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The Legal Implications under Federal Law when States Enact Biology-Based Transgender Bathroom Laws for Students and Employees

*Marka B. Fleming**

*Gwendolyn McFadden-Wade***

... It is essential for [students and] employees to be able to [go to school and] work in a manner consistent with how they live the rest of their daily lives, based on their gender identity.*

I. INTRODUCTION

Gavin Grimm, a transgender¹ boy, sued the Gloucester High School in Gloucester, Virginia, because the school board adopted a policy that prevented him from using the boy's bathroom.² The newly adopted policy required all students to use the bathroom based on their biological sex rather than their gender identity.³ The case reached the United States Court

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* *Best Practices: A Guide to Restroom Access for Transgender Workers*, available at <https://www.osha.gov/Publications/OSHA3795.pdf> (last visited Sept. 29, 2017).

1. For purposes of this article, the term "transgender" is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth. And, "gender identity refers to a person's internal sense of being male, female or something else." AMERICAN PSYCHOLOGICAL ASSOCIATION.ORG, available at <http://www.apa.org/topics/sexuality/transgender.aspx> (last visited Sept. 29, 2017).

2. *G.G. v. Gloucester Cty. Sch. Bd.*, 2016 U.S. App. Lexis 7026 (4th Cir. Apr. 19, 2016); see also, Richard Fausset, *Appeals Court Favors Transgender Student in Virginia Restroom Case*, N.Y. TIMES, Apr. 19, 2016, available at <https://www.nytimes.com/2016/04/20/us/appeals-court-favors-transgender-student-in-virginia-restroom-case.html> (last visited Sept. 29, 2017).

3. *G.G. v. Gloucester Cty. Sch. Bd.*, 2016 U.S. App. LEXIS 7026 at *9 (4th Cir. Apr. 19, 2016).

of Appeals for the Fourth Circuit in 2016. Citing a violation of Title IX of the Education Amendments Act of 1972, a federal statute prohibiting federally funded educational programs from discriminating against or denying benefits to individuals based on their sex,⁴ the appellate court held the school board's actions were illegal.

Gloucester High School is not the only educational institution to require students to use the bathroom based on the student's biological sex.⁵ Ashton Whitaker, a transgender high school senior, was informed by the Kenosha Unified School District in Kenosha County Wisconsin that he could not use the boy's bathroom.⁶ In response, Ashton filed a lawsuit to enjoin the school from: (1) enforcing any policy that denies the him access to the boy's restroom at school and school-sponsored events; (2) taking any formal or informal disciplinary action against him for using the boy's restroom; (3) using, causing or permitting school employees to refer to the him by his female name and female pronouns; and (4) taking any other action that would reveal the his transgender status to others at school.⁷ The United States District Court for the Eastern District of Wisconsin heard the case and concluded that Ashton had shown a likelihood of success on the merits of the case. A preliminary injunction was issued.⁸

Educational institutions, such as the secondary schools in the previously cited cases, are regulated by Title IX yet they are by no means unique in their effort to restrict the use of bathrooms by transgender individuals. Employers have required employees to use the bathroom based on their biological sex.⁹ In response, transgender individuals have

4. *Id.* at *29–31; see also, 20 U.S.C. § 1681(a).

5. See *e.g.*, *Whitaker v. Kenosha Unified High Sch.*, No. 16-CV-943-PP, 2016 U.S. Dist. LEXIS 129678 (Sept. 22, 2016) (granting a preliminary injunction to a transgender male whose high school prevented him from using the male's restroom); *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 603 (Me. 2014) (holding that a school's actions of denying a transgender female student the right to use the girl's restroom violated the Maine's Human Rights Act); see also, Ivey DeJesus, *Transgender Bathroom Rights and Nondiscriminatory Laws are about to Top State Issues in Pa.*, PENNLIVE, May 17, 2016, available at http://www.pennlive.com/news/2016/05/bathroom_bills_non-discriminat.html (last visited Sept. 29, 2017) (“ In recent weeks two Philadelphia suburban school districts adopted comprehensive policies addressing the rights of transgender students. . . . The same conversation is happening in at least two other school districts—the Pine-Richland School District in Allegheny County and the Lower Merion School District, in Montgomery County.”); Letitia Stein, *In U.S. Bathroom Battles, Florida Transgender Student Fights for Equality*, REUTERS, Apr. 20, 2016, available at <http://www.reuters.com/article/us-usa-lgbt-students-idUSKCN0XH0YQ> (last visited Oct. 17, 2017) (“For 17-year-old transgender male Nate Quinn, using the bathroom at school became a battle. The Florida high school student was barred last year from using the boys' restroom.”).

6. *Whitaker v. Kenosha Unified High Sch.*, No. 16-CV-943-PP, 2016 U.S. Dist. LEXIS 129678 (Sept. 22, 2016).

7. *Id.* at *10–11.

8. *Id.*

9. See *e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (holding that transsexuals is not a protected class under Title VII and the employee failed to allege a sex stereotyping claim when a transgender employee's employer failed to allow him to use the

defended their rights to use the bathroom of their choice often by citing Title VII of the Civil Rights Act of 1964, a federal statute that prohibits employers from discriminating against employees on the basis of “race, color, religion, sex, or national origin.”¹⁰ For example, in 2002, a transgender female adjunct instructor in Avondale, Arizona, sued her employer, the Estrella Mountain Community College, claiming the community college violated her Title VII rights.¹¹ The lawsuit arose after the community college prevented her from using the women’s bathroom “until such time as she provided proof that she did not have male genitalia.”¹²

Likewise, in 2004, the Utah Transit Authority fired a transgender female bus driver after she merely asked to use the women’s bathroom.¹³ The employer’s decision to terminate prevailed when, three years later, the United States Court of Appeals for the Tenth Circuit determined that Title VII had not been violated.¹⁴

The aforementioned cases raise the question: what legal rights do transgender individuals have to use the bathroom of their choice? Clearly these rights are directly affected by the school and employer policies, but more importantly there is a veiled issue of discrimination that quietly looms in the shadows. The discrimination issue surfaces when, as in the aforementioned cases, bathroom policies based solely on biological sex, purposefully emerge and restrict the use of these facilities by transgender individuals.¹⁵ Is the right to use the bathroom of one’s choice a relevant issue? Is it a timely issue? Is the issue politically charged? At the federal level, the issue has been discussed, addressed, packaged and settled only to be unpacked again. At the state level, the issue has been debated, almost legislated in several states but is certain to remain afloat because of deep rooted public opinion, the probability of litigation and the question of whether restrictive bathroom policies violate federal statutes.

This article focuses on the transgender bathroom issue at the state level and provides insight into the attempts by states to turn policy into law. First, the article surveys a sample of contemporary transgender bathroom legislation, proposed or adopted by states throughout the country. Afterwards, it discusses several federal cases in which courts addressed the

woman’s restroom); *Goins v. West Grp.*, 635 N.W.2d 717, 720 (Minn. 2001) (holding that denying a transgender female the right to use the female restroom did not violate Minnesota’s Human Rights Act).

10. *See id.*; *see also*, 42 U.S.C. § 2000e-2(a).

11. *Kastl v. Maricopa Cty. Cmty. College Dist.*, No. CIV 02-1531-PHX-SRB, 2004 U.S. Dist. LEXIS 29825 (D. Ariz. June 2, 2004).

12. *Id.*

13. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).

14. *See id.*

15. *See generally*, Vincent J. Samar, Article, The Right to Privacy and the Right to Use the Bathroom Consistent with One’s Gender Identity, 24 DUKE J. GENDER L. & POL’Y 33 (2016); Brian Eisner, Article, *Being a Transgender Student: An Uphill Fight for Equality*, 28 J. CIV. RTS. & ECON. DEV. 419 (2016).

legality of biology-based transgender bathroom laws in the public educational and employment sectors. Next, it explores the legal implications to be considered by states when determining whether to base their individual state law on biology or gender identity. Finally, the article concludes by arguing that transgender bathroom laws, if enacted, should be based on an individual's gender identity. Such a result would address the discrimination issue and reduce potential liability for state agencies and other government entities.

II. MODERN APPLICATIONS OF TRANSGENDER BATHROOM LAWS

Numerous state governments have wrestled with the question of a transgender individual's use of public bathrooms based on biology or gender identity and have proposed laws to allow or restrict such use.¹⁶ For purposes of this article, the term "gender-identity based" bathroom laws refers to those laws that base a person's right to use a public bathroom or public facility on the gender with which the person identifies. The term "biology-based" bathroom laws refers to those laws that base a person's right to use a public bathroom or public facility on the individual's biological sex. Only a handful of states have been proactive in enacting bathroom laws specific to transgender individuals by granting them the right to use the bathroom based on gender identity. Conversely, several states vehemently oppose this position, but a lack of legislation, is revealing.

A. STATE-ENACTED GENDER-IDENTITY BASED LAWS

A few states, eight to be exact, and the District of Columbia, have enacted laws specifically protecting the rights of students and employees to use public bathrooms and facilities based on their gender identity.¹⁷ The short list includes: California, Colorado, Delaware, Iowa, New Jersey, Oregon, Vermont, and Washington.¹⁸ In these jurisdictions, the law is

16. *See infra* notes 18-88.

17. *See* D.C. Code Mun. Regs. tit. 4 § 802 (2018); (last visited Sept. 29, 2017) ("In order to meet the obligations to prohibit discrimination based on gender identity or expression as set forth in the Act, the Office and the Commission adopt this chapter . . . "[t]o implement the provisions of the Act regarding discrimination based on gender identity or expression in employment, housing, public accommodations, or educational institutions, including all agencies of the District of Columbia government and its contractors."); *see also*, Transgender People and the Law, ACLU, *available at* <https://www.aclu.org/know-your-rights/transgender-people-and-law> (last visited Sept. 29, 2017).

18. *See* CA Dep't of Fair Employment & Housing, DFEH Issues Guidance for California Employers on Transgender Employees, (2017), *available at* <https://dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/LozanoPR20160217.pdf> (last visited Sept. 29, 2017) ("Under California law, all employees have the right to use restroom and locker room facilities that correspond to their gender identity."); S.B. 08-200, 66th Gen. Assemb., 2nd Reg. Sess., (Co. 2008) (enacted); Colorado Civil Rights Commission Rules and Regulations, §3 CCR 708-1 (2014); State of Delaware Guidelines on Equal Employment Opportunity and Affirmative

education/student specific, employment specific, or a combination of both. For example, California's School Success and Opportunity Act ("SSOA"), enacted in 2013, was a transgender bathroom law based on gender identity, specific to students.¹⁹ This act "requires that a pupil be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."²⁰ The state had already enacted a law specific to employment ten years earlier.

The Fair Employment and Housing Act of 2004 ("FEHA"), made it illegal for all California employers "with 5 or more employees to fire, fail to hire or discriminate against employees who are perceived to be transgender or gender non-conforming."²¹ The law applied to both private and public employers in California.²² To clarify the application of the law, in February 2016, the California Department of Fair Employment and

Action Gender Identity Guidelines, *available at* <http://www.delawarepersonnel.com/policies/documents/sod-eeoc-guide.pdf> (last visited Sept. 29, 2017) ("An employee whose gender identity does not match his or her assigned sex at birth, including a transitioning employee, will have access to the gender-specific facilities (including restrooms) that corresponds to his or her gender identity, beginning when the employee first begins presenting in accordance with such gender identity."); Iowa Code §216.2 (2017) (covering both students and employees and defining the term "'gender identity' as a gender-related identity of a person, regardless of the person's assigned sex at birth"); S.B. 3067, 217th Leg., Reg. Sess., (N.J. 2017) (introduced) ("The Commissioner of Education shall develop and distribute to school districts guidelines concerning transgender students . . . The guidelines developed by the commissioner shall include, but not be limited to, information and guidance regarding the following: use of restrooms and locker rooms, including not requiring a transgender student to use a restroom or locker room that conflicts with the student's gender identity, and providing reasonable alternative arrangements if needed to ensure a student's safety and comfort."); Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students, Oregon Department of Education (2016), *available at* http://media.oregonlive.com/education_impact/other/Transgender%20Student%20Guidance%205-5-16.pdf (last visited July 24, 2017); Sex, Sexual Orientation and Gender Identity: A Guide to Vermont's Anti-Discrimination Law for Stores, Restaurants, Schools, Professional Offices and Other Places of Public Accommodation, State of Vermont Human Rights Commission, *available at* <http://hrc.vermont.gov/sites/hrc/files/publications/trans-pa-brochure.pdf> (last visited Sept. 29, 2017) ("The Human Rights Commission interprets the law to require that an individual be permitted to access restrooms in accordance with his/her gender identity, rather than his/her assigned sex at birth."); A Guide to Sexual Orientation and Gender Identity and the Washington State Laws Against Discrimination, Washington State Human Rights Commission, *available at* http://www.humwa.gov/media/dynamic/files/162_Updated%20SO%20GI%20Guide.pdf (last visited Sept. 29, 2017) ("If an employer maintains gender-specific restrooms, transgender employees should be permitted to use the restroom that is consistent with the individual's gender identity.").

19. A.B. 1266, Gen. Assemb., Reg. Sess., (Ca. 2013) (enacted).

20. *Id.* (emphasis added.); *see also*, Emeline Garcia, Note, *AB 1266: The School Success and Opportunity Act or a Violation of the Constitutional Right to Privacy*, 35 U. LA VERNE L. REV. 243 (2004).

