



**TRANSGENDER STUDENTS:**  
**CASES, TRENDS, AND LESSONS FROM AROUND THE COUNTRY**

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**I. New Virginia Law**

**Be it enacted by the General Assembly of Virginia:**

**1. That the Code of Virginia is amended by adding a section numbered 22.1-23.3 as follows:  
§ 22.1-23.3. Treatment of transgender students; policies.**

A. The Department of Education shall develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools that address common issues regarding transgender students in accordance with evidence-based best practices and include information, guidance, procedures, and standards relating to:

1. Compliance with applicable nondiscrimination laws;
2. Maintenance of a safe and supportive learning environment free from discrimination and harassment for all students;
3. Prevention of and response to bullying and harassment;
4. Maintenance of student records;
5. Identification of students;
6. Protection of student privacy and the confidentiality of sensitive information;
7. Enforcement of sex-based dress codes; and
8. Student participation in sex-specific school activities and events and use of school facilities. Activities and events do not include athletics.

B. Each school board shall adopt policies that are consistent with but may be more comprehensive than the model policies developed by the Department of Education pursuant to subsection A.

- 2. That the Department of Education shall develop and make available to each school board model policies pursuant to subsection A of § 22.1-23.3 of the Code of Virginia, as created by this act, no later than December 31, 2020.**
- 3. That each school board shall adopt policies pursuant to subsection B of § 22.1-23.3 of the Code of Virginia, as created by this act, no later than the beginning of the 2021-2022 school year.**



## II. Massachusetts and Other State Laws

- A. In 2012, several Massachusetts statutes that prohibit discrimination on the basis of specified categories were amended to include gender identity. Among the amended statutes was one that prohibits discrimination against public school students. NOTE: The U.S. Department of Education’s newly released Title IX regulations do not touch on any issues relating to transgender students.
- B. In addition to Massachusetts, 16 states and Washington, D.C. also have laws that prohibit discrimination in schools on the basis of gender identity. For a state-by-state comparison of legal protections in place for transgender students, the following sources are useful:
- <https://www.freedomforallamericans.org/states/>
  - <https://www.hrc.org/state-maps>
  - <https://transgenderlawcenter.org/equalitymap>
  - <http://www.nclrights.org/wp-content/uploads/2013/07/StateLawsThatProhibitDiscriminationAgainstTransPeople.pdf>
- C. Under the Massachusetts statute, “gender identity” is defined as “a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person’s core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.” Mass. Gen. Laws ch. 4, § 7 (2012).
- D. The Massachusetts Board of Elementary and Secondary Education approved “Principles for Ensuring Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, transgender, Queer, and Question (LGBTQ) Students,” which are identified and explained at <http://www.doe.mass.edu/sfs/lgbtq/Principles-SafeEnvironment.html>. These principles include:
1. Schools must have policies, and update them as needed, protecting LGBTQ students from harassment, violence, and discrimination based on LGBTQ status, to ensure compliance with the law.
  2. Schools must include content about violence and suicide prevention related to LGBTQ students in their required training for school personnel.



3. Schools are encouraged to offer school-based groups for LGBTQ and heterosexual students.
  4. Schools are encouraged to provide support for family members of LGBTQ students.
  5. School divisions are encouraged to designate a staff member who is proficient in issues related to sexual orientation and gender identity.
  6. Schools, through their curricula, shall encourage respect for the human and civil rights of all individuals, including LGBTQ individuals.
  7. Schools are encouraged to provide age-appropriate information about LGBTQ issues in school libraries and in student and faculty resource centers.
  8. Schools are encouraged to have a diverse workforce.
  9. Schools are encouraged to review academic and non-academic policies and procedures, and available data, to identify issues or patterns that may create barriers to a safe and successful learning experience for LGBTQ students.
- E. The Massachusetts Department of Elementary and Secondary Education (DESE) also released a document entitled “Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment,” available at <http://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html>. The guidance addresses some steps school divisions should take in adapting their policies to comply with the anti-discrimination law. The DESE guidance includes the following:
1. “Consistent with the statutory standard, a school should accept a student's assertion of his or her gender identity when there is ‘consistent and uniform assertion of the gender-related identity, or any other evidence that the gender-related identity is sincerely held as part of a person's core identity.’ If a student's gender-related identity, appearance, or behavior meets this standard, the only circumstance in which a school may question a student's asserted gender identity is where school personnel have a credible basis for believing that the student's gender-related identity is being asserted for some improper purpose.”
  2. Confirmation of asserted gender identity can be made through any number of ways, including, but not limited to:
    - a letter from a parent, health care provider, school staff member familiar with the student (a teacher, guidance counselor, or school psychologist, among others), or other family members or friends;*
    - a letter from a social worker, doctor, nurse practitioner, or other health care provider stating that a student is being provided medical care or treatment relating to her/his gender identity;*



