety and success.

II. STRUGGLES AT THE SCHOOL YARD GATE

Trans³ students face many challenges at schools. These students must not only struggle with fellow classmates, but must also struggle with teachers and staff.

A. Discrimination and Struggles In Schools

Schools are often seen as safe places for all kids to have a few hours a day of safety from the troubles of home and the outside world. For trans boys and girls in K-12 institutions, that doesn't always happen. Instead, the statistics gathered from trans boys and girls in K-12 institutions show that the problems continue inside the schoolhouse gate. A 2013 report from the Gay, Lesbian & Straight Education Network surveyed a total of 7,898 LGBT students.⁴ 37.8% of students felt unsafe at school due to their gender expression.⁵ Over 35% of students avoided gender segregated spaces in school due to feeling unsafe or uncomfortable.⁶ Over 68% reported that they avoided school functions because they felt unsafe or uncomfortable.⁷ 61.6% of LGBT students that reported an incident of harassment saw no response by faculty and staff.⁸ 42.2% of trans students reported not being allowed to use their preferred name.⁹ 59.2% reported being required to use a bathroom or locker room for their legal sex.¹⁰ Finally, 31.6% of trans students had been prevented from wearing clothing considered inappropriate because of their legal sex.¹¹

Besides feeling unsafe and suffering incidents of harassment, trans students also feel the effects in other ways. LGBT students that experienced higher levels of gender expression-based victimization were more than three times as likely to have missed school in the past compared to those who

experienced lower levels of harassment, had a lower GPA than students who were less often harassed, and twice as likely to report that they did not plan to pursue any post-secondary education.¹² All of these stats are shocking because these are all the things that many believe shouldn't be happening at school. Students should feel safe at school and should not be afraid to attend school. Students should not have to avoid certain areas of school to prevent being harassed.

B. The Good, The Bad, and The Ugly: Schools' Approaches To Discrimination

Schools are usually taking three distinct approaches to trans students. Some schools are making really positive, inclusive measures to make sure that trans students feel welcome and safe to the best of their ability. Unfortunately, there are some schools and state legislatures moving in the opposite direction and guising non-inclusive, dangerous legislation as legislation to help protect privacy. And then, there is a third group of schools utilizing what appears to be a neutral approach, but as one will see this approach is not as neutral as the school believes and often singles out trans students.

Many school districts have clear, inclusive written policies related to trans students. Specifically, schools in Boulder, Co, Madison, WI, Oakland, CA, and Portland, OR, among others across the nation, have written trans

affirming, inclusive statements that govern.¹³ There are other schools that are covered not by a particular written statement, but by state laws that include specific language about trans students and/or gender identity. California, New Jersey, and the City of Boston all have policies with accompanying laws explicitly stating trans students' ability to use the bathroom in which they identify with.¹⁴ Washington DC, Colorado, and Oregon have implemented wide casting anti-discrimination laws and have further explained that schools are included in these policies, as well as affirming trans students' ability to use the appropriate restroom for their gender identity.¹⁵ Overall, at least 8 states, Washington DC, and numerous local governing bodies have adopted the idea trans students should not be discriminated based on their gender identity and that includes bathroom use.¹⁶

Unfortunately, Newton's third law applies even in trans education policy.¹⁷ Some states have introduced legislation that would give cisgender¹⁸ students the right to sue trans students if they saw them in the locker room or bathroom.¹⁹ For example, a Texas lawmaker wanted to set up a discriminatory mechanism in the guise of a crime stopper-like tip line that would reward students with \$2000 if they reported trans students in the a restroom that does not align with their biological sex.²⁰ These are only a few examples of the pursuit of thinly veiled government sponsored

discriminatory policies frustrating the progression of trans citizens, including students.

Finally there are a handful of school districts that appear to take an almost neutral stance on the issue. These schools may not have a written policy or have yet to run into the issue of dealing with trans students, so they often make minor accommodations like allowing the student to utilize gender neutral bathrooms or provide a separate changing area for just that student. As one will see, this type of “separate, but equal” treatment is not holding up too well in the court system.