21. Fair Employment and Housing Act, Cal. Gov. Code §12940.

22. *See id.*

Housing issued guidance for California employers.²³ A press release made it “clear that employers must allow transgender employees access to bathrooms, showers, locker rooms and other such facilities that correspond with their gender identity.”²⁴

Similarly, Colorado provides both transgender students as well as employees with the right to use public bathrooms or facilities based on their gender identity in S.B. 08-200.²⁵ The Colorado general assembly enacted the law to prohibit discrimination based on sexual orientation, including transgender status.²⁶ Thereafter, the Colorado Association of School Boards, the Colorado Association of School Executives, the Colorado Education Association, and One Colorado²⁷ collaborated to devise a document entitled *Guidance for Educators Working with Transgender and Gender NonConforming Students* stating that the “preferred practice is to allow students access to the bathroom or locker room that corresponds to their gender identity consistently asserted at school.”²⁸

Additionally, Rule 81.11 of the Colorado Code of Regulation required employers to allow transgender employees to use the bathroom based on their gender identity.²⁹ In part, the law states that: “All covered entities shall allow individuals the use of gender segregated facilities that are consistent with their gender identity” and “[g]ender segregated facilities include but are not limited to, bathrooms, locker rooms, dressing rooms and dormitories.”³⁰

23. See California Department of Fair Housing & Employment February 17, 2016, News Release, *supra* note 19.

24. *Id.*

25. See, S.B. 08-200, 66th Gen. Assemb., 2nd Reg. Sess., (Co. 2008)(enacted)

26. *Id.*

27. “One Colorado is the state’s leading advocacy organization dedicated to advancing equality for lesbian, gay, bisexual, transgender, and queer (LGBTQ) Coloradans and their families.” ABOUT US, ONE COLORADO.ORG, *available at* <http://www.one-colorado.org/about-us/> (last visited Sept. 29, 2017).

28. This guidance specifically, stated that in schools the “preferred practice is to allow students access to the restroom or locker room that corresponds to their gender identity consistently asserted at school.” The school, in determining a student’s access to restroom, is advised to consider the following factors: (1) the student’s age; (2) the student’s preferences (including his or her need or desire for privacy); (3) any relevant medical needs; (4) the location of facilities in proximity to the student’s classes and schedule; (5) the design and layout of the facilities; (7) the age and nature of the other students; (8) the student’s maturity level; and (9) behavior or disciplinary history. See *Guidance for Educators Working with Transgender and Gender NonConforming Students*, *available at* https://cdpsd.ocs.state.co.us/safeschools/Resources/One%20Colorado/OneCO%20Transgender_Guidance.pdf (last visited Apr. 3, 2018).

29. §3 CCR 708-1 of Colorado Civil Rights Commission Rules and Regulation Rule 81.11.

30. See *supra* note 29.

B. STATE-ENACTED BIOLOGY-BASED LAWS

Conversely, between 2013 and 2017, approximately twenty-four states considered enacting transgender bathroom laws to restrict the use of public bathrooms to the individual's biological sex.³¹ Interestingly, Colorado is on this list, notwithstanding the state's 2008 legislation.³² A biology-based transgender bathroom bill was introduced into the Colorado state legislature in 2015.³³ However, like the fate of similar bills proposed in other states, the Colorado bill died in committee by a vote of 7 to 4.³⁴

Like Colorado, other states have considered enacting biology-based transgender bathroom legislation. The states of Arizona, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, Nevada, New York, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wisconsin are among those possibly motivated by gallant intent.³⁵ Proponents of these laws argue that the public's safety is at risk

31. Bathroom Bill Legislation: Overview of State Legislation, National Conference of State Legislatures, Aug. 30, 2016, *available at* <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> (last visited Sept. 29, 2017).

32. *See* H.B. 15-1081, 70th Gen. Assemb., 1st Reg. Sess., (Co. 2015) ("Notwithstanding any other provisions of this section, it is not a discriminatory practice for a person to restrict admission to a place of public accommodation to individuals of one sex if: . . . the place of public accommodation is a sex-segregated locker room and the restriction is based on an individual's actual, biological sex."); *see also*, Joey Bunch, *Locker Room Privacy Bill Called Unfair to Transgender People Dies*, DENVER POST, Feb. 4, 2015, *available at* <http://www.denverpost.com/2015/02/04/locker-room-privacy-bill-called-unfair-totransgender-people-dies/> (last visited Sept. 29, 2017).

33. *See id.*

34. *See id.*

35. *See* S.B. 1045, 51st Leg., 1st Reg. Sess. (Az. 2013) (introduced); H.B. 583, Leg., Reg. Sess. (Fl. 2015) (died in judiciary committee) ("Single-sex public facilities designated for females shall be restricted to females. . . . Single-sex public facilities designated for males shall be restricted to males."); H.B. 4474, 99th Gen. Assemb., Reg. Sess., (Il. 2016) (session sine die) ("Requires a school board to designate each pupil restroom, changing room, or overnight facility accessible by multiple pupils simultaneously, whether located in a public school building or located in a facility utilized by the school for a school-sponsored activity, for the exclusive use of pupils of only one sex. Defines "sex" as the physical condition of being male or female, as determined by an individual's chromosomes and identified at birth by that individual's anatomy."); H.B. 1079, Gen. Assemb., Reg. Sess. (In. 2016) (as introduced by Rep. Timothy Harman) (Single sex facility trespass. Makes it a Class B misdemeanor if: (1) a male knowingly or intentionally enters a single sex facility that is designated to be used only by females; or (2) a female knowingly or intentionally enters a single sex facility that is designated to be used only by males.); S.B. 35, 119th Gen. Assemb., 2nd Reg. Sess., (In. 2016) (introduced) ("Single sex facilities. Provides that student facilities in school buildings must be designated for use by female students or male students, and may be used only by the students of the biological gender for which the facility is designated. Makes it a Class A misdemeanor if: (1) a male knowingly or intentionally enters a single sex public facility that is designed to be used by females; or (2) a female knowingly or intentionally enters a single sex public facility that is designed to be used by males."); H.B. 2737, Gen. Assemb., Reg. Sess., (Ks. 2016)(died in committee) (created the student physical privacy act and providing, among other things, that "[i]n all public schools and postsecondary educational institutions in this state, student restrooms,

locker rooms and showers that are designated for one sex shall be used only by members of that sex. "Sex means the physical condition of being male or female, which is determined by a person's chromosomes, and is identified at birth by a person's anatomy."); S.B. 513, Gen. Assemb., Reg. Sess., (Ks. 2016) (died in committee) (created the student physical privacy act); H.B. 364, Gen. Assemb., 16 Reg. Sess., (Ky. 2016) (introduced) (Created "new sections of KRS Chapter 158 to ensure that student privacy exists in school restrooms, locker rooms, and showers; require students born male to use only those facilities designated to be used by males and students born female to use only those facilities designated to be used by females"); H.B. 542, Gen. Assemb., Reg. Sess., (La. 2016) (introduced) (stating that "[e]mployers may designate restrooms based on sex and may restrict the use of such facilities to only those employees, contract workers, customers, and visitors whose sex designated at birth corresponds to the designation of the restroom" and the term "[s]ex means the sex assigned to a person at birth."); H.B. 1320, 189th Gen. Assemb., Reg. Sess., (Ma. 2015) ("Access to lawfully sex-segregated facilities, accommodations, resorts, and amusements, as well as educational, athletic, and therapeutic activities and programs, shall be controlled by an individual's anatomical sex of male or female, regardless of that individual's gender identity."); H.B. 5717, Gen. Assemb., Reg. Sess., (Mi. 2016) (introduced) ("A bill to restrict the use of public bathrooms, changing facilities, and similar shared spaces used for private activities based on biological sex." . . . "Biological sex" means physical condition of being male or female, as stated on the individual's birth certificate or a state-issued identification card."); S.B. 993, Gen. Assemb., Reg. Sess., (Mi. 2016) (introduced) ("A restroom, locker room or shower that is located in an elementary or secondary school under the control of the board or board of directors, is designated for pupil use, and is accessible by multiple pupils at the same time shall be designated for and used only by pupils of the same biological sex." . . . "As used in this section, 'biological sex' means the physical condition of being male or female as determined by a person's chromosomes and anatomy as identified at birth."); H.F. 3396, 89th Leg., Reg. Sess., (Mn. 2016) (introduced) ("Other than single-occupancy facilities, no employer shall permit access to restrooms, locker rooms, dressing rooms, and other similar places on any basis other than biological sex."); S.F. 3002, 89th Leg., Reg. Sess., (Mn. 2016) (introduced) ("Other than single-occupancy facilities, no employer shall permit access to restrooms, locker rooms, dressing rooms, and other similar places on any basis other than biological sex."); H.B. 1258, Gen. Assemb., Reg. Sess. (Ms. 2016) ("Except as otherwise provided in this section, it shall be unlawful for a person to knowingly and intentionally enter into restroom facilities or other bath facilities that were designed for use by the gender opposite the person's gender at birth."); H.B. 1847, 98th Gen. Assemb., 2nd Reg. Sess., (Mo. 2016) ("All public restrooms, other than single occupancy restrooms, shall be designated as gender-divided restrooms."); H.B. 2303, 98th Gen. Assemb., 2nd Reg. Sess., (Mo. 2016) ("No student of the female sex shall use a student bathroom or student changing room that has been designated by the school district for the exclusive use of the male sex, and no student of the male sex shall use a student bathroom or student changing room that has been designated by the school district for the exclusive use of the female sex." The term "sex" under this bill is defined as "the physical condition of being male or female, as identified at birth by an individual's anatomy."); S.B. 720, 98th Gen. Assemb., 2nd Reg. Sess., (Mo. 2016) ("Every public school restroom, locker room and shower room designated for student use and which is accessible by multiple students at the same time shall be designated for and used only by students of the same biological sex." The term "biological sex" under the bill is defined as "the physical condition of being male or female, which is determined by a person's chromosomes, and is identified at birth by a person's anatomy and indicated on their birth certificate."); A.B. 375, Gen. Assemb., Reg. Sess., (Nov. 2015) (a bill requiring "any school facility in a public school, including a restroom, locker or shower which is designated for use by persons of one biological sex must only be used by persons of that biological sex as determined at birth."); S.B. A10127, Gen. Assemb., Reg. Sess., (N.Y. 2016) (introduced) ("The board of trustees of the state university of New York and the trustees of the city

university of New York are authorized to promulgate rules or policies requiring every state university of New York and city university of New York, including all their constituent units including community colleges, to ensure that multiple occupancy bathrooms or changing facilities that are designated for use, be designated for and used only by persons based on their biological sex. For purposes of this section, the following definitions apply: (a) ‘Biological sex’ shall mean the physical condition of being male or female, which is stated on a person’s birth certificate.”); H.B.2, Gen. Assemb., 2nd Extra Sess., (N.C. 2016) (repealed) (“An Act to Provide for Single Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and Create Consistency in Regulation of Employment and Public Accommodations.”); S.B. 1014, 55th Leg., 2nd Reg. Sess., (Ok. 2016) (introduced) (“It shall be unlawful for a person to use a gender specific restroom when that person’s biological gender is contrary to that of the gender); H.B.1008, Gen. Assemb., Reg. Sess., (S.D. 2016) (vetoed) (“Every restroom, locker room, and shower room located in a public elementary or secondary school that is designated for student use and is accessible by multiple students at the same time shall be designated for and used only by students of the same biological sex. In addition, any public school student participating in a school sponsored activity off school premises which includes being in a state of undress in the presence of other students shall use those rooms designated for and used only by students of the same biological sex.” The term “biological sex” under this bill “means the physical condition of being male or female as determined by a person’s chromosomes and identified at birth by a person’s anatomy.”); H.B. 2414, 109th Gen. Assemb., Reg. Sess., (Tn. 2016) (died in chamber) (“Public schools shall require that a student use student restroom and locker room facilities that are assigned for use by persons of the same sex as the sex indicated on the student’s original birth certificate. . . . Public institutions of higher education shall require that a student use the restroom and locker room facilities that are assigned for use by persons of the same sex as the sex indicated on the student’s original birth certificate.”); H.B. 663, Gen. Assemb., Reg. Sess., (Va. 2016) (failed) (“The Director of the Department shall develop and implement policies that require every restroom designated for public use in any public building on property that is owned, leased, or controlled by the Commonwealth . . . and that is designated for use by a specific gender to solely be used by individuals whose anatomical sex matches such gender designation. . . . Local school boards shall develop and implement policies that require every school restroom, locker room, or shower room that is designated for use by a specific gender to solely be used by individuals whose anatomical sex matches such gender designation.” The term anatomical sex under this bill “means the physical condition of being male or female, which is determined by a person’s anatomy.”); H.B. 781, Gen. Assemb., Reg. Sess., (Va. 2016) (defeated) (a bill titled Restroom facilities; use of facilities in public buildings or schools, definition of biological sex.); H.B. 2589, 64th Leg., Reg. Sess., (Wa. 2016) (introduced) (“Nothing in this chapter prohibits a public or private entity from limiting access to a private facility segregated by gender, such as a bathroom, restroom, toilet, shower, locker room, or sauna, to a person if the person is preoperative, nonoperative, or otherwise has genitalia of a different gender from that for which the facility is segregated. Nothing in this chapter grants any right to a person to access a private facility segregated by gender, such as a bathroom, restroom, toilet, shower, locker room, or sauna, of a public or private entity if the person is preoperative, nonoperative, or otherwise has genitalia of a different gender from that for which the facility is segregated.”); H.B. 2782, 64th Leg., Reg. Sess., (Wa. 2016) (introduced) (“This act may be known and cited as the Washington gender privacy protection act.”); H.B. 2941, 64th Leg., Reg. Sess., (Wa. 2016) (introduced) (“Schools must provide toilets and restroom facilities for each sex with no disparities based on sex. Each school must provide facilities to be used separately by each sex. Schools may provide a gender-neutral single occupant bathroom to accommodate a student’s privacy concerns. “Sex” as used in this section means biological sex or sex assigned at birth.”); S.B. 6548, 64th Leg., Reg. Sess., (Wa. 2016) (introduced) (“AN ACT Relating to allowing the use of gender-segregated facilities”); A.B. 469, Gen. Assemb., Reg. Sess. (Wi. 2015) (failed

when transgender individuals are allowed to use the bathroom based on their gender identity.³⁶ Specifically their argument suggests that men, disguised as women, would intentionally invade the women's bathroom with the ultimate purpose of raping women.³⁷ Conversely, opponents of biology-based laws argue that the laws unlawfully discriminate against transgender individuals.³⁸

Among states, biology-based bathroom laws are by no means generic in language. Some proposed laws were restricted to secondary and post-secondary schools only.³⁹ For example, in Kansas, the legislature, through House Bill 2737 and Senate Bill 513, proposed creating "the student physical privacy act."⁴⁰ Specifically, these bills provided that: "In all public schools and postsecondary educational institutions in this state, student bathrooms, locker rooms and showers that are designated for one sex shall be used only by members of that sex."⁴¹ And, the term "sex" under these bills "means the physical condition of being male or female, which is determined by a person's chromosomes, and is identified at birth by a person's anatomy."⁴² Furthermore, the bill gave a student the right to sue the school for monetary damages if the school gave a person of the opposite sex "permission to use the facilities of a different sex or the school

to pass) ("This bill requires a school board to designate each pupil restroom and changing room (together, changing room) located in a public school building and accessible by multiple pupils as for the exclusive use of pupils of only one sex. The bill defines 'sex' as the physical condition of being male or female, as determined by an individual's chromosomes and identified at birth by that individual's anatomy."); S.B. 582, Gen. Assemb., Reg. Sess., (Wi. 2015) (failed to pass) ("This bill requires a school board to designate each pupil restroom and changing room (together, changing room) located in a public school building and accessible by multiple pupils as for the exclusive use of pupils of only one sex. The bill defines 'sex' as the physical condition of being male or female, as determined by an individual's reproductive organs and as designated on that individual's birth certificate.").