*a letter from a clergy member, coach, family friend, or relative stating that the student has asked to be treated consistent with her/his asserted gender identity; or*

*photographs at public events or family gatherings.*

3. “[S]chool personnel should use the student's chosen name and pronouns appropriate to a student's gender identity, regardless of the student's assigned birth sex. For those students who have been attending a school and undergo gender transition while attending the same school, it is important to develop a plan for initiating use of the chosen name and pronouns consistent with the student's gender identity.”
  4. “When determining which, if any, staff or students should be informed that a student's gender identity is different from the assigned birth sex, decisions should be made in consultation with the student, or in the case of a young student, the student's parent or guardian. The key question is whether and how sharing the information will benefit the student.”
  5. “[T]he principal should direct school personnel to use the student’s chosen name. Every effort should be made to update student records (for example, Individualized Education Programs) with the student's chosen name and not circulate records with the student's assigned birth name. Records with the student's assigned birth name should be kept in a separate, confidential file.”
  6. For transgender students, a gender marker on a transcript or other document should reflect the student’s gender identity, not the student’s assigned sex.
  7. Concerning the use of restrooms, locker rooms, and changing facilities, each situation needs to be reviewed and addressed on a case-by-case basis, based on the particular circumstances of the student and the school facilities. “In all cases, the principal should be clear with the student (and parent) that the student may access the restroom, locker room, and changing facility that corresponds to the student’s gender identity.”
  8. Concerning P.E. classes and competitive athletics, all students must be allowed to participate in a manner consistent with their gender identity.
- F. DESE also released guidance on notifying parents when a student has been bullied based on gender identity and expression, which is available at <http://www.doe.mass.edu/sfs/bullying/PNguidance.html>. The guidance recommends that school divisions designate a staff person who is proficient in gender identity/express topics and design an appropriate notification process for these situations. Special care is required in these instances because a parent may not be aware of the student’s transgender status, and consulting with the student.



### III. Cases from the U.S. Courts of Appeal

A. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017)

1. Background: Transgender male student brought action against the school division alleging violation of Title IX and the Equal Protection Clause of Fourteenth Amendment because an unwritten policy did not allow him to use the boys' bathroom. The district court denied the school division's motion to dismiss and granted a preliminary injunction allowing the student to use the boys' bathroom.
2. Holding: The court upheld the decision to deny the motion to dismiss and grant the preliminary injunction. Transgender students can assert claims under Title IX. "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates IX." 858 F.3d at 1049.

Because the policy at issue involved sex-based classification, the school division's justification for its policy must be "exceedingly persuasive." The court ruled that its justification was not. The school division's stated justification for its policy—to ensure that bathroom privacy rights were protected—was based on sheer conjecture and abstraction. Only after a teacher witnessed a student washing his hands in the boys' bathroom, which occurred when the student had already been using such bathrooms for nearly six months, did the student's use of the boys' bathroom become an issue for the division, and there was no allegation that school division received any complaints from other students. In addition, the court noted that a transgender student's presence in the bathroom provides no more risk to other students' privacy rights than the presence of any other student who uses the bathroom at the same time.

B. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018) (cert. denied)

1. Background: School division replaced policy requiring bathroom usage based on sex at birth with policy of allowing usage based on gender identity in 2016. Permission to use a bathroom based on gender identity was based on a student-specific analysis and granted on a case-by-case basis. A transgender student met with counselors, principals, and school administrators. Once approved, a student could no longer use the bathrooms she or he formerly used. The school also had several single-user bathrooms and other private changing areas for any student who did not wish to use communal facilities.

Cisgender high school students brought action against school division and school officials alleging that division's policy of allowing transgender students to access bathrooms and locker rooms consistent with the transgender



students' gender identity violated their constitutional rights of bodily privacy, as well as Title IX. The district court denied plaintiffs' motion for preliminary injunction.

