

Title IX:  
Transgender Bathrooms

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# TITLE IX

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No person in the United States 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. § 1232g

# FEDERAL REGULATIONS

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- Prohibits any person from being subject to separate or different rules of behavior, sanctions, or other treatment.
- Allows for schools to maintain separate but comparable restrooms and locker rooms.
- Allows separate sports teams.

34 C.F.R. § 106

# DEAR COLLEAGUE LETTERS

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- 2016: DOE and DOJ under Obama Administration issues letter directing must treat transgender students consistent with their gender identity.
  - Includes access to restrooms
- 2017: DOE and DOJ under Trump Administration withdraws Obama Administration letter.
  - Not consistent with express language of Title IX

# ISSUES

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- Title IX and Federal Regulations do not define “sex”.
- 2017 Trump Administration letter does not define “sex”.
- Court decisions.

# COURT DECISIONS

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- *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).
- *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp 3d 833 (S.D. Ind. 2019).

# COURT DECISIONS

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- *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444 (E.D. VA 2019).
- *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 515 (3rd Cir. 2019), *cert. denied*.
- *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*.

## *Whitaker v. Kenosha Unified Sch. Dist.*

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- School prohibited transgender male student from using male restroom. Allowed female or gender neutral facility use.
- Student brought a lawsuit against the school alleging violations of Title IX and the Equal Protection clause (14th Amendment).
- 7th Circuit analyzed the student's the likelihood of success on the merits on the issue of a preliminary injunction.
- Found that transgender student has likelihood of success on the merits for claim of discrimination against a school under Title IX based on a sex-stereotyping theory.
  - *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); Title VII



## *Whitaker v. Kenosha Unified Sch. Dist.*

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“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 Title IX. The School District's policy also subjects [the student], as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX. Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act.”

## *J.A.W. v. Evansville Vanderburgh Sch. Corp.*

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- School prohibited transgender male student from using male restroom, except if birth certificate changed. Allowed female or gender neutral facility use
- Student brought a lawsuit against the school alleging violations of Title IX and the Equal Protection clause (14th Amendment).
- District Court granted summary judgment in favor of the student finding that practice requiring transgender student to use a bathroom that did not conform to their gender identity violated Title IX.
  - Relied on *Whitaker* decision.

## *Grimm v. Gloucester Cty. Sch. Bd.*

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- School prohibited transgender male student from using the male restrooms.
- District Court denied injunction and dismissed student's claim.
- 4th Circuit reversed and found in favor of student.
- Supreme Court granted review but then remanded for reconsideration in light of the 2017 Trump Administration letter.
- District Court again found student has right to bring claim under Title IX on basis of transgender status.

# *Doe v. Boyertown Area Sch. Dist.*

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- School allowed transgender student to use restrooms and locker rooms based on student's gender identity. Allowed gender neutral facility use for other students.
- Students brought lawsuit against school alleging violations of Title IX and Constitutional right to bodily privacy.
- 3rd Circuit denied preliminary injunction finding that students did not have a likelihood of success on the merits.
  - right to privacy is not absolute and generally less in school restrooms and locker rooms.
  - transgender students in restrooms and locker rooms not so severe, pervasive, or offensive to constitute harassment under Title IX.
- Supreme Court denied certiorari.

# *EEOC v. R.G. & G.R. Harris Funeral Homes*

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- Title VII case. Courts look to Title VII when construing Title IX.
- Employee fired after informing employer the he was transgender.
- EEOC brought a lawsuit against employer for violation of Title VII.
- District Court granted summary judgment for employer.
- 6th Circuit reversed, finding termination on basis of transgender status is actionable under Title VII.
- Supreme Court granted certiorari to review the case.

# CONSIDERATIONS

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- Alliance Defending Freedom letter
- Child & Parental Rights Campaign letter

QUESTIONS?

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