36. See Erin Beck, *Transgender Predator Myth Affects Lives in W.Va.*, CHARLESTON GAZETTE-MAIL, pg. P1B, May 8, 2016 ("if cities and states pass laws that ban discrimination in public places rapist will put on dresses, sneak into women's restrooms, and assault women and children); see also, Jeff Brady, *When a Transgender Person Uses the Restroom Who is at Risk?*, NPR, May 15, 2016, available at <http://www.npr.org/2016/05/15/477954537/when-a-transgender-person-uses-a-public-bathroom-who-is-at-risk> (last visited Oct. 4, 2017).

37. See Beck, *supra* note 37.

38. See Katy Steinmetz, *Everything You Need to Know About the Debate Over Transgender People and Bathrooms*, TIME, July 28, 2015, available at <http://time.com/3974186/transgender-bathroom-debate/> (last visited Oct. 4, 2017); see also, Brady *supra* note 37.

39. See e.g. H.B. 2737, Gen. Assemb., Reg. Sess., (Ks. 2016) (died in committee); S.B. 513, Gen. Assemb., Reg. Sess., (Ks. 2016) (died in committee); H.B. 364, Gen. Assemb., 16 Reg. Sess., (Ky. 2016) (introduced); H.B. 5717, Gen. Assemb., Reg. Sess., (Mi. 2016) (introduced); S.B. 993, Gen. Assemb., Reg. Sess., (Mi. 2016) (introduced); S.B. A10127, Gen. Assemb., Reg. Sess., (N.Y. 2016) (introduced).

40. H.B. 2737, Gen. Assemb., Reg. Sess., (Ks. 2016) (died in committee); S.B. 513, Gen. Assemb., Reg. Sess., (Ks. 2016) (died in committee).

41. See *id.*

42. See *supra* note 40.

failed “to take reasonable steps to prohibit such use.”⁴³ Both of these bills, however, failed to pass and died in committee on June 1, 2016.⁴⁴

Other contemplated transgender bathroom laws were intended to govern public employees within a state.⁴⁵ For example, Louisiana House Bill 542, pre-filed⁴⁶ with the Louisiana House of Representatives on March 3, 2016, was drafted to provide rights for employers on issues regarding transgender individuals.⁴⁷ The bill stated that “[e]mployers may designate bathrooms based on sex and may restrict the use of such facilities to only those employees, contract workers, customers, and visitors whose sex designated at birth corresponds to the designation of the bathroom.”⁴⁸ The bill was withdrawn the next day and never reached the House.⁴⁹

Comparably, South Carolina’s Senate Bill 1203, introduced into the state’s senate on April 6, 2016, provided that “[m]ultiple occupancy bathrooms and changing facilities located on public property, including but not limited to property owned by the State, its authorities, commissions, departments, committees or agencies, or any political subdivision of the State, shall be designated for and only used by a person based on his biological sex.”⁵⁰ As stated, this bill would encompass both public employers and public schools.⁵¹ The bill was referred to the General Committee on the same day that it was introduced. It had not been enacted as of October 2017.⁵²

Other states have gone a step further by proposing to criminalize the use of public bathrooms if used by someone inconsistent with his or her biological sex.⁵³ Notably, Indiana’s House Bill 1079 was introduced in the state’s House of Representatives on January 5, 2016, and proposed to make it a “Class B misdemeanor if: (1) a male knowingly or intentionally enters a single sex facility that is designated to be used only by females; or (2) a female knowingly or intentionally enters a single sex facility that is designated to be used only by males.”⁵⁴ This bill, like those proposed in

43. *Id.*

44. *See id.*

45. *See e.g.*, H.B. 542, Gen. Assemb., Reg. Sess., (La. 2016) (introduced); G.B. 1203, 121st Gen. Assemb., Reg. Sess. (S.C. 2016) (introduced).

46. The term prefile has been defined as “the ability to introduce a measure before the opening of the session.” Glossary of Legislative Terms, National Conference of State Legislatures, *available at* <http://www.ncsl.org/research/about-state-legislatures/glossary-of-legislative-terms.aspx> (last visited Oct. 4, 2017).

47. *See*, H.B. 542, Gen. Assemb., Reg. Sess., (La. 2016) (introduced).

48. *Id.*

49. *Id.*

50. G.B. 1203, 121st Gen. Assemb., Reg. Sess., (S.C. 2016) (introduced).

51. *Id.*

52. *Id.*

53. *See e.g.*, H.B. 1079, Gen. Assemb., Reg. Sess., (In. 2016) (as introduced by Rep. Timothy Harman); H.B. 1258, Gen. Assemb., Reg. Sess., (Ms. 2016).

54. H.B. 1079, Gen. Assemb., Reg. Sess., (In. 2016) (as introduced by Rep. Timothy Harman).

other state legislations before it, failed to pass.⁵⁵

Likewise, Mississippi's House Bill 1258 stated: "[e]xcept as otherwise provided in this section, it shall be unlawful for a person to knowingly and intentionally enter into bathroom facilities or other bath facilities that were designed for use by the gender opposite the person's gender at birth."⁵⁶ And, anyone found in violation of the provisions was subject to prosecution.⁵⁷ The law failed to pass on February 23, 2016. Refusing to be crushed by this defeat, in April 2016, the state passed a law specifically defining a man and a woman based on the "individual's immutable biological sex as objectively determined by anatomy and genetics at the time of birth."⁵⁸ Three months after this law was enacted, a federal judge struck it down.⁵⁹

1. North Carolina's Biology-Based Transgender Bathroom Law

Despite the numerous states that have contemplated enacting biology-based transgender bathroom laws, currently the only state to have actually enacted such a law is North Carolina.⁶⁰ On March 23, 2016, former Governor Pat McCrory signed into law the Public Facilities Privacy & Security Act, commonly known as House Bill 2 ("HB-2").⁶¹

55. *Id.*

56. H.B. 1258, Gen. Assemb., Reg. Sess., (Ms. 2016)

57. *Id.*

58. *See* H.B. 1523, Gen. Assemb., Reg. Sess., (Ms. 2016); *see also*, Emma Green, *America's Profound Gender Anxiety*, ATLANTIC MONTHLY, May 31, 2016, available at <http://www.theatlantic.com/politics/archive/2016/05/americas-profound-gender-anxiety/484856/> (last visited Oct. 4, 2017); Avianne Tann, *Mississippi Religious Freedom Bill*, ABC News, Apr. 6, 2016, available at <http://abcnews.go.com/US/mississippi-religious-freedom-bill-sweeping-anti-lgbt-law/story?id=38170420> (last visited Oct. 4, 2017); Neely Tucker, *U.S. District Judge Strikes Down Mississippi's Religious Freedom Law*, WASH. POST, July 1, 2016, available at https://www.washingtonpost.com/lifestyle/style/us-district-judge-strikes-down-mississippi-religious-freedom-law/2016/07/01/f98dc2ca-3ec9-11e6-a66faa6c1883b6b1_story.html?utm_term=.f176c9772cd2 (last visited Oct. 4, 2017).

59. *Id.*

60. H.R. 2 Gen. Assemb., 2nd Extra Sess., 2016-3 (N.C. 2016); *see also*, Carcaño v. McCrory, 203 F. Supp. 3d 615 (M.D.N.C. June 6, 2016).

61. In November 2014, almost two years before this law was enacted, the Charlotte, North Carolina, City Council began considering a proposal to amend the city's nondiscrimination ordinances to prevent discrimination on the basis of "marital status, family status, sexual orientation, gender identity, and gender expression." Approximately, four months later, on March 2, 2015, the proposed ordinance was modified to include the following language: "Notwithstanding the foregoing, this section shall not, with regard to sex, sexual orientation, gender identity and gender expression, apply to restrooms, locker rooms, showers, and changing facilities." However, the proposed ordinance failed to pass by a vote of six to five. Thereafter, in February 2016, the Charlotte City Council considered a new proposal to its nondiscrimination ordinance, which added "marital status, familial status, sexual orientation, gender identity and gender expression" to the list of protected characteristics. But, this time the proposed ordinance did not contain exceptions for bathrooms, showers or other similar facilities and it repealed prior rules that exempted "restrooms, showers rooms, bathrooms and similar facilities." This newly proposed ordinance, which "regulated places of public accommodation and businesses seeking to

HB-2 targeted government agencies within the state by specifically providing that: “‘Public agencies’ shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex.”⁶² And, the term “biological sex” was defined under the law as “the physical condition of being male or female, which is stated on a person’s birth certificate.”⁶³ In effect, this bill prevented all public agencies from allowing transgender individuals to use public bathrooms that are consistent with their gender identity.⁶⁴ The term public agencies included (1) “[a]ll agencies, boards, offices, and departments under the direction and control of a member of the Council of State”; (2) “[a] local board of education”; (3) “[t]he judicial branch”; (4) “[t]he legislative branch”; and (5) “[a]ny other political subdivision of the State.”⁶⁵ Clearly and purposefully, North Carolina’s HB-2 was enacted to directly affect the lives of both transgender students attending public institutions in North Carolina and transgender employees working for the state.⁶⁶

HB-2, however, had a much deeper impact because it provides that “the regulation of discriminatory practices in places of public accommodation is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State.”⁶⁷ In essence, through HB-2, the state legislature vested itself with sole authority to regulate on matters related to discrimination in places of public accommodation. Local and state agencies were stripped of their ability to regulate—as many had previously done—or to override the state law on this matter.⁶⁸

Following the enactment of HB-2 and in response to it, Margaret Spellings, the President of the University of North Carolina (“UNC”) system, sent a memorandum to all of its Chancellors indicating that “University institutions must require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based

contract with Charlotte,’ passed by a vote of seven to four. After the adoption of Charlotte’s new ordinance, the North Carolina General Assembly, who was not scheduled to reconvene until April 25, 2016, convened a special session one month early to vote on HB-2. The same day that the special session was convened the law passed the House by a vote of eighty-four to twenty-five; passed the Senate with all Republicans unanimous supporting the law while the Democrats walked out in protest; and was signed into law by the governor. H.R. 2 Gen. Assemb., 2nd Extra Sess., 2016-3 (N.C. 2016); *see also*, Carcaño v. McCrory, 203 F. Supp. 3d 615 (M.D.N.C. June 6, 2016).

62. *Id.*

63. *Id.*

64. *Id.*

65. H.R. 2 Gen. Assemb., 2nd Extra Sess., 2016-3 (N.C. 2016).

66. H.R. 2 Gen. Assemb., *supra* note 65.

67. *Id.*

68. *Id.*

on their biological sex.”⁶⁹

Shortly thereafter, on May 4, 2016, a little over a month after North Carolina enacted HB-2, the United States Department of Justice sent a letter to former Governor McCrory indicating that North Carolina's law violated, among other things, Title IX and Title VII.⁷⁰ The letter indicated that through compliance and implementation of the law, North Carolina “is engaging in a pattern and practice of discrimination against transgender state employees.”⁷¹ On the same day, the Department of Justice also sent a letter to Spellings reiterating that HB-2 was illegal and stating that, as a recipient of federal financial assistance, the UNC system must comply with Title IX, and, as an employer, the system must comply with Title VII.⁷² Both letters gave the respective recipients until May 9, 2016, to remedy the situation.⁷³

Rather than complying with the Department of Justice's request, North Carolina filed a lawsuit against the federal government on May 9th, requesting that the court declare HB-2 legal.⁷⁴ The lawsuit was filed in the United States District Court for the Eastern District of North Carolina.⁷⁵ In response, and in a different district court, the Department of Justice filed a similar lawsuit against North Carolina, challenging the legality of HB-2. Its petition was filed in the United States District Court for the Middle District of North Carolina.⁷⁶ Subsequently, on September 16, 2016, North Carolina dismissed its lawsuit against the federal government citing “substantial costs to the State.”⁷⁷

In addition to the federal lawsuit filed by the Justice Department, an

69. See Memorandum from Margaret Spellings on Compliance with the Public Facilities Privacy & Security Act to Chancellors (Apr. 5, 2016), *available at* https://www.northcarolina.edu/sites/default/files/public_facilities_guidance_memo_0.pdf (last visited Oct. 7, 2017).

70. See Letter from U.S. Department of Justice to Governor Pat McCrory (May 4, 2016), *available at* <http://media.charlotteobserver.com/static/images/misc/HB2050412.pdf> (last visited Oct. 7, 2017).

71. See *supra* note 71.

72. See Letter from U.S. Department of Justice to President Margaret Spellings, Thomas C. Shanahan & University of North Carolina Board of Governors (May 4, 2016), *available at* <http://www.charlotteobserver.com/news/politics-government/article75647942.ece/BINARY/Read:%20DOJ%20letter%20to%20UNC> (last visited Oct. 7, 2017).