III. LEGAL REMEDIES: TITLE IX, EQUAL PROTECTION, FIRST AMENDMENT, ADA, AND STATE LAW

The law is progressing and catching up to include the rights of trans students. Schools that receive federal funding must comply with Title IX when it comes to sex discrimination.²¹ Title IX is a federal law prohibiting sex discrimination in any educational program that receives federal financial assistance.²² The US Department of Education, the governing body that over sees Title IX compliance, has affirmed that bullying and harassment that occurs in schools based on gender identity is a violation of Title IX and schools may be liable if they do not address it.²³ It’s important to note that Title IX is not a fix-all remedy. Even with Title IX, trans students may still have issues regarding access to sex segregated facilities,

issues with being called the student's preferred name and/or gender pronouns, and navigating dress code policies.²⁴ But, Title IX scholars have suggested that denying transgender students' access to gender appropriate facilities would be a violation of Title IX.²⁵

As noted earlier, some schools are attempting a "separate, but equal" approach in allowing students access to a gender neutral or private bathroom without the ability to use the bathroom that conforms with their gender identity.²⁶ A recent case out of the United States 4th Circuit has allowed a trans student to sue his school board based on a Title IX violation because of this very type of separate/private bathroom arrangement.²⁷ The Department of Education filed a statement of interest in that case and included the following,

Under Title IX, discrimination based on a person's gender identity, a person's transgender status, or a person's nonconformity to sex stereotypes constitutes discrimination based on sex. As such, prohibiting a student from accessing the restrooms that match his gender identity is prohibited sex discrimination under Title IX. There is a public interest in ensuring that all students, including transgender students, have the opportunity to learn in an environment free of sex discrimination.²⁸

The 4th Circuit reviewed the District Court's ruling in that case and determined that Title IX may have been violated due to sex discrimination.²⁹ The case has now been remanded to the district court for

further ruling.

Beyond Title IX, students may utilize the 14th Amendment in court cases arguing a failure of equal protection under the law. However, transgender individuals are not conferred the rights and protections given to protected classes under the 14th Amendment.³⁰ This means that the government (including public schools) must only show a rational basis for not allowing trans students into gender-segregated areas like bathrooms. Historically, this is a low burden for the government to meet. In a 10th Circuit case, the court ruled that under Title VII (workplace discrimination), a transgender person cannot be discriminated “because of sex”.³¹ Furthermore, the court specifically reminded the parties, that transgender individuals were not considered a protected class.³²

Other trans legal scholars have also seen a pathway of using the 1st Amendment when trans individuals and students are faced with policies that police clothing, grooming, and other activities connected to gender expression.³³ Lawyers have argued that trans students are engaging in free speech by conveying a particular message by an expression of masculinity or femininity via dress, hair styling, and/or wearing certain accessories.³⁴ Legal advocates have made strong arguments that choosing a bathroom as a form of expression that conveys a particular message via conduct.³⁵ One court found that a trans student’s ability to choose which restroom to use is

important to the student's health and well-being.³⁶ Public schools cannot violate the First Amendment in order to avoid a controversy.³⁷ The umbrella of the First Amendment protects the "silent, passive expression of opinion" that is a trans student attempting to fit in.³⁸ The use of the First Amendment to fight policies that frustrate trans students ability to be expressive are not prominent, but could prove to be another effective legal strategy depending on the facts of the case.

Some scholars like Daniella A. Schmidt have even explored the idea of using disability law in an effort to create more inclusive policies in regards to facility access.³⁹ As she notes in her article, "Bathroom Bias: Making the Case for Trans Rights Under Disability Law," there is often much criticism because many believe that using disability law perpetuates stigma against trans individuals and continues the medicalization of transgender people.⁴⁰ The author explains the many ways that this logic isn't true and concludes that at the end of the day as a lawyer, she has an ethical obligation to plead winning claims and therefore the idea of using disability law should not be so easily dismissed because it has been successful in some cases.⁴¹

One of the seemingly more successful ways for advocates to challenge anti-trans laws has been through state courts and state laws. Many states provide much broader protections through state human rights laws as

mentioned earlier. There have been multiple success stories using this avenue of challenge. For example, a Maine student was denied access to a bathroom at school based on their gender identity.⁴² The student sued the school claiming a violation of Maine Human Rights Act, which barred discrimination based on sex or sexual orientation.⁴³ The court ruled in the student's favor citing the state's human rights act.⁴⁴ It specifically noted, "Where...it has been clearly established that student's psychological well-being and educational success depend upon being permitted to use the communal restroom consistent with her gender identity, denying access to the appropriate restroom constitutes sexual orientation discrimination..."⁴⁵ Granted, the court conflates the notion of gender identity and sexual orientation, but the student was awarded \$75,000 and the policy was corrected.⁴⁶

Similarly, a student was successful in utilizing a Colorado anti-discrimination law when a school provided the trans female student the option to use the boy's bathroom, the nurse's bathroom, or the faculty bathroom, but not the girl's bathroom.⁴⁷ The decision noted the "severe and pervasive treatment" that the student is subject to when she is forced to disregard her identity while performing one of the most essential function of a human.⁴⁸

While the above examples present viable legal options, most cases

don't make it to court and not every issue that trans students face in school can be remedied through the court system. This is exactly why it's important for schools to be proactive and create policies and programs that are sure to be mindful of transgender students.

