



TITLE IX, TRANSGENDER STUDENTS & BATHROOMS



TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

- No 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. 20 U.S.C. § 1681(a).
- In order to hold that sex discrimination violates Title IX, the court must find:
 - The student was excluded from participation in an education program on the basis of sex;
 - That the educational institution was receiving federal financial assistance at the time; and
 - That improper discrimination caused the student harm.

THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the First Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § I.

- Sex-based discrimination is reviewed using a standard called “intermediate scrutiny.”
- To satisfy intermediate scrutiny, a sex-based policy must:
 - Advance an important government interest and
 - Be substantially related to that objective.

THERE IS A SPLIT IN THE FEDERAL CIRCUIT COURTS

- The Federal Court system is divided into regions, called Circuits.
 - There are 12 circuits and Arizona is in the Ninth Circuit
- Below Circuit Courts of Appeal, the District courts in each circuit must follow the authority from the Court of Appeals in that circuit.
 - Authority from other circuits is not binding and cannot be relied on if it conflicts with the law in the particular circuit.
- Only the Supreme Court is authority for all circuits and the United States Supreme Court has not ruled on the issue of transgender students and bathrooms.

PRIOR TO DECEMBER 2022, EVERY CIRCUIT COURT THAT HAD ADDRESSED THIS ISSUE HAD SIDED WITH TRANSGENDER STUDENTS

- *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017): Held that transgender students may bring sex-discrimination claims under Title IX based upon a theory of sex-stereotyping
- *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018): Court denied motion for a preliminary injunction, finding that cisgender students were not likely to succeed on the merits of their due process claim. Requiring transgender students to use single user or birth-sex-aligned facilities would be discriminatory.
- *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020): Policy allowing transgender students to use bathrooms, showers, and locker rooms that match their gender identity did not violate rights of cisgender students.
- *Grimm v. Gloucester County School Bd*, 976 F.3d 399 (4th Cir. 2020): Policy excluding transgender students from using bathroom that corresponds with gender identity violates Title IX and Equal Protection.

PARENTS FOR PRIVACY V. BARR (9TH CIR. 2020)

School District adopts policy allowing transgender students to use bathrooms and locker rooms that match their gender identity.

Cisgender students and their parents brought action for injunctive relief against school district, alleging that the policy violated the due process clause, Title IX and the First Amendment's Free Exercise Clause.

- **Fourteenth Amendment right to privacy:** The court held that the right to privacy does not extend to avoiding all risk of intimate exposure to or by a transgender person.
 - In support of this conclusion the court noted that students who did not want to share facilities with a transgender student were offered alternative options and privacy protections, it did not matter that these alternatives appear inferior or less convenient.
- **Fourteenth Amendment right to direct the education and upbringing of one's children:** The court explained that the right of a parent to make decisions concerning the care, custody and control of their children did not extend to provide parents the fundamental right to determine bathroom policies of public schools.

PARENTS FOR PRIVACY V. BARR (9TH CIR. 2020), CONTINUED

- **Title IX:** Plaintiffs claimed policy produced unwelcome sexual harassment and created a hostile environment on the basis of sex.
 - The court ruled against the students stating that the alleged harassment was not so severe, pervasive, or objectively offensive to rise to the level of a Title IX violation. Specifically, Plaintiff did not allege the transgender students were making any inappropriate remarks, threatening them, deliberately flaunting nudity or physically touching them.
 - “The presence of transgender people in an intimate setting does not, by itself, create a sexually harassing environment that is severe or pervasive.”

PARENTS FOR PRIVACY V. BARR (9TH CIR. 2020), CONTINUED

- **Free Exercise Clause:** The first amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Plaintiffs claimed the policy forced them to be exposed to an environment that conflicts with and prevents them from fully practicing their religious beliefs.
 - The court held that the policy did not violate the Free Exercise Clause because the policy is neutral, generally applicable and rationally related to a legitimate government interest.

Overall takeaway: Cisgender students do not have the right to exclude transgender students from using the bathroom based on their gender identity or to be guaranteed bathrooms segregated by biological sex/sex at birth.

GRIMM V. GLOUCESTER COUNTY SCHOOL BD (4TH CIR. 2020)

Male transgender student brought discrimination claims against school for preventing him from using the bathroom aligned with his gender identify.

- Court held that school board policy to separate bathrooms based on sex violated the Equal Protection Clause and Title IX.
- **Equal Protection Claim:** held that policy separating students based on biological sex did not pass intermediate scrutiny since the policy was not substantially related to its important interest in protecting student privacy because a transgender child uses the bathroom by going into a private stall.
 - In addition, the school installed privacy screens in between urinals and did not present any evidence that transgender students would be less likely to mind their business in a bathroom than other students.
- **Title IX Claim:** The Court concluded that because the school could not exclude the student from a bathroom without considering the students biological sex, the policy discriminated against the student because of his sex.