73. See *id.*

74. See *McCrory v. U.S.*, No. 5:16-cv-00238-BO (E.D.N.C. filed May 9, 2016) *available at* <http://media2.newsobserver.com/content/media/2016/5/9/Complaint%20McCrory%20V%20USA.pdf> (last visited Oct. 4, 2017).

75. See *id.*

76. See *U.S. v. State of N.C.*, No. 5:16-cv-00238-BO (E.D.N.C. filed May 9, 2016) dismissed; *available at* <http://media2.newsobserver.com/content/media/2016/5/9/Complaint%20McCrory%20V%20USA.pdf> (last visited Oct. 7, 2017).

77. See Rebecca Hersher, *North Carolina Governor Drops Bathroom Lawsuit Against U.S.*, NPR, Sept. 19, 2016, *available at* <http://www.npr.org/sections/thetwo-way/2016/09/19/494573314/north-carolina-governor-drops-bathroom-bill-lawsuit-against-u-s> (last visited Oct. 7, 2017); see also, *McCrory Drops House Bill 2 Lawsuit, Cites Costs*, ABC11.COM, Sept. 18, 2016, *available at* <http://abc11.com/politics/mccrory-drops-house-bill-2-lawsuit-cites-costs/1516428/> (last visited Oct. 7, 2017).

action was brought against the state in the case of *Carcano v. McCrory*. In *Carcano*, North Carolina was sued by several transgender plaintiffs, including two transgender students and one employee, alleging that HB-2 violated: (1) Title VII, (2) Title IX, (3) the Due Process Clause and (4) the Equal Protection Clause.⁷⁸ Additionally, the plaintiffs filed a motion for a preliminary injunction enjoining the enforcement of HB-2 until their lawsuit was settled.⁷⁹ The lawsuit was filed in the United States District Court for the Middle District of North Carolina. In August 2016, the federal judge granted the plaintiffs' motion for preliminary injunction, thereby blocking the enforcement of HB-2 while their lawsuit was ongoing.⁸⁰

As a result of HB-2, the state had to brace itself against the strong waves of negative backlash. Corporations and celebrities boycotted the state.⁸¹ PayPal canceled its decision to open an office in the state.⁸² Deutsche Bank abandoned its plans to add hundreds of new jobs in the state.⁸³ The National Basketball Association and the National College Athletic Association decided to move their sports games, traditionally scheduled and played in North Carolina, to venues outside the state.⁸⁴

78. *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. June 6, 2016).

79. *Id.*

80. *Id.* at 622–23. (“After careful consideration of the limited record presented thus far, the court concludes that the individual transgender Plaintiffs have made a clear showing that (1) they are likely to succeed on their claim that Part I violates Title IX, as interpreted by the United States Department of Education (“DOE”) under the standard articulated by the Fourth Circuit; (2) they will suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities weighs in favor of an injunction; and (4) an injunction is in the public interest.”); *see also*, Corinne Segal, *UNC cannot Enforce Part of HB-2, Federal Judge Rules*, PBS, Aug. 27, 2016, available at <http://www.pbs.org/newshour/rundown/transgender-unc-hb-2-injunction/> (last visited Oct. 7, 2017) (“A federal judge has blocked the University of North Carolina from enforcing part of the state’s recent law that limits bathroom use by transgender people, adding that the plaintiffs “are likely to succeed on their claim” that the law is discriminatory.”).

81. *See* Amber Phillips, *The Legal Effect of North Carolina’s Transgender Bathroom Law in 4 Questions*, WASH. POST, May 9, 2016, available at <https://www.washingtonpost.com/news/the-fix/wp/2016/05/09/the-legal-fight-over-north-carolinas-transgender-bathroom-law-explained-in-4-questions/>, (last visited July 28, 2016).

82. *See*, *Paypal Withdraws Plans for Charlotte Expansion over HB2*, THE CHARLOTTE OBSERVER, Apr. 5, 2016, available at <http://www.charlotteobserver.com/news/business/article70001502.html> (last visited Oct. 17, 2017); citing *HB2, Paypal Cancels Planned Charlotte Expansion*, WRAL, Apr. 5, 2016, available at <http://www.wral.com/citing-hb2-paypal-cancels-planned-charlotte-expansion/15621787/> (last visited Oct. 17, 2017).

83. *See* Steven Benen, *NCAA Joins Backlash Against North Carolina’s Anti-LGBT Law*, MSNBC, Sept. 13, 2016, available at <http://www.msnbc.com/rachel-maddow-show/ncaa-joins-backlash-against-north-carolinas-anti-lgbt-law> (last visited Oct. 7, 2017) (“[NCAA officials] announced on Monday evening that they will relocate all of their championship events scheduled to take place in North Carolina due to the controversial HB2 law. . . .”); *see also*, Scott Jaschik, *NCAA Moves Championship from North Carolina*, INSIDE HIGHER ED, Sept. 13, 2016, available at <https://www.insidehighered.com/news/2016/09/13/ncaa-will-move-championship-games-north-carolina> (last visited Oct. 7, 2017).

84. *See* Emma Margolin, *NBA Pulls All-Star Game Out of Charlotte*, NBC NEWS, July

In an attempt to diminish the negative impact of HB-2, on March 20, 2017, North Carolina's newly elected governor, Governor Roy Cooper, signed into law House Bill 142 ("HB-142), commonly referred to as a "compromise bill", which repealed some parts of HB-2.⁸⁵ Specifically, HB-142 repealed the provision of HB-2 that required individuals to use public bathrooms or facilities based on their biological sex.⁸⁶ However, HB-142 retained, until December 2020, the portion of HB-2 that prohibited state agencies and local governments from regulating, on their own, access to multiple occupancy bathrooms and facilities.⁸⁷ That authority remained with the state legislature, thereby paralyzing the authority of state agencies and local governments to regulate on this matter.

III. LEGAL CASES EXAMINING BIOLOGICAL-BASED LAWS

When states enact transgender bathroom laws based on a student's or an employee's biological sex, legal questions arise under federal law; are the biology-based transgender bathroom laws discriminatory?⁸⁸ Plaintiffs

21, 2016, available at <http://www.nbcnews.com/feature/nbc-out/nba-pulls-all-star-game-out-charlotte-over-hb2-n614466> (last visited Oct. 7, 2017); see also, Marc Tracy & Alan Blinder, *N.C.A.A. Moves Championship Events from North Carolina, Cites Anti-Gay-Rights Law*, N.Y. TIMES, Sept. 12, 2016, available at <http://www.nytimes.com/2016/09/13/sports/naaa-moves-championship-events-from-north-carolina.html?r=0> (last visited Oct. 7, 2017); Scott Cacciola & Alan Blinder, *N.B.A. to Move All-Star Game from North Carolina*, N.Y. TIMES, July 21, 2016, available at <http://www.nytimes.com/2016/07/22/sports/basketball/nba-all-star-game-moves-charlotte-transgender-bathroom-law.html> (last visited Oct. 7, 2017).

85. In November 2016, Democrat candidate Roy Cooper won the North Carolina gubernatorial election and beat the incumbent Republican candidate Pat McCrory. See *North Carolina Gov. McCrory Concedes Governor's Race*, CBS NEWS, Dec. 5, 2016, available at <http://www.cbsnews.com/news/pat-mccrory-north-carolina-governor-concedes-roy-cooper/> (last visited on July 26, 2017); see also, H.R. 142 Gen. Assemb., Reg. Sess., (N.C. 2017) [hereinafter North Carolina House Bill 142]; see also, Jason Hanna, Madison Park & Elliott C. McLaughlin, *North Carolina Repeals Bathroom Bill*, CNN, Mar. 30, 2017, available at <http://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/> (last visited July 19, 2017) ("North Carolina lawmakers on Thursday passed a bill that repeals the state's controversial bathroom law in a move meant to end a year of tumult that saw businesses leave and major sporting events and concerts canceled."); Daniella Silva, *HB2 Repeal: North Carolina Overturns Controversial 'Bathroom Bill'*, NBCNEWS, Apr. 2, 2017, available at <http://www.nbcnews.com/news/us-news/hb2-repeal-north-carolina-legislature-votes-overturn-controversial-bathroom-bill-n740546> (last visited July 19, 2017) ("A deal that North Carolina lawmakers reached to repeal the state's controversial and costly 'bathroom bill' passed on Thursday after a contentious debate—but the compromise has left LGBTQ advocates exasperated, with some calling it 'shameful' and an 'outrageous betrayal.'").

86. See North Carolina House Bill 142, *supra* note 86.

87. See *id.*; see also, Hanna, Park & McLaughlin, *supra* note 86 ("LGBTQ and civil rights advocates have called for a full repeal of the bill, and denounced the new compromise over provisions they say will still allow for discrimination: namely a three-year ban on local nondiscrimination ordinances.").

88. While scope of this article is limited to federal claims, it should be noted that there have been a small number of cases instituted against schools and employers based on state

commonly assert that the law violates either Title IX and/or Title VII.⁸⁹

A. THE TITLE IX CLAIM- EDUCATION

Title IX provides that “[n]o person 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.”⁹⁰ The law forbids discrimination by educational institutions based on certain characteristics, such as sex.⁹¹ To allege a violation of Title IX based on sex discrimination, the plaintiff must show that: (1) he or she was excluded from participation in an education program because of his or her sex; (2) the educational institution was receiving federal financial assistance at the time of his or her exclusion; and (3) that the improper discrimination caused the plaintiff harm.⁹² A review of two federal cases highlights the issue.

1. *Johnston v. University of Pittsburg of the Commonwealth System of Higher Education*

The issue of whether Title IX is violated when a transgender student is denied the right to use the bathroom because of a biology-based policy was raised in the case of *Johnston v. University of Pittsburg of the*

claims for biology-based transgender bathroom laws implemented for students and employees. The state cases have focused on whether these biology-based transgender bathroom laws violate state statutes prohibiting discrimination against individuals based on their gender identity or expression. *See e.g.*, Reg’l Sch. Unit 26, 86 A.3d at 603; Mathis v. Fountain Fort Carson School District 8, No. P20130034X at 10–11 (Colo. Div. of Civil Rights June 17, 2013), *available at* <http://www.transgenderlegal.org/media/uploads/doc529.pdf> (last visited Oct. 17, 2017) (the Colorado Civil Rights Division held that a school discriminated against a transgender female student when it denied her the right to use the girl’s restroom); Goins, 635 N.W.2d at 717; cf. *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) (After granting a university’s motion to dismiss on federal claims, the court declined to exercise jurisdiction over a transgender student’s state claim that a university violated his rights under the Pennsylvania Human Relations Act by prohibiting him from using the male restroom.); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015 (D. Nev., Oct. 4, 2016) (holding that the employer actions of banning a transgender employee from the men’s and women’s restroom violated Nevada’s Anti-Discrimination Statute codified as N.R.S. 613.330, which prevents discrimination based on gender identity).

89. It should also be noted that when a transgender student or employee is denied the right to use the restroom based on his or her gender identity, this individual may also choose to bring an equal protection claim or a due process claim. *See e.g.*, *Johnston*, 97 F.Supp.3d at 672 (holding that a transgender student who was denied the right to use the restroom based on his gender identity failed to state a cognizable claim for relief under the Equal Protection Clause of the Fourteenth Amendment); *Carcano v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. Aug. 26, 2016) (a case where students and a faculty member brought equal protection and due process claims after being denied the right to use the restroom based on their gender identity).

90. 20 U.S.C.S §1681(a).

91. *Id.*

92. *Cannon v. University of Chicago et al.*, 441 U.S. 677, 691 (1979).

Commonwealth System of Higher Education.⁹³ In *Johnston*, the plaintiff, Seamus Johnston, born biologically female, understood his gender identity as a male at the early age of nine.⁹⁴ In May 2009, Seamus transitioned completely from female to male by holding himself out as a male in all parts of his life including: (1) amending his gender marker to male on his Pennsylvania license; (2) changing his name to a male name; (3) registering with the Selective Service; (4) amending the gender marker on his United States passport to male; and (5) amending the gender marker to male on his Social Security record.⁹⁵

From 2009 to 2011, Seamus attended the University of Pittsburgh at Johnstown as an undergraduate Computer Science major.⁹⁶ Although in March 2009, on his application for enrollment at the university, he listed his sex as female,⁹⁷ during his entire tenure at the university Seamus held himself out as a male. In August 2011, Seamus requested that the university change the gender marker to male on his school records.⁹⁸ While enrolled at the university, he consistently used the men's bathroom on campus and even registered for a men's weight training class during the spring 2011 semester.⁹⁹ As a student in this class, he used the men's locker room.¹⁰⁰

In September 2011, a university official informed Seamus that he could no longer use the men's locker room without a court order or a new birth certificate reflecting his gender as a male.¹⁰¹ Nonetheless, Seamus continued to use both the men's bathroom and locker room, and after receiving several citations, on December 2, 2011, the university held a disciplinary hearing.¹⁰² At the hearing, Seamus was sanctioned and found guilty of violating the student code of conduct.¹⁰³ Despite these sanctions, Seamus continued to use the men's facilities. Subsequently, he was expelled from the school, and later filed a lawsuit against the university.¹⁰⁴

In his complaint, Seamus asserted that the university discriminated against him in violation of Title IX "because of his sex, including his transgender status and his perceived failure to conform to gender stereotypes."¹⁰⁵ The university's response asserted that Seamus failed to state a cognizable action because Title IX does not prevent discrimination

93. *Johnston*, 97 F. Supp. 3d 657 (2015).

94. *Id.* at 662.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 662–63.

99. *Id.* at 663.

100. *Id.*

101. *Id.*

102. *Id.* at 664.

103. *Johnston*, 97 F. Supp. 3d at 664.