IV. LOOKING BEYOND THE COURTROOM

In a study of trans students, researchers found that it was rare for teacher's to intervene when trans students were being harassed.⁴⁹ The study found that students were as likely to report teachers intervening instances of harassment and bullying as they were to report being on the receiving end of harassment or negative comments from the teachers themselves.⁵⁰ In the study, there was also a focus group component. During this part of the research study, one student noted, “[teachers] should actually speak up, because I’ve been in a lot of classrooms where stuff is said, and the teachers don’t do [anything]. And if they did, it would stop right there if the teacher actually did something.”⁵¹

One of the most important resources for trans students determined by the focus group was that of an advocate at school.⁵² The study author points out that many schools have advocates at the district for student groups like minorities and students with special needs that helps work with the student to advocate for appropriate changes and be the nexus between the administration and the student.⁵³ The author notes though that many of

these offices don't have the ability or the knowledge to assist transgender students.⁵⁴ Linking students with an adult at school that is able to understand their situation and know how to appropriately advocate for them is essential to making sure trans students are more successful and safe at school.

Many students also recommended mandatory training for teachers and staff on LGBT issues.⁵⁵ As cliché as it may sound, knowledge is power. Certainly there are some educators that are bigoted or have no desire to learn about trans students and the struggles they face, but it is likely that many are just ignorant or they believe their previous training on "LGB" issues is sufficient for dealing with the "T" issues. But, trans students experience a significantly different set of struggles that gay, lesbian, and bi students do not experience.

Educating teachers and professionals in the school setting would help bridge that gap. When teachers are trained appropriately, they will soon learn that sexual orientation and gender identity are not the same thing. They will learn how to appropriately address students including appropriate name and pronouns. They will learn how it can be viewed as insensitive to use "transgendered," but more appropriate to use transgender person or individual. They will learn that medical transitioning is not required to be considered trans. These types of small changes make big differences in the

lives of trans students. It's important that once educators are aware of these changes, that they be sure to intervene and create educational moments for other students when they observe harassment or ignorance from other students directed at the trans student. The more educators know, the more effective they can be in creating a positive environment for all students, hopefully making a difference for the future of the individuals they educate.

V. TRANS STUDENT OUTLOOK: WHAT HAPPENS IF WE DON'T INTERVENE?

If policies and attitudes do not change, the outlook for trans students isn't bright. The trend of transgender discrimination in schools quickly follows young people into the real world. The National Gay and Lesbian Task Force and the National Center for Transgender Equality conducted a study of 6,450 transgender and nonconforming people in 2010.⁵⁶ The results of their survey provide an insight to the everyday struggles of some of these individuals. The respondents experienced twice the rate of unemployment compared to the general population.⁵⁷ Almost 90% of respondents responded that they had experienced harassment, mistreatment, or discrimination in the work place or took action to hide who they were at work.⁵⁸ Respondents were also nearly four times as likely to have a household income of less than \$10,000 per year compared to the general population.⁵⁹

Among the many other statistics the report explores, there is one set of

statistics that are particularly shocking: 41% of respondents reported attempting suicide compared to the average of 1.6% of the general population.⁶⁰ Of the individuals that reported experiencing a loss of job due to transgender bias, 55% reported attempting suicide.⁶¹ Of the individuals that reported harassment or being bullied at school, 51% reported attempting suicide.⁶² Of the individuals that were considered low income or reported being a victim of physical assault, 61% reported attempting suicide.⁶³ Of the trans individuals that reported being a victim of sexual assault, a staggering 64% reported attempting suicide.⁶⁴

It is clear that trans students face unique challenges compared to cisgender and even to lesbian, gay, and bisexual people. Many individuals begin to experience these challenges when they are in the care of K-12 educators. This is exactly why it is important that schools create inclusive, trans affirming policies and practices. If schools refuse to do so, they must be prepared to face liability under the law including Title IX, and possibly the 14th amendment, the 1st amendment, disability law, and various state human rights laws. These are just some of the legal avenues that have been taken in the past. It is important to note that this is a quickly changing area of law and this is by no means an exhaustive list of possible ways to challenge these types of policies.⁶⁵ With the combined effort of progressive school districts, teachers acting as advocates, legal advocates, law makers,

and resilient trans students, positive change can occur.

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² Jennifer Bendery, *Joe Biden: Transgender Discrimination Is 'The Civil Rights Issue of Our Time'*, HUFFINGTON POST (Oct. 30, 2012), http://www.huffingtonpost.com/2012/10/30/joe-biden-transgender-rights_n_2047275.html.