GRIMM V. GLOUCESTER COUNTY SCHOOL BD (4TH CIR. 2020)

- THE SUPREME COURT DENIED THE PETITION FOR CERTIORARI

ADAMS V. SCHOOL BD. OF JOHNS COUNTY (11TH CIR. 2022) CREATES A SPLIT IN THE CIRCUITS

- In November 2022, the 11th Circuit broke with all other circuits that had ruled on this issue and ruled against a transgender student challenging the policy that prohibited students from using the bathroom that matched their gender identity. Any student could use a gender-neutral bathroom or one that corresponded to their biological sex (as determined by birth certificates).

ADAMS V. SCHOOL BD. OF JOHNS COUNTY (11TH CIR. 2022), CONTINUED

Transgender student brought a claim against the school alleging that the policy violated Title IX and the Equal Protection Clause.

- **Equal Protection:** Court stated that the policy passed intermediate scrutiny - it did not violate Equal Protection because the policy advanced the governmental objective of protecting students' privacy in school bathrooms and does so in a manner that is substantially related to that objective.
- **Title IX:** Court ruled that policy did not violate Title IX because Title IX's implementing regulations expressly allow schools to provide separate bathrooms on the basis of sex.
 - Addressed by the 9th Circuit in *Barr*: "just because Title IX authorizes sex-segregated facilities does not mean that they are required, let alone that they must be segregated based only on biological sex and cannot accommodate gender identity."



OTHER RELEVANT DEVELOPMENTS

BOSTOCK V. CLAYTON COUNTY, GEORGIA | 40 S. CT. 1731 (2020)

The United States Supreme Court rules that Title VII's prohibition of discrimination based on sex also prohibits discrimination based on sexual orientation or gender identity.

- Employers may not discriminate against an individual because of their sexual orientation or gender identity.
- Discrimination based on sexual orientation or gender identity necessarily entails discrimination based on sex.
- So, discrimination on the basis of gender identity or sexual orientation is sex discrimination under Title VII.

EXECUTIVE ORDER NO. 13988

On January 20, 2021 President Biden signed an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.

- Extended *Bostock* holding that discrimination because of sex covers discrimination on the basis of gender identity and sexual orientation to Title IX, the Fair Housing Act and the Immigration and Nationality Act.
- Based on principals reflected in the Constitution and the policy that every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love.
 - Specifically, “children should be able to learn without worrying about whether they will be denied access to the restroom, locker room, or school sports.”
- Identified discrimination based on sexual orientation or gender identity a violation of Title IX.

GUIDANCE IN RESPONSE TO THE EXECUTIVE ORDER

U.S. Department of Justice – Civil Rights Division: issued a Memorandum applying *Bostock* to Title IX.

- Before reaching this conclusion the Division reviewed caselaw, including the dissents in *Bostock*, *Grimm* and *Adams*, statutory text, and legislative history and found nothing persuasive that could justify a departure from *Bostock*'s textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly.

Equal Employment Opportunity Commission: issued a Technical Assistance Document that explains how employers should apply the *Bostock* decision.

- Employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity.

U.S. Department of Education: issued a Notice of Interpretation explaining that it will enforce Title IX's prohibition on sex-based discrimination to include sexual orientation and gender identity based discrimination.

- *Bostock* applies to Title IX because Title VII and Title IX have textual similarities, additional case law recognizes that the reasoning of *Bostock* applies to Title IX and that differential treatment of students based on gender identity or sexual orientation may cause harm, and because the U.S. Department of Justice's Civil Rights Division has concluded that the *Bostock* analysis applies to Title IX.
- To implement this interpretation, OCR will now fully enforce Title IX to prohibit discrimination based on sexual orientation or gender identity.

LAWSUIT CHALLENGING ENFORCEMENT OF THE GUIDANCE:

TENNESSEE V. U.S. DEPARTMENT OF EDUCATION

Multiple states, including Arizona, brought action in Tennessee District Court against the EEOC, US Department of Justice and the US Department of Education challenging the legality of their guidance that laws prohibiting sex discrimination also prohibit discrimination on the basis of gender identity or sexual orientation.

- Tennessee District Court granted the states' motion which enjoined the enforcement of the guidance from the three agencies.
- Court concluded that the guidance was not valid because it did not comply with the Administrative Procedures Act which requires an agency to go through a notice and comment period when it issues guidance that expands the legal authority of a case.
- The holding is a result of a procedural deficiency; it is not a decision on the merits of the guidance or interpretation.

CONCLUSION

- *Bostock* is national law, but held that individuals could no longer be discriminated against based on their sexual orientation or gender identity in the employment context. Whether or not this holding would extend to public schools and bathrooms has not been decided on a national level and is not decided in this case.
- Circuit courts have reached different conclusions regarding whether transgender students have a right to use the bathroom aligned with their gender identity, although the majority side with the transgender students.
- The 9th Circuit makes it clear that cisgender students do not have a constitutional right to bathrooms that exclude transgender students but has not ruled on whether or not transgender students have a right to use a bathroom that corresponds with their gender identity.