104. *Id.*

105. *Id.* at 672.

on the basis of gender identity.¹⁰⁶ To support their position, the university cited Title IX, which it claims does not mention gender identity, gender expression, or gender transition.¹⁰⁷ Additionally, the university argued that Seamus's allegations did not constitute sex stereotyping, which, if proven, would render the university's action discriminatory.¹⁰⁸

The court in *Johnston* agreed with the university and determined that Seamus failed to state a cognizable claim for discrimination under Title IX.¹⁰⁹ In reaching this conclusion, the court held that the university's policy that required students to use sex-segregated bathrooms and locker rooms based on their biological sex, did not violate Title IX's prohibition against sex discrimination.¹¹⁰ The court reached this finding notwithstanding the fact that it cited no federal court cases where this specific issue was addressed.¹¹¹ Instead, the court relied on federal court decisions that had traditionally held that transgender status is not a protected characteristic under Title VII.¹¹² Namely, the *Johnston* court cited the United States Court of Appeals for the Eighth Circuit's holding in *Sommers v. Budget Marketing, Inc.*, in which the Eighth Circuit concluded that the term "sex" in Title VII should be given the traditional definition of male and female, rather than an expansive meaning which would include transgender status.¹¹³ Influenced by the Eighth Circuit's decision, the court in *Johnston* concluded that Title IX does not provide protection for transgender status.¹¹⁴

Next, the court in *Johnston* addressed Seamus' claim that the university

106. *Id.*

107. *Id.*

108. *Id.*; see also, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

109. *Johnston*, 97 F. Supp. 3d at 672.

110. *Id.* at 672–73.

111. *Id.* at 674.

112. *Id.* at 672 (citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007) (denying a transgender employee's Title VII claim)); see also, *Ulane v. E. Airlines*, 742 F.2d 1081, 1084 (7th Cir. 1984) ("While we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals."); *Sommers v. Budget Marketing, Inc.* 667 F.2d 748, 750 (8th Cir. 1982) ("Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act."); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 658 (S.D. Tex. 2008); ("Courts consistently find that transgendered persons are not a protected class under Title VII per se.") *Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K, 2003 U.S. Dist. Lexis 11373 at *2 (S.D. Ind., June 6, 2003) ("Sweet's intent to change his sex does not support a claim of sex discrimination under Title VII because that intended behavior did not place him within the class of persons protected under Title VII from discrimination based on sex."); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) ("What makes Schroer's sex stereotyping theory difficult is that, when the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII.").

113. *Johnston*, 97 F. Supp. 3d at 676; see also, *Sommers*, 667 F.2d at 750.

114. *Johnston*, 97 F. Supp. 3d at 676.

violated Title IX because it illegally engaged in sex stereotyping by denying him the right to use the men's bathroom and locker room.¹¹⁵ The U.S. Supreme Court in the case of *Price Waterhouse v. Hopkins* first articulated a claim for sex stereotyping.¹¹⁶ In *Price Waterhouse*, the plaintiff, a non-transgender female accountant, was denied partnership in the accounting firm because she failed to conform to the gender stereotypes of a female.¹¹⁷ Several reasons were advanced for failure to promote.¹¹⁸ For example, she was seen as "macho" and she was "overcompensated for a woman". Additionally, it was said she needed to take "a course at charm school" and used too much profanity for a female.¹¹⁹ After reviewing the case, the Supreme Court rendered a landmark decision when it held that employment discrimination based on sex stereotypes constitutes sex discrimination under Title VII.¹²⁰ The *Johnston* Court, however, found the allegations proffered by Seamus were insufficient to state a claim under a sex stereotyping theory.¹²¹

The court noted that Seamus had not alleged that the university discriminated against him because of the way he looked, acted or spoke, and specifically, "he did not behave, walk, talk, or dress in a manner inconsistent with any preconceived notions of gender stereotypes."¹²² Rather, the court found that Seamus merely alleged that the university refused to allow him the use the bathroom based on his gender identity.¹²³ The court determined that merely denying an individual to use the restroom based on his or her gender identity does not constitute sex stereotyping.¹²⁴

2. *G.G. v. Gloucester County School Board*

The 2016 high profile case of *G.G. v. Gloucester County School Board* involved a transgender high school male student who brought a Title IX claim against a school for requiring him to use the bathroom based on his biological sex.¹²⁵ In *Gloucester*, the plaintiff, Gavin Grimm, was diagnosed with gender dysphoria.¹²⁶ He underwent hormone therapy

115. *Id.* at 680.

116. *Price Waterhouse*, 490 U.S. 228 (1989).

117. *Id.* at 278.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Johnston*, 97 F. Supp. 3d at 676.

122. *Id.* at 681.

123. *Id.*

124. The court emphasized the fact that *Johnston* never alleged that the university harassed or discriminated against him because of his transgender status. Also, the court noted that the university had allowed *Johnston* to live as a male in all aspects of his life with the exception of allowing him to use the men's bathroom and men's locker room. *Id.* (citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir.2007)).

125. 822 F.3d. 706, 713, 715 (4th Cir. 2016).

126. "Gender dysphoria (formerly Gender Identity Disorder) is defined by strong, persistent feelings of identification with the opposite gender and discomfort with one's own assigned sex that results in significant distress or impairment. People with gender dysphoria

beginning in his freshman year in high school at which time he legally changed his name to Gavin.¹²⁷ He lived all aspects of his life as a boy, but did not undergo sex reassignment surgery.¹²⁸

Before his sophomore year began, Grimm and his mother told school officials that he was a transgender boy.¹²⁹ School officials were supportive and took steps to make sure teachers and staff treated him as a boy.¹³⁰ In this supportive environment, Grimm requested that school officials allow him to use the boy's bathroom, and the school officials granted him permission.¹³¹ Grimm used the boy's bathroom without incidence for approximately seven weeks.¹³² When his use of the boy's bathroom became known by others in the community, the Gloucester County School Board ("the Board") was contacted in an effort to prevent Grimm from continuing to use the boy's bathroom.¹³³

At a school board meeting, held December 9, 2014, by a vote of 6-1, the Board adopted a new school policy. The policy read in part:

It shall be the practice of [Gloucester County Public Schools] to provide male and female bathroom and locker room facilities in its school, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.¹³⁴

The Board also indicated it would update school bathrooms to improve student privacy and it would, among other things, construct single-stall unisex bathrooms available to all students.¹³⁵ Nevertheless, this newly adopted policy was unsatisfactory because it precluded Grimm from using the boy's bathrooms.¹³⁶ Although unisex bathrooms were available to Grimm under this policy, he did not find them to be a suitable alternative because they made him "feel even more stigmatized . . . and being required to use the separate bathrooms set him apart from his peers, and serve[d] as a daily reminder that the school view[ed] him as 'different.'"¹³⁷ As a result, on June 11, 2015, Grimm sued the Board seeking a preliminary injunction

desire to live as members of the opposite sex and often dress and use mannerisms associated with the other gender." *Id.* (citing Gender Dysphoria, PSYCHOLOGY TODAY (2017), <https://www.psychologytoday.com/conditions/gender-dysphoria> (last visited Oct. 17, 2017)).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d. 706, 713, 715 (4th Cir. 2016).

132. *Id.* at 715–16.

133. *Id.* at 716.

134. *Id.*

135. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d. at 716.

136. *Id.*

137. *Id.*

to allow him to use the boy's bathroom.¹³⁸

The district court held a hearing on Grimm's motion for a preliminary injunction on July 27, 2015, and also on the Board's motion to dismiss Grimm's lawsuit.¹³⁹ At the hearing, the district court orally dismissed Grimm's Title IX claim, followed by written orders dated September 4, 2015, and September 17, 2015, respectively, denying the injunction and dismissing Grimm's Title IX claim.¹⁴⁰ In its September 17, 2015, order, the district court's rationale was clear. Title IX prohibits discrimination on the basis of sex not on the basis of other concepts such as gender identity or sexual orientation.¹⁴¹ The district court concluded that Grimm was female and that requiring him to use the female bathroom did not impermissibly discriminate against him on the basis of sex, which, if proven, would be in violation of Title IX.¹⁴²

Grimm appealed to the United States Court of Appeals requesting reversal of the district court's dismissal of his Title IX claim.¹⁴³ In support of Grimm's appeal, the United States filed an amicus brief in order to defend the federal government's interpretation of Title IX as requiring schools to provide transgender students access to bathrooms congruent with their gender identity.¹⁴⁴ On appeal the United States Court of Appeal reversed the district court's dismissal of the case.¹⁴⁵ The court's rationale for the reversal is circular but noteworthy.¹⁴⁶

In the ruling of the Court of Appeals, the majority opinion relied heavily on the Department of Education's Office of Civil Rights interpretation of the law and used the Department of Education's interpretation as its basis of understanding the law and the application of the law.¹⁴⁷ The court noted that not all distinctions based on sex violate Title IX.¹⁴⁸ For example, it does not violate Title IX for an educational institution receiving federal funds to maintain "separate living facilities for the different sexes."¹⁴⁹ The court cited extensively 34 Code of Federal Regulations §106.33 ("§106.33") which allows "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for

138. *Id.* at 717.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 718.

146. *See id.*

147. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d. at 718.

148. *Id.*

149. *Id.* (quoting 20 U.S.C. § 1686).

students of one sex shall be comparable to such facilities provided for students of the other sex.”¹⁵⁰

However, how is §106.33 to be interpreted and applied? Is the language ambiguous or unambiguous and if so, what difference does it make? In an opinion letter, dated January 7, 2015, the Department of Education’s Office of Civil Rights construed how §106.33 should be applied to transgender individuals.¹⁵¹ According to the opinion letter: “When a school elects to separate or treat students differently on the basis of sex, in those situations, a school generally must treat transgender students consistent with their gender identity.”¹⁵² Notably, at the original trial, the district court failed to follow the Department of Education’s interpretation of §106.33 and instead found that the regulation was unambiguous because “‘it clearly allows the School Board to limit bathroom access on the basis of sex,’ including birth or biological sex.”¹⁵³

Conversely, the Department of Education contended that §106.33 was ambiguous because it was silent as to the meaning of the phrases “students of one sex” and “students of the other sex” in the context of transgender students.¹⁵⁴

The court in *G.G. v. Gloucester County School Board* indicated that if it found the regulation to be unambiguous, as held by the district court, the Department of Education’s interpretation would not be given Auer deference.¹⁵⁵ Therefore, the court began its analysis by first determining whether §106.33 actually contained an ambiguity.¹⁵⁶

The Court of Appeals determined that the regulation §106.33 allows schools to exclude males from female facilities and vice versa.¹⁵⁷ However, the appellate court noted that the regulation did not determine whether a transgender individual would be a male or female “for purposes of access to sex-segregated bathrooms.”¹⁵⁸ Thus, the appellate court determined that the regulation had more than one valid reading as to the

150. *Id.* (quoting 34 C.F.R. § 106.33).

151. *Id.*

152. *Id.* at 715, 718; *see also* Letter From James A. Ferg-Cardima, Acting Deputy Assistance Secretary for Policy, United States Department of Education Office of Civil Rights, to Emily T. Prince, Esq. (Jan. 7, 2015) *available at* http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf (last visited Oct. 17, 2017).

153. *G.G.*, 822 F.3d. at 718 (quoting *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.* 132 F. Supp. 3d 736 (E.D. Va. 2015), *rev’d in part, vacated in part*, 822 F.3d 709 (4th Cir. 2016)).

154. *Id.* at 719.

155. Auer deference means that the agency is given deference in interpreting its regulations. *G.G.*, 822 F.3d. at 720; *see also* *Auer v. Robbins*, 519 U.S. 452 (1997) (holding that when an agency interprets its own regulation it is entitled to near-absolute deference unless it “is plainly erroneous or inconsistent with the regulation”).

156. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d. at 720.

157. *Id.*

158. *Id.*

meaning of the “maleness or femaleness.”¹⁵⁹ As such, the court found the regulation to be ambiguous as applied to transgender individuals.¹⁶⁰

Since the Court of Appeals determined that the regulation was ambiguous as applied to transgender individuals, the Department of Education’s interpretation would be given deference unless the School Board could show that the Department of Education’s interpretation was “plainly erroneous or inconsistent with the regulation or statute,”¹⁶¹ and that the deference was unreasonable. The appellate court noted at the time Title IX was adopted in 1975, there were two dictionary definitions and interpretations of the word “sex.”¹⁶² According to the first definition, the word “sex” means “‘the character of being either male or female’ or ‘the sum of those anatomical and physiological differences with reference to which the male and female are distinguished.’”¹⁶³ According to the second definition the word “sex” is described as:

The sum of the morphological, physiological and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usually genetically controlled and associated with special sex chromosomes and that is typically manifested as maleness and femaleness.¹⁶⁴

Although the appellate court’s majority reasoned that these two definitions suggest that at the time Title IX was enacted, the term “sex” was understood to denote a male, and was mainly based on biological sex, these classic definitions were not the only way that the term “sex” could be defined.¹⁶⁵

In addition, to warrant deference to the Department of Education’s interpretation of §106.33 for transgender individuals, the interpretation had to be reasonable.¹⁶⁶ In determining whether this interpretation was reasonable, the court looked at the Department of Education’s position on transgender individuals and found it to have been consistently enforced since 2014.¹⁶⁷ Furthermore, the Department’s position that maleness and femaleness is determined by one’s gender was in line with existing guidance and regulations of various federal agencies, including the Occupational Safety and Health Administration (“OSHA”); the Equal Employment Opportunity Commission (“EEOC”); the Department of

159. *Id.*

160. *Id.*

161. *Id.* at 721 (citing *Auer*, 519 U.S. at 461).

162. *Id.*

163. *Id.* (quoting *American College Dictionary* 1109 (1970)).

164. *Id.* (quoting *Webster’s Third New International Dictionary* 2081 (1971)).

165. *Id.*

166. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d. at 721.