³ The word “trans” is used in the paper as an abbreviation that includes both people that identify as transgender or transsexual. GLAAD (Gay and Lesbian Alliance Against Defamation) defines transgender as “An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms - including transgender.” Further, GLAAD defines transsexual as “An older term that originated in the medical and psychological communities. Still preferred by some people who have permanently changed - or seek to change - their bodies through medical interventions (including but not limited to hormones and/or surgeries). Unlike transgender, transsexual is not an umbrella term.” For more information, please see <http://www.glaad.org/reference/transgender>

⁴ *See generally* JOSEPH G. KOSCIW ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY AND NAT’L GAY AND LESBIAN TASK FORCE, THE 2013 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS, NATIONAL CENTER FOR TRANSGENDER EQUALITY AND NATIONAL GAY AND LESBIAN TASK FORCE (2014), http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf.

⁵ *Id.* at xvi.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at xvii.

⁹ *Id.*

¹⁰ *Id.* at xviii.

¹¹ *Id.*

¹² *Id.*

¹³ Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC’Y 301, 330 (2013).

¹⁴ *Id.* at 311.

¹⁵ *Id.*

¹⁶ *Id.* at 314.

¹⁷ Newton’s third law is the physics concept that states for every action, there is an equal and opposite reaction. *See* <http://www.physicsclassroom.com/class/newtlaws/Lesson-4/Newton-s-Third-Law>.

¹⁸ “Cisgender” is a term that refers to individuals whose birth or biological sex aligns with their gender identity. *See* H.C. Crethar & L.A. Vargas, *Multicultural Intricacies in Professional Counseling*, in THE COUNSELOR’S COMPANION: WHAT EVERY BEGINNING COUNSELOR NEEDS TO KNOW 61 (J. Gregoire & C. Jungers eds., 2007).

¹⁹ Suzanne E. Eckes & Colleen E. Chesnut, *Transgender Students and Access to Facilities*, 321 ED. LAW REP. 1, 8 (2015).

²⁰ *Id.* at 8.

²¹ *Id.* at 7.

²² 20 U.S.C. § 1681 (West 1972).

²³ *Id.* at 6.

²⁴ *Id.* at 7.

²⁵ *Id.*

²⁶ E.g., Resolution Agreement between the Arcadia Unified School District, the U.S. Dept. of Education, Office for Civil Rights, and the U.S. Dept. of Justice, Civil Rights Division, OCR Case Number 09-12-1020, DOJ Case Number 169-12C-70 (July 24, 2013), *available at*

http://www.nclrights.org/site/DocServer/Arcadia_Resolution_agreement_07.24.2013.pdf;

Mathis v. Fountain-Fort Carson School District 8, Colo. Dep't of Regulatory Agencies, Div. of Civil Rights, Charge No. P20130034X, *available at* [http://](http://www.transgenderlegal.org/media/uploads/doc529.pdf)

www.transgenderlegal.org/media/uploads/doc529.pdf (June 18, 2013); *John Doe, et al. v. Regional School Unit*, 86 A.3d 600 (2014).

²⁷ G.G. ex rel. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *2 (4th Cir. Apr. 19, 2016)

²⁸ Statement of Interest of the United States at 1-2, G.G. ex rel. *Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 739 (E.D. Va. 2015), *rev'd in part, vacated in part*, No. 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016) (Civil No. 4:15ev54).

²⁹ G.G. ex. Rel. *Grimm*, 2016 WL 1567467 at *8.

³⁰ *Id.* at 6.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 7.

³⁴ Danielle Weatherby, *From Jack to Jill: Gender Expression As Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 120 (2015)

³⁵ *Id.* at 121.

³⁶ *Id.*

³⁷ *Id.* at 127-28.

³⁸ *Id.* at 128.

³⁹ See generally Daniella A. Schmidt, *Bathroom Bias: Making the Case for Trans Rights Under Disability Law*, 20 MICH. J. GENDER & L. 155 (2013)

⁴⁰ *Id.* at 159.

⁴¹ *Id.* at 185.

⁴² Eckes & Chestnut, *supra*, note 7, at 9.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 10.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Jennifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 38 J. YOUTH ADOLESCENCE 1175, 1186 (2010).

⁵⁰ *Id.* at 1179.

⁵¹ *Id.* at 1183.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1184.

⁵⁶ Jaime M. Grant et al., NAT'L CTR. FOR TRANSGENDER EQUALITY AND NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

⁵⁷ *Id.* at 3.

⁵⁸ *Id.*

⁵⁹ *Id.* at 2.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ This area of law is so fast changing that within the time of writing this paper there were multiple changes and developments including new directives and new cases being filed across the country. For example, the Department of Justice issued a handbook hours before the submission deadline for this paper. These new guidelines specifically direct schools to allow students to use the bathroom of their choice and failure to do so is considered a Title XI violation. *See* U.S. DEP'T OF EDUC., EXAMPLES OF POLICIES AND EMERGING PRACTICES FOR SUPPORTING TRANSGENDER STUDENTS (May 2016).