2. **Holding:** The court upheld the denial of a preliminary injunction. The court ruled that the plaintiffs' claim that "their right to privacy was violated because the policy permitted them to be viewed by members of the opposite sex while partially clothed" did not give rise to a constitutional violation because the school division's policy "served a compelling interest—preventing discrimination against transgender students—and was narrowly tailored to that interest." The court observed that requiring transgender students (as opposed to any student leery of using communal facilities) to use individual bathrooms is not a narrowly tailored solution and actually undermines the interest of preventing discrimination because it increases the scrutiny and stigma associated with being transgender.

The court also rejected the plaintiffs' argument that "their constitutional right to privacy is necessarily violated because they are forced to share bathrooms and locker rooms with transgender students" because the right to privacy is not that broad and no student was compelled to undress in front of other students because any student could use the individual changing areas. The court noted that the privacy protections in place to allow any student to privately change or use the bathroom were more than suitable to protect any privacy concerns relating to the presence of transgender students in the locker rooms and bathrooms.

C. Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir. 2020)

1. **Background:** In response to transgender boy's request to use boys' locker room, the school division developed a student safety plan to accommodate this student and future students to allow locker room use according to gender identity and provide supervision in the locker room to ensure student safety.

Students, parents, and organizations brought action for injunctive relief alleging that high school's policy of allowing transgender students to use restrooms, locker rooms, and showers that matched their gender identity, rather than their biological sex assigned at birth, violated the fundamental rights to privacy and for parents to direct the care, education and upbringing of their children under the Fourteenth Amendment; Title IX; and the First Amendment's Free Exercise Clause. The district court granted the defendants' motion to dismiss for failure to state a claim.

2. **Holding:** The court affirmed the dismissal. Concerning the fundamental right to privacy, the court held that the "potential threat that a high school student might see or be seen by someone of the opposite biological sex while either are undressing or performing bodily functions in a restroom, shower, or locker room does not give rise to a constitutional violation." 949 F.3d at 1223. The



court noted that the plaintiffs failed to show that the contours of the privacy right were so broad that the division’s student safety plan would not adequately protect privacy, especially because the plan provides alternative options for students who do not want to share facilities with a transgender student.

The court also rejected the plaintiffs’ arguments under Title IX. The court held that because the student safety plan applies to all students regardless of sex, nobody is treated differently because of sex, and so there was no Title IX violation. The court observed that although Title IX permits sex-segregated bathrooms, it does not require bathrooms to be segregated according to gender at birth. The court also rejected the plaintiffs’ argument that having to share facilities with transgender students creates a sexually harassing environment. The court noted that the mere presence of transgender students using the facilities for their intended purpose is not enough to show harassment that is “severe, pervasive, and objectively offensive” enough to give rise to a Title IX violation.

The court also held that the plaintiffs failed to cite any authority showing that parents’ substantive due process rights under the Fourteenth Amendment encompass a right to direct the curriculum, administration, or policies of public schools,” such that the student safety plan infringed on those rights. 949 F.3d at 1232. Finally, the court also held that the student safety plan did not place a substantial burden on the plaintiffs’ exercise of religion by requiring them “to choose between the benefit of a free public education and violating their religious beliefs.” 949 F.3d at 1234. The student safety plan is “rationally related to the legitimate purpose of protecting student safety and well-being, and eliminating discrimination on the basis of sex and transgender status.” 949 F.3d at 1238.

#### IV. Pending decisions

- A. These cases are noteworthy because they will address whether the challenged policies in fact violate Title IX and the Equal Protection Clause, unlike the cases cited above in which the court only addressed the issue at the preliminary injunction and/or motion to dismiss stage.
- B. Eleventh Circuit: Adams v. Sch. Bd. of St. Johns Cnty., No. 18-13592, oral argument held in Dec. 2019
  - 1. Background: A transgender boy challenged the school’s policy of requiring restroom usage based on biological sex at birth. At a bench trial, the student prevailed on both Title IX and Equal Protection Claims. 318 F. Supp. 3d 1293 (M.D. Fla. 2018). The court held that the student proved a Title IX violation because “the School Board, a federally funded institution, prohibits [the student], a transgender boy, from using the boys’ restroom ‘on the basis of sex,’ which discrimination caused him harm.” The court also held that the



student's rights under the equal protection clause were violated because the school board could not show that the privacy and safety concerns it cited as justification for its policy were founded.