167. *Id.*

Housing and Urban Development, and the Office of Personnel Management.¹⁶⁸ On this basis, the majority of the appellate court determined that the Department of Education's interpretation of §106.33, as it relates to bathroom access by transgender individuals, was entitled to deference and should be the controlling weight in the case.¹⁶⁹ Accordingly, the court reversed the district court's dismissal of Grimm's Title IX claim.¹⁷⁰

B. THE TITLE VII CLAIM - EMPLOYMENT

Title VII of the Civil Rights Act of 1964, that provides in pertinent part that "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin," addresses discrimination in the

168. *Id.*; see also *Lusardi v. McHugh*, Appeal No. 0120133395 (E.E.O.C. 2013), available at <http://transgenderlawcenter.org/wp-content/uploads/2015/04/EEOC-Lusardi-Decision.pdf> (holding that the employer's decision to prevent the transgender employee from using the restroom based on her gender identity violated Title VII). In May 2016, the Equal Employment Opportunity Commission published a fact sheet titled Bathroom Access for Transgender Employees under Title VII of the Civil Rights Act of 1964 addressing transgender employees' rights in the workplace and reiterating its conclusion reached in the *Lusardi* case. Fact Sheet: Bathroom Access for Transgender Employees under Title VII of the Civil Rights Act of 1964, Equal Employment Opportunity Commission, <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm> (last visited Oct. 7, 2017). In June 2015, the Occupational Safety and Health Administration provided guidance to employers through a publication titled a Guide to Restroom Access for Transgender Workers that stated the following: "The core belief underlying these policies is that all employees should be permitted to use the facilities that correspond with their gender identity. For example, a person who identifies as a man should be permitted to use men's restrooms, and a person who identifies as a woman should be permitted to use women's restrooms. The employee should determine the most appropriate and safest option for him- or herself." Best Practices: A Guide to Restroom Access for Transgender Workers, United States Department of Labor: Occupational Safety and Health Administration, <https://www.osha.gov/Publications/OSHA3795.pdf> (last visited Oct. 17, 2017); Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, U.S. Office of Personnel Management, <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/> (last visited Oct. 17, 2017) (stating that for "a transitioning employee, this means that, once he or she has begun working in the gender that reflects his or her gender identity, agencies should allow access to restrooms and (if provided to other employees) locker room facilities consistent with his or her gender identity"); "HUD assumes that a recipient or a sub-recipient ('provider') that makes decisions about eligibility or placement into single-sex emergency shelters or facilities will place a potential client (or a current client seeking a new assignment) in a shelter or a facility that corresponds to the gender with which the person identifies, taking health and safety into consideration." Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities, Notice CPD-15-02, U.S. Department of Housing and Urban Development (2015) available at <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf> (last visited Oct. 17, 2017).

169. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d. at 723.

170. *Id.*

workplace.¹⁷¹ To establish a prima facie case of employment discrimination under Title VII, the plaintiff must be established that he or she “(1) is a member of a protected class; (2) suffered an adverse employment action; (3) was qualified for the position in question; and (4) was treated differently from similarly situated individuals outside of his protected class.”¹⁷² The following cases are of interest and help to understand the application of this law when a plaintiff files a Title VII claim against an employer for failing to allow the use of a bathroom based on gender identity.

1. *Etsitty v. Utah Transit Authority*

In *Etsitty v. Utah Transit Authority*¹⁷³ the plaintiff, Krystal Etsitty, a female transgender individual, sued Utah Transit Authority because she was allegedly terminated for failure to “conform to their expectations of stereotypical male behavior.”¹⁷⁴ Both parties filed for summary judgment.

Etsitty was born as a biological male, but identified as a woman and dressed as a female outside of work.¹⁷⁵ Diagnosed with gender dysphoria, Etsitty began taking female hormones.¹⁷⁶ A few years later, she applied for and received a position as a bus operator with the UTA.¹⁷⁷ During the training period, Etsitty presented herself as a male and used the male bathrooms.¹⁷⁸ Shortly thereafter, she met with her supervisor informing him that she was transgender and would begin appearing at work as a female.¹⁷⁹ Initially, her supervisor expressed support for Etsitty and indicated that there should be no problem with her transgender status.¹⁸⁰ Following this meeting with her supervisor, Etsitty began wearing makeup, jewelry, and acrylic nails to work and began using the female bathrooms while on her route.¹⁸¹ Along the route, bus operators have permission to use the bathrooms of selected businesses but that right is revocable.¹⁸²

Subsequently, Betty Shirley, the operations manager of the UTA division where Etsitty worked, became concerned about the bathroom Etsitty would be using, male or female, and spoke to Bruce Cardon, a human resource generalist for Shirley's division.¹⁸³ Afterwards, a meeting

171. 42 U.S.C. § 2000e-2(a).

172. *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566, 570 (6th Cir. 2004).

173. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1215 (10th Cir. 2007).

174. *Id.* at 1218.

175. *Id.*

176. *Id.*

177. *Id.* at 1218–19.

178. *Id.* at 1219.

179. *Id.*

180. *Etsitty v. Utah Transit Auth.*, 502 F.3d at 1219.

181. *Id.*

182. *Id.*

183. *Id.*

was set up with Etsitty to discuss the matter.¹⁸⁴ At the meeting, concern was expressed and questions posed as to whether Etsitty would switch back and forth between the male and female bathroom, especially since she had not undergone a sex-change operation.¹⁸⁵ After the meeting, Etsitty was placed on administrative leave and ultimately terminated.¹⁸⁶ One reason advanced for Etsitty's termination was the potential liability for UTA "from co-workers, customers, and the general public" resulting from Etsitty's usage of the female bathroom.¹⁸⁷

To support her claim of sex discrimination pursuant to Title VII, Etsitty presented two separate legal theories.¹⁸⁸ Under the first theory, she alleged she suffered sex discrimination based on her status as a transgender.¹⁸⁹ Under the second theory, she alleged she suffered sex discrimination because she failed to conform to sex stereotypes.¹⁹⁰

The United States Court of Appeals for the Tenth Circuit first addressed whether transgender status is a protected class under Title VII.¹⁹¹ Since this appellate court had never addressed this question, it relied on a line of other court decisions that have held that transgender status is not a protected class under the law.¹⁹² Based on this reliance, the court concluded that Etsitty's first legal theory, sex discrimination based on her transgender status, failed.¹⁹³

The appellate court next addressed Etsitty's second legal theory that she suffered from sex discrimination because she failed to conform to the social stereotypes about how a man should act or appear.¹⁹⁴ On this issue, the appellate court assumed that Etsitty had satisfied her prima facie burden under the *Price Waterhouse* theory of gender stereotyping, thereby shifting the burden to UTA to articulate a legitimate nondiscriminatory reason for Etsitty's termination.¹⁹⁵ Recall, UTA's reason for termination was based on the potential liability it faced because Etsitty intended to use the female bathroom.¹⁹⁶ Clearly, it would not always be possible to accommodate Etsitty's bathroom preference because UTA drivers, like Etsitty, typically

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 1221.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* (citing *Ulane v. E. Airlines*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977)) ("A transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII. This court refuses to extend the coverage of Title VII to situations that Congress clearly did not contemplate.")

193. *Id.* at 1222.

194. *Etsitty v. Utah Transit Auth.*, 502 F.3d at 1222–23.

195. *Id.* at 1224.

196. *Id.*

use public bathrooms along their routes rather than bathrooms at the UTA facility.¹⁹⁷ In response, Etsitty argued that basing her termination on her intent to use the female bathroom “is essentially another way of stating that she was terminated for failing to conform to sex stereotypes.”¹⁹⁸

The appellate court disagreed with Etsitty and concluded that the UTA’s concern constituted a nondiscriminatory, legitimate reason for termination.¹⁹⁹ According to the court, “Title VII’s prohibition on sex discrimination, however, does not extend so far [and] . . . [u]sing the bathroom designated for the opposite sex does not constitute a . . . failure to conform to sex stereotypes.”²⁰⁰

Since the appellate court concluded that the UTA had provided a legitimate nondiscriminatory reason for Etsitty’s termination, the burden shifted to Etsitty to show there was a genuine issue of material fact as to whether the proffered reason was a pretext which would preclude summary judgment sought by both parties.²⁰¹ Etsitty contended that a rational jury could conclude that she was terminated because she did not act and appear, as the UTA believed a man should, and she pointed to evidence in the record, including the deposition testimony of the UTA employees who expressed concern about Etsitty using the bathroom.²⁰² Specifically, Etsitty pointed to Shirley’s statements that: “We both felt that there was an image out there for us, that we could have a problem with having someone who, even though his appearance may look female, he’s still a male because he still has a penis.”²⁰³ Additionally, Etsitty pointed to Cardon’s statements that: “We have expectations of operators and how they appear to the public if we see something that is considered radical or could be interpreted by the public as being inappropriate, we talk to the operators about that and expect them to have a professional appearance.”²⁰⁴

After a complete review of the deposition testimony, the appellate court concluded that these statements did not provide sufficient evidence of pretext to preclude summary judgment in favor of UTA.²⁰⁵ To support this position, the appellate court pointed to Shirley’s statements after she mentioned Etsitty’s appearance.²⁰⁶ In those statements, Shirley explained that the problem with Etsitty’s appearance was that Etsitty may not be able to find a unisex bathroom on the route, thereby exposing UTA to liability.²⁰⁷ Moreover, the court observed that when Cardon was asked

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1225.

202. *Id.*

203. *Id.*

204. *Etsitty v. Utah Transit Auth.*, 502 F.3d at 1225.

205. *Id.*

206. *Id.*

207. *Id.* at 1225–26.

what he found unprofessional about Etsitty's appearance, he responded with concerns about her bathroom selection.²⁰⁸ Thus, the court concluded that, when the deposition testimony of Shirley and Cardon were read in their entirety and in context, it provided additional proof that the UTA did not terminate Etsitty because she failed to conform with gender stereotypes.²⁰⁹ Instead, the court determined that the testimony proved that the UTA terminated Etsitty because she was a biological male who intended to use the women's public bathroom.²¹⁰ Based on the evidence, the court affirmed the district court's decision to grant summary judgment in favor of the UTA on Etsitty's Title VII claim.²¹¹

2. *Roberts v. Clark County School District*

The case of *Roberts v. Clark County School District* also involved a transgender employee who brought a Title VII claim after being denied the right to use the bathroom based on his gender identity.²¹² The plaintiff, Bradley Roberts, a transgender police officer with the Clark County School District in Nevada, was born female but identified as a male.²¹³ His employment with the school district began in 1992 and continued without any incident until he began dressing as a male for work in 2011.²¹⁴ At that time, he also began using the men's bathroom at work.²¹⁵ When others complained, Roberts' commanding officers scheduled a meeting with him.²¹⁶ During the meeting, Roberts was informed that he could no longer use the men's bathroom and he should "confine himself to the gender neutral bathrooms to avoid any further complaints."²¹⁷

In response, Roberts sent a letter to his superior explaining that he was changing his name to Bradley; he wanted his coworkers to use male pronouns when referring to him; and he wanted to use the men's bathroom.²¹⁸ A meeting to discuss the matter was held in November 2011, and at that time, it was decided that Roberts could be referred to as a man but was not allowed to use the men's or women's bathroom.²¹⁹ Instead, he had to use a gender-neutral or single occupancy bathroom until he could provide documentation of a sex change.²²⁰ Roberts' lawsuit alleging a violation of Title VII followed.²²¹

208. *Id.* at 1226.

209. *Id.*

210. *Id.*

211. *Id.* at 1227.

212. *Roberts v. Clark Cty. Sch. Dist.*, 215 F.Supp.3d 1001 (D. Nev. 2016).

213. *Id.*

214. *Id.* at 1004–05.

215. *Id.* at 1005.

216. *Id.*

217. *Id.*

218. *Roberts v. Clark Cty. Sch. Dist.*, 215 F.Supp.3d at 1005.

219. *Id.* at 1005–06.

220. *Id.*

221. *Id.*

On his Title VII claim, the United States District Court of Nevada answered the question of whether Title VII's protection against sex discrimination includes protection for gender identity.²²² In answering this question and in support of its decision, the district court cited the Ninth Circuit's unpublished decision in *Kastl v. Maricopa County Community College District*. The 2004 decision in *Kastl* signaled the direction of the Ninth Circuit's position in transgender Title VII cases.²²³ Notably, the *Kastl* case, previously mentioned in this article, involved a transgender adjunct instructor who sued the Estrella Mountain Community College after she was banned from the women's bathroom.²²⁴ In *Kastl*, the Ninth Circuit found a prima facie case of gender discrimination on "the theory that impermissible gender stereotypes were a motivating factor" in the community college's actions against the transgender instructor.²²⁵

The district court in *Roberts* also referenced the Ninth Circuit's decision *Schwenk v. Hartford*.²²⁶ The *Schwenk* court expanded the analysis of Title VII and struggled with question of whether the Gender Motivated Violence Act ("GMVA") covered transgender individuals.²²⁷ The Act provides a federal protected civil-rights cause of action for victims of gender-motivated violence.²²⁸ The Act also protects men who were sexually assaulted by other men.²²⁹ The *Schwenk* court examined the term "sex" under Title VII and found that it encompasses "both sex—that is, biological differences between men and women—and gender," a term which was used to "refer to an individual's sexual identity."²³⁰ Additionally, the district court found that the GMVA parallels Title VII, which means that like Title VII, the GMVA prohibits discrimination based on a person's gender identity.²³¹ Based on *Schwenk*, the district court in *Roberts* reasoned that the United States Court of Appeals for the Ninth Circuit would likely hold that gender-identity discrimination is actionable under Title VII.²³²

Accordingly, the district court in *Roberts* held that discrimination based on a person's gender identity violates Title VII discrimination because it

222. *Id.* at 1011.

223. *Id.* at 1012–13 (citing *Kastl v. Maricopa County Community College District*, 325 F.App'x 492 (9th Cir. 2009)).

224. It should be noted that the court granted the community college's motion for summary judgment because the employee failed to provide sufficient evidence that the community college's legitimate nondiscriminatory reason for denying her the right to use the women's restroom was a pretext. *Kastl*, 325 F.App'x at 493.

225. *See id.*

226. *Id.* at 1014 (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)).

227. *Schwenk*, 204 F.3d at 1202.

228. *Id.*

229. *Id.*

230. *Schwenk*, 204 F.3d at 1202.

231. *Id.*

232. *Roberts*, 215 F.Supp.3d at 1014.

amounts to sexual discrimination.²³³ The district court explained that the Roberts' employer, the Clark County School District, did not challenge *Roberts* regarding all of the four necessary elements of a prima facie case of discrimination, but merely challenged: (1) whether he had actually suffered an adverse employment action and (2) whether the employer treated him differently than a similarly situated employee who did not belong to the same protected class.²³⁴

On the question of whether banning Roberts from the bathroom was an adverse employment action, the court concluded that it was.²³⁵ In reaching this conclusion, the district court referenced and adopted the EEOC's decision in *Lusardi v. McHugh*.²³⁶ In *Lusardi*, the EEOC addressed the issue of whether a transgender employee proved that she was subjected to disparate treatment and harassment based on sex when her employer, the U.S. Army Aviation and Research Development and Engineering Center, among other things, restricted her from using the common female bathroom.²³⁷ The EEOC concluded that the employer's decision to prevent Lusardi from using the bathroom based on her gender identity violated Title VII.²³⁸ The EEOC explained that "[e]qual access to bathrooms is a significant, basic condition of employment" and concluded that segregating bathroom access based on a person's transgender status constitutes a significant harm for transgender individuals.²³⁹

On the question of whether the school district treated Roberts differently than similarly situated employees, the district court also affirmed.²⁴⁰ The court based its decision on evidence that Roberts was not allowed to use the female bathroom, which meant that he was treated differently than other females.²⁴¹ Further, the court concluded that the

233. *Id.*

234. *Id.* at 1015; *see also* *Cornwell v. Electra Central Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006) (citing *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802 (1973)) ("To state a prima facie claim for discrimination, the plaintiff must show that (1) he belongs to a protected class, (2) performed his job satisfactorily, (3) he suffered an adverse employment action, and (4) the employer treated him differently than a similarly situated employee who does not belong to the same protected class.").

235. *Roberts*, 215 F.Supp.3d at 1015.

236. *Id.*

237. The EEOC "is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information." Overview, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/eeoc/index.cfm> (last visited on July 31, 2017); *see also*, *Lusardi v. McHugh*, Appeal No. 0120133395 (E.E.O.C. 2013), <http://transgenderlawcenter.org/wp-content/uploads/2015/04/EEOC-Lusardi-Decision.pdf>.

238. Overview, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/eeoc/index.cfm> (last visited July 31, 2017); *see also* *Lusardi v. McHugh*, Appeal No. 0120133395 (E.E.O.C. 2013), <http://transgenderlawcenter.org/wp-content/uploads/2015/04/EEOC-Lusardi-Decision.pdf>.

239. *Roberts*, 215 F.Supp.3d at 1015.

240. *Id.* at 28.

241. *Id.*

school district failed to articulate a legitimate nondiscriminatory reason for the bathroom ban. Thus, the court granted summary judgment in Roberts's favor on the question of whether the school district discriminated against Roberts under Title VII.²⁴²

IV. LEGAL CONSIDERATIONS WHEN ENACTING BIOLOGY-BASED LAWS

Only a handful of cases have dealt with transgender bathroom laws and these cases have resulted in inconsistent holdings. As such, it is difficult, likely impossible in most cases, to determine how a court will hold when confronted with transgender bathroom policies or laws in both the public educational and employment sectors.²⁴³

Albeit few in numbers, an examination of federal cases that have been decided can reasonably highlight facts and factors to consider when a state is contemplating whether to enact biology-based or gender-identity based transgender bathroom laws for students and employees.

A. THE EDUCATIONAL SECTOR

Let's compare the facts in *Johnston v. University of Pittsburg of the Commonwealth System of Higher Education* with those in *G.G. v. Gloucester County School Board*.²⁴⁴ First, let's examine the type of setting. The *Johnston* case involved a transgender college student in Pittsburg, Pennsylvania, who enrolled in the school as a female, but held himself out to be a male throughout his entire tenure at the university.²⁴⁵ Next, let's examine the response from the school when they became aware of the issue. In *Johnston*, after the student informed the post-secondary school of his transgender status, the school did not support the right of the student to use the bathroom based on his gender identity.²⁴⁶ Despite this fact, the student continued to use the men's bathroom and locker rooms and was even sanctioned for his failure to comply with the school's request to stop using these facilities.²⁴⁷

Comparatively, *G.G. v. Gloucester County School Board* involved a transgender student who was diagnosed with gender dysphoria and attended a secondary school in Gloucester, Virginia.²⁴⁸ He was not a college student as in *Johnston*. And unlike the college in *Johnston*, when the high school student and his mother informed the school of his

242. Using the same analysis, the court concluded that the school district in precluding Roberts from using the male and female restrooms also violated N.R.S. 613.330, which prevents employers from discriminating against employees based on gender identity. *Id.* at *29.

243. *See supra* notes 94-171.

244. *See id.*

245. *See supra* notes 94-125.

246. *See supra* notes 94-125.

247. *Id.*

248. *See supra* notes 126-171.

transgender status, the school initially allowed him to use the boy's bathroom and only back peddled on it its decision after receiving negative publicity.²⁴⁹ It seems ironic that the secondary school in *G.G. v. Gloucester County School Board*—where students are younger and more impressionable—was initially more supportive of a gender identity-based bathroom choice than the post-secondary school in the *Johnston* case—where the students are older and less impressionable.²⁵⁰

The court's conclusions in the two cases were very different.²⁵¹ The court in *Johnston*, decided on the district court level that preventing the college level transgender student from using the men's bathroom did not violate Title IX, whereas the appellate court in *G.G. v. Gloucester County School Board* concluded that preventing the secondary education level transgender student from using the boy's bathroom violated Title IX.²⁵² These very different decisions were reached based on completely different analysis by the courts in these cases.²⁵³

The *Johnston* holding that Title XI is not violated when a transgender student is denied the right to use a bathroom because of a biology-based policy was decided in March 2015 without any consideration of the Department of Education's January 7, 2015, letter stating that transgender students should be allowed to use the bathroom or other public facilities based on the gender identity.²⁵⁴ Instead, the district court in *Johnston* used as guidance the Eighth Circuit's Title VII cases, including *Sommers v. Budget Marketing, Inc.*, holding that transgender employees are not protected under Title VII.²⁵⁵ Further, the *Johnston* court determined that the student had not sufficiently alleged sex discrimination based on sex stereotyping.²⁵⁶ The district court's conclusion was based on its finding that the student did not claim that the university discriminated against him because of the way he looked, acted or spoke and he never alleged that the university harassed him.²⁵⁷ The district court found that the student's only allegation was that he was denied the right to use the bathroom based on his gender identity, which in the court's opinion was not enough to constitute a sex-stereotyping claim.²⁵⁸

In contrast, *G.G. v. Gloucester County School Board* was decided in 2016. Unlike the district court in *Johnston*, the appellate court in *G.G. v. Gloucester County School Board* considered the Department of Education's January 7, 2015, letter and used it as a basis for determining

249. *Id.*

250. *Id.*

251. *See supra* notes 94-171.

252. *Id.*

253. *Id.*

254. *See supra* notes 94-125.

255. *See id*; *see also*, *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982).

256. *See supra* notes 94-125.

257. *Id.*

258. *See supra* notes 94-125.

whether the biology-based bathroom laws violated the transgender student's Title IX rights.²⁵⁹ On May 13, 2016, approximately one month after the *G.G. v. Gloucester County School Board* case was decided, President Barack Obama provided further guidance to public schools and universities grappling with the issue of whether to allow transgender students to use public bathrooms or facilities based on their biology or their gender identity.²⁶⁰

Specifically, in a joint letter from the Department of Justice and the Department of Education, the Obama administration made it clear that students in schools should be allowed to use the bathroom based on their gender identity.²⁶¹ This letter, in pertinent part, stated that: "When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity."²⁶²

Thereafter, failing to prevail at the appellate level, the Gloucester County School Board petitioned the Supreme Court to hear the case, and the Court granted the school board's writ of certiorari on October 28, 2016.²⁶³ However, in January 2017 a new United States president was sworn into office and on February 22, 2017, the newly elected President, Donald Trump, revoked the federal guidelines issued under the Obama administration that protected transgender students. The revocation effectively placed in the hands of the states and school districts the decision of whether or not transgender students should have access to bathrooms based on their gender identity.²⁶⁴

259. *See supra* notes 126-171.

260. Emanuella Grinberg, *Feds Issue Guidance on Transgender Access to Public Restrooms*, CNN, May 14, 2016, available at <http://www.cnn.com/2016/05/12/politics/transgender-bathrooms-obama-administration/> (last visited Oct. 17, 2017); Julie Hirschfeld Davis & Matt Apuzzo, *U.S. Directs Public Schools to Allow Access to Restrooms*, N.Y. TIMES, May 12, 2016, available at <http://www.nytimes.com/2016/05/13/us/politics/obama-administration-to-issue-decree-on-transgender-access-to-school-restrooms.html?r=0> (last visited Oct. 7, 2017).

261. Letter from Department of Justice, Office for Civil Rights and Department of Education, Office of Civil Rights (May 13, 2016), available at <https://www.justice.gov/opa/file/850986/download> (last visited Oct. 17, 2017).

262. *Id.*

263. *See*, *Gloucester County School Board v. G.G.*, 137 S. Ct. 369 (Oct. 28, 2016).

264. In November 2016, Republican candidate Donald J. Trump won the presidential election beating Democratic candidate Hillary Rodham Clinton. *See* Matt Flegenheimer & Michael Barbaro, *Donald Trump is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES, Nov. 9, 2016, available at <https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html> (last visited July 26, 2017) ("Donald John Trump was elected the 45th president of the United States on Tuesday in a stunning culmination of an explosive, populist and polarizing campaign that took relentless aim at the institutions and long-held ideals of American democracy."); Letter from Department of Justice, Office for Civil Rights (Feb. 22, 2017), available at <http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf> (last visited Jul. 24, 2017); *see also*, Greg Toppo, *Trump Administration Pulls Transgender Restroom Rules; It Should Be Up to States to Decide Issue, White House Says*, USA TODAY, Feb. 23, 2017, at 3A

This revocation of federal guidelines was articulated in a joint letter from the Department of Education and the Department of Justice.²⁶⁵ The joint letter from the Trump administration specifically withdrew the Department of Education's January 7, 2015, letter and the joint letter from the Department of Education and the Department of Justice dated May 13, 2016.²⁶⁶ At the time of the Trump administration's letter dated February 22, 2017, the *G.G. v. Gloucester County School Board* case was still before the Supreme Court.²⁶⁷ Based on the Trump administration letter, the Supreme Court vacated and remanded the case back to the United States Court of Appeals for the Fourth Circuit to decide the case, without consideration of the Department of Education's January 7, 2015, letter.²⁶⁸

On August 2, 2017, the United States Court of Appeals for the Fourth Circuit remanded the case to the district court for this court to decide whether the case is moot since the high school student graduated in June 2017.²⁶⁹ If the district court determines that the case is moot, there will be no decision in the case. If the district court decides that the case is not moot, the Court of Appeals will have to decide the case without the Department of Education's January 7, 2015, letter.

Without this letter, there will be no interpretation by the Department of Education as to the meaning of how §106.33, allowing "separate toilet, locker room, and shower facilities on the basis of sex" should be interpreted for transgender students. Consequently, it is very possible that the ordinary definition of the term "sex" based on one's biological sex at birth will be used to define the term.²⁷⁰ Moreover, given the current

("The Trump administration withdrew guidelines outlining which restrooms transgender students can use, potentially sowing confusion in schools, angering LGBTQ rights groups and adding uncertainty to a widely discussed case due to come before the U.S. Supreme Court next month."); Ariane de Vogue, Mary Kay Mallonee & Emanuella Grinberg, *Trump Administration Withdraws Federal Protection for Transgender Students*, CNN, Feb. 23, 2017, available at <http://www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protection-on-transgender-bathrooms-in-schools/> (last visited July 20, 2017) ("The Trump administration on Wednesday night withdrew Obama-era protections for transgender students in public schools that let them use bathrooms and facilities corresponding with their gender identity."); Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathroom for Transgender Students*, N.Y. TIMES, Feb. 22, 2017, available at <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html> (last visited on July 20, 2017) ("In a joint letter, the top civil rights officials from the Justice Department and the Education Department rejected the Obama administration's position that nondiscrimination laws require schools to allow transgender students to use the bathrooms of their choice.").

265. See Letter from Department of Justice, Office for Civil Rights (Feb. 22, 2017), available at <http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf> (last visited July 24, 2017).

266. *Id.*

267. See *Gloucester County Sch. Bd. v. G. G.*, 2017 U.S. LEXIS 1626 (U.S., Mar. 6, 2017).

268. *Id.*

269. *Gloucester County Sch. Bd. v. G. G.*, 869 F.3d 286 (4th Cir. 2017).

270. See *supra* notes 126-171.

political climate in the federal government to limit the rights of transgender students, it is very possible that the United States Court of Appeals for the Fourth Circuit may find that the Gloucester County School Board's biology-based transgender bathroom policy does not violate Title IX.²⁷¹ Furthermore, it is very likely that when states impose biology-based transgender bathroom policies for students, conservative courts may find that these laws do not violate Title IX.

However, the victory is not completely won by proponents for biology-based bathroom policies and laws. If states adopt biology-based bathroom policies for students, there still may be potential liability under Title IX based on the theory of sex stereotyping, a claim articulated in the *Price Waterhouse* case.²⁷² As previously mentioned, this case involved an accountant who was denied a job because she was "too macho" and was told that she needed to "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."²⁷³ In essence, the accountant was denied the position because she did not fit the gender stereotypes of a female.²⁷⁴ The Supreme Court in *Price Waterhouse* held that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender" in violation of the law.²⁷⁵

Although the United States Supreme Court in *Price Waterhouse* did not specifically address a transgender individual, the United Court of Appeals for the Sixth Circuit addressed this specific issue in *Smith v. City of Salem*.²⁷⁶ This case involved a transgender firefighter who was forced to resign and later brought a Title VII sex-stereotyping claim against her employer.²⁷⁷ The appellate court concluded that the employee had a cognizable claim under Title VII.²⁷⁸ In reaching, this holding the court stated the following:

. . . discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered

271. *See id.*

272. *Price Waterhouse*, 490 U.S. 228 (1998).