C. Fourth Circuit: Grimm v. Gloucester Cty. Sch. Bd., No. 19-1952, oral argument scheduled for May 2020 has been postponed

1. Background: Transgender male student prohibited by school board policy from using the boys' bathroom and locker room. Student underwent gender transformation, including chest reconstruction surgery, and was issued state ID card identifying him as male and an amended birth certificate. The student was still prohibited from using the boys' facilities. The student brought claims against the school board under Title IX and the Equal Protection Clause.
2. The court granted the student's motion for summary judgment. 400 F. Supp. 3d 444 (2019). Concerning Title IX, the court held, "[i]n sum, there is no question that the Board's policy discriminates against transgender students on the basis of their gender nonconformity. Under the policy, all students except for transgender students may use restrooms corresponding with their gender identity. Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go." 400 F. Supp. 3d at 456–57.
3. The court also held that the challenged policy is not substantially related to protecting student privacy because there were no complaints regarding any encounter with the student in the restroom, and there was no greater risk of invasion of privacy to students from someone of the same physiological sex. Because the school board had not met its burden of providing an "exceedingly persuasive justification" for its policy, the court found the policy unconstitutional.
4. The court also granted the student's request for a permanent injunction against the school board to update his educational records to reflect his male identity in light of his state-issued documents demonstrating the same, which the school board had refused to do.

V. **Lawsuits Related to Transgender Participation in Sports**

A. Hecox v. Little, No. 1:20-cv-00184 (D. Id. 2020)

1. In 2020, Idaho became the first state to pass legislation banning transgender women and girls from participating on school sports teams consistent with their gender identity. Other states have proposed similar legislation.
2. Two individuals have challenged the new law: a transgender female college student at Boise State University who wants to participate in cross country; and a cisgender female high school student who is concerned that her



“masculine” traits might be used to dispute her gender and force her to undergo invasive testing to prove she is a female in order to participate in sports.

3. The plaintiffs are alleging that the Idaho law violates their Fourteenth Amendment rights to equal protection, informational privacy, and fair notice; their Fourth Amendment right against unreasonable searches; and Title IX.

B. Soule v. Connecticut Ass’n of Schs., et al., No. 3-20-cv-00201 (D. Conn. 2020)

1. Four cisgender female high school students challenge state athletic policy permitting transgender girls to participate in girls’ athletic events. The plaintiffs allege they are harmed by the policy because they must compete against others who are biologically male and so face competitive disadvantages because of physiological differences between men and women.
2. The complaint alleges that the policy constitutes sex discrimination under Title IX by “failing to provide effective accommodation for the interests and abilities of girls” and “failing to provide equal treatment, benefits and opportunities for girls.”
3. The Department of Justice has filed a Statement of Interest in this case, siding with the plaintiffs, because they argue that Title IX does not require the policy and rather conflicts with it.

**VI. Lawsuits Related to Pronoun Usage**

A. Meriwether v. Trustees of Shawnee State Univ. et al., No. 1:18-cv-00753 (S.D. Ohio Feb. 12, 2020); 6th Circuit appeal pending.

A university professor was disciplined for violating university nondiscrimination policies because he refused to address a transgender student using the student’s preferred gender identity title and pronouns. The defendants’ motion to dismiss was granted because the plaintiff’s speech was not protected under the First Amendment. The court also found that the plaintiff did not state a claim that the plaintiff’s First Amendment protections of free exercise of religion and against compelled speech and departure from religious neutrality were violated. Nor were the plaintiff’s due process or equal protection rights violated.

B. Vlaming v. West Point Sch. Bd. et al., No. 3:19-cv-00773 (E.D. Va. 2019)

A high school French teacher was terminated for insubordination after he refused to use male pronouns to refer to a male transgender student and used female pronouns instead. The plaintiff brought several claims in state court against the defendants under state law, including that his rights of free speech, free exercise of religion, and due process under the Virginia Constitution were violated. The defendants removed the case to federal court, and the plaintiff filed a motion for remand. This decision is currently pending as of May 5, 2020.