273. *Id.*

274. *Id.*

275. *Id.*

276. *Smith*, 378 F.3d 566 (6th Cir. 2004).

277. *Smith*, 378 F.3d 566 (6th Cir. 2004).

278. *Id.*

discrimination because of his or her gender non-conformity.²⁷⁹

In essence, the appellate court in *Smith* determined that a sex stereotyping claim may also exist for transgender individuals if an adverse action is taken against them because they fail to act according to certain preconceived notions about how a particular gender should act.

This means that when states consider adopting biology-based transgender bathroom policies for students, they should be aware that in some jurisdictions this type of policy or law may be viewed as a form of sex stereotyping or a means of discriminating against individuals because of their failure to conform to preconceived notions about their biological sex.²⁸⁰ In those jurisdictions, a biology-based transgender bathroom policy would illegally violate Title IX.²⁸¹ Thus, states in these jurisdictions should be wary about enacting biology-based transgender bathroom policies as these laws could potentially expose schools to legal liability.

B. THE EMPLOYMENT SECTOR

First, before analyzing the employment cases discussed in this article, it should be noted that on December 15, 2014, the Obama administration issued a memorandum stating that “Title VII’s prohibition of sex discrimination . . . encompasses discrimination based on gender identity, including transgender status.”²⁸² Subsequently, at least two federal agencies—the EEOC and the OSHA—provided guidance to employers on the rights of transgender employees to use public bathrooms or facilities.²⁸³ Specifically, in May 2016, the EEOC published a fact sheet titled *Bathroom Access for Transgender Employees under Title VII of the Civil Rights Act of 1964* addressing transgender employees’ rights in the workplace and reiterating its conclusion reached in the *Lusardi v. McHugh* case, holding that an employer’s decision to prevent a transgender employee from using the bathroom based on her gender identity violated

279. *Id.* at 575.

280. Compare *Roberts v. Clark Cnty Sch. Dist.*, 215 F. Supp. 3d 1001, 1010 (D. Nev., Nov. 28, 2016) with *Etsitty v. Utah Transit Auth.*, 502 F.3d at 1219 (Etsitty argued that terminating her because she was going to use the female restroom was a form of sex stereotyping or was based on her failure to conform to gender stereotypes of a male.)

281. See *Roberts v. Clark County School District*, 215 F. Supp. 3d 1001, 1010 (D. Nev., Nov. 28, 2016).

282. See *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, (Op. Att’y Gen. Dec. 15, 2014), available at <https://www.justice.gov/file/188671/download> (last visited Oct. 12, 2017).

283. See *infra* notes 237-240; see also *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace* issued by the U.S. Office of Personnel Management, OPM.GOV, available at <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/> (last visited Oct. 17, 2017) (stating that for “a transitioning employee, this means that, once he or she has begun working in the gender that reflects his or her gender identity, agencies should allow access to restrooms and (if provided to other employees) locker room facilities consistent with his or her gender identity”).

Title VII.²⁸⁴

Also, in June 2015, the OSHA provided guidance to employers through a publication titled a Guide to Bathroom Access for Transgender Workers that stated the following:

The core belief underlying these policies is that all employees should be permitted to use the facilities that correspond with their gender identity. For example, a person who identifies as a man should be permitted to use men's bathrooms, and a person who identifies as a woman should be permitted to use women's bathrooms. The employee should determine the most appropriate and safest option for him- or herself.²⁸⁵

In essence, the OSHA's position is that transgender employees should be allowed to use the bathroom based on their gender identity.²⁸⁶

However, on October 4, 2017, the Trump administration reversed the Obama administration's memorandum dated December 15, 2016, by issuing a memorandum stating that "Title VII's prohibition against sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se, including transgender status."²⁸⁷ Similar to rights of transgender students,

284. Fact Sheet: Bathroom Access for Transgender Employees under Title VII of the Civil Rights Act of 1964, U.S. Equal Employment Opportunity Commission, *available at* <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm> (last visited Oct. 17, 2017) (In May 2016, the EEOC published a fact sheet titled Bathroom Access for Transgender Employees under Title VII of the Civil Rights Act of 1964 addressing transgender employees' rights in the workplace and reiterating its conclusion reached in the Lusardi case.); *see also*, Lusardi v. McHugh, Appeal No. 0120133395, *available at* [http://op.bna.com.s3.amazonaws.com/eg.nsf/id/pdon9velpx/%24File/lusardi%20\(eeoc%20decision\).pdf](http://op.bna.com.s3.amazonaws.com/eg.nsf/id/pdon9velpx/%24File/lusardi%20(eeoc%20decision).pdf) (last visited Oct. 17, 2017).

285. Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace issued by the U.S. Office of Personnel Management, Fact Sheet: Bathroom Access for Transgender Employees under Title VII of the Civil Rights Act of 1964, *available at* <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/> (last visited Oct. 17, 2017).

286. "With the Occupational Safety and Health Act of 1970, Congress created the Occupational Safety and Health Administration (OSHA) to assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance." About OSHA, United States Department of Education, *available at* <https://www.osha.gov/about.html> (last visited on July 31, 2017); *see also*, Best Practices: A Guide to Restroom Access for Transgender Workers, *available at* <https://www.osha.gov/Publications/OSHA3795.pdf> (last visited Oct. 17, 2017). In June 2015, the OSHA provided guidance to employers through a publication titled a Guide to Restroom Access for Transgender Workers that stated the following: "The core belief underlying these policies is that all employees should be permitted to use the facilities that correspond with their gender identity. For example, a person who identifies as a man should be permitted to use men's restrooms, and a person who identifies as a woman should be permitted to use women's restrooms. The employee should determine the most appropriate and safest option for him-or herself."

287. *See* Revised Treatment of Transgender Employment Discrimination Claims (Op. Att'y Gen. Oct. 17, 2017), *available at* <https://assets.documentcloud.org/documents/406743>

the federal government has attempted to limit the rights of transgender employees. Presently, the federal administrative guidelines from the EEOC and OSHA remain unchanged. The question of whether biology-based transgender bathroom laws violate Title VII remains, but the answer to the question is as muddy as the great Mississippi River.

Indeed, the ultimate determination of the question of whether biology-based transgender bathroom laws and policies for employees violate Title VII is the United States Supreme Court. However, until the Supreme Court decides this matter, the question will remain a topic of much debate. Since this question has yet to be decided, perhaps a comparison of the handful of federal cases that have addressed this question, will be helpful.

The *Etsitty* case involved a transgender bus driver who asked to be allowed to use the female bathrooms during her route.²⁸⁸ In other words, the employee was not requesting to use the restroom at her place of employment, but at locations away from her place of employment.²⁸⁹ UTA, the employer of the transgender employee, claimed that it denied the employee's request based on its concern for UTA's potential liability resulting from the employee's bathroom use while away from the employer's place of business.²⁹⁰

The *Roberts* case involved a transgender police officer that requested to use the men's bathroom at his place of employment.²⁹¹ Clark County School District, the employer, denied the employee's request without any apparent explanation.²⁹² The courts in *Etsitty* and *Roberts* reached very different conclusions on the question of whether the employers violated Title VII by preventing the employees from using the bathroom based on their gender identity.²⁹³ The United States Court of Appeals for the Tenth Circuit's conclusion in *Etsitty* was that there was no violation of Title VII, whereas the district court in *Roberts* concluded that Title VII was violated.²⁹⁴

Based on these very different conclusions, it appears that an employer's liability for biology-based transgender bathroom laws may depend upon the jurisdiction in which the employment case is instituted.²⁹⁵ For instance, in *Etsitty v. Utah Transit Authority*, the lawsuit was filed in the Tenth Circuit, which is a court that does not extend Title VII protections to transgender employees.²⁹⁶ On the other hand, the *Roberts* case was instituted in the Ninth Circuit, a circuit that would likely extend—

7/Sessions-memo-reversing-gender-identity-civil.pdf (last visited Oct. 12, 2017).

288. *See supra* notes 175-212.

289. *Id.*

290. *See supra* notes 175-212.

291. *See supra* notes 213-243.

292. *See supra* notes 213-243.

293. *See supra* notes 175-43.

294. *Id.*

295. *See id.*

296. *See supra* notes 175-212.

as the *Roberts* Court predicted—Title VII protection to transgender employees.²⁹⁷

Although the facts of the cases were similar, the courts viewed the sufficiency of the plaintiff-employee's evidence differently.²⁹⁸ For example, in *Etsitty*, the Court affirmed the district court's grant of summary judgment, concluding that the employee failed to present evidence that the employer's nondiscriminatory legitimate reason of not allowing her to use the bathroom was a pretext.²⁹⁹ On the other hand, in *Roberts*, the court concluded that the employee had presented enough evidence to preclude the defendant-employer from being granted summary judgment on Title VII.³⁰⁰ Arguably, the different determination of the sufficiency of the plaintiff-employee's evidence by each court could be traced to the difference in protections for transgender employees in the Tenth and Ninth Circuits.

Currently, it is unclear how a federal court will decide on the issue of whether state-enacted biology based transgender bathroom laws violates Title VII. Nevertheless, the review of the existing federal cases reveal that courts in numerous jurisdictions have expanded the protections of the law to include transgender status based on the *Price Waterhouse* sex-stereotyping theory.³⁰¹ It can be argued that currently more courts now find Title VII protections for transgender employees.³⁰² Nonetheless, this majority view may not be the view accepted by the Supreme Court when and if it addresses this issue, given the current political climate on the

297. *See supra* notes 213-243.

298. *See supra* notes 175-243.

299. *See supra* notes 175-212.

300. *See supra* notes 213-243.

301. *See e.g.*, *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883 (11th Cir. 2016) (reversing summary judgment for the employer on the plaintiff's claim that she was terminated from her job as an auto mechanic because she is transgender); *Doe v. Arizona*, No. CV-15-02399-PHX-DGC, 2016 U.S. Dist. LEXIS 36229 (D. Ariz., Mar. 21, 2016) (holding discrimination against a transgender employee constitutes sex-based discrimination under Title VII); *Dawson v. H&H Electric, Inc.*, No. 4:14CV00583 SWW, 2015 U.S. Dist. LEXIS 122723 (E.D. Ark. Sept. 15, 2015) (holding that termination of a transgender employee based on her transgender status constituted sex discrimination under Title VII); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir., Apr. 4, 2017) (en banc) (holding that discrimination on the basis of sexual orientation is a form of sex discrimination in violation of Title VII); *Macy v. Holder*, App. No. 0120120821, 2012 EEOPUB LEXIS 1181, (EEOC App. 20, 2012) (The EEOC's holding that Title VII prohibits workplace discrimination based on gender identity.).

302. *See Chai Feldblum, Vulnerable Population: Law, Policies in Practice and Social Norms: Coverage of Transgender Discrimination under Sex Discrimination Law*, 14 J.L. SOC'Y 1, 24 (2013) ("In one respect, the Commission's decision in *Macy* was just the Commission catching up with federal and state courts that had concluded that the gender stereotyping theory of *Price Waterhouse* included protection for transgender individuals who had been discriminated against on the basis of their transgender status."); Ilona M. Turner, *Comment, Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 563 (2007) ("The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.").

Federal level and the current composition of the Court.

If a court follows what appears to be the majority view applied by *Roberts* Court, the court will conclude that biology-based bathroom laws violate Title VII.³⁰³ Thus, if states in the jurisdictions following the majority view enact transgender bathroom laws for employees, this will very likely create potential liability for state agencies and governmental employers.³⁰⁴ In effect, states in these jurisdictions should refrain from enacting biology-based transgender bathroom laws for employees since these laws will likely violate Title VII.³⁰⁵

Overall, it appears that employees may have more protections than students when states adopt biology-based bathroom laws. Indeed, the federal government no longer has guidelines directing schools to allow students to use the bathroom based on their gender identity.³⁰⁶ Moreover, a student's claim that biology-based transgender bathroom laws violate Title IX may only exist if the student articulates a sex stereotyping claim and the case is in a jurisdiction that is willing to recognize such a claim.³⁰⁷

On the other hand, currently, federal guidelines from the EEOC and the OSHA, directing employers to allow employees to use the bathroom or public facilities based on their gender identity, still exists. Even more, the majority view of courts throughout the country appear to support the interpretation of Title VII protections for transgender employees based on a sex-stereotyping claim.³⁰⁸ Hence, it seems very likely that when states enact biology-based bathroom laws for employees, Title VII may be violated, unless the court follows what appears to be the minority view that no such protection exists.³⁰⁹

Nevertheless, until more cases and additional guidance is provided, states should carefully consider whether to enact transgender bathroom laws in the first place. Yet, if they choose to enact such laws, they should think twice about imposing biology-based transgender bathroom laws.

V. CONCLUSION

Recently, a few states have enacted transgender bathroom laws based on an individual's gender identity.³¹⁰ On the other hand, numerous states have considered enacting transgender bathroom laws based on the individual's biological sex.³¹¹ In fact, the question of whether to enact gender-identity based bathroom laws or biology-based bathroom laws, have

303. *See supra* notes 215-245.

304. *See id.*

305. *See id.*

306. *See supra* notes 265-267.

307. *See supra* notes 273-281.

308. *See supra* notes 213-243.

309. *See supra* notes 175-212.

310. *See supra* notes 18-31.

311. *See supra* notes 32-88.

arisen in both the public educational and employment sectors. In some cases, when biology-based laws have been enacted, the results have been lawsuits filed by students and employees claiming violations of Title IX and Title VII, respectively. To lessen the potential liability for states and state agencies, including public schools and governmental employers, these laws should be based on the individual's gender identification.