“On the Basis of Sex…”: Title IX Compliance in a Time of Evolving Legal Interpretations of “Sex”

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Presented at the 2017 School Law Seminar, March 23-25, Denver, Colorado

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“On the Basis of Sex …”: Title IX Compliance When Legal Interpretations of “Sex” are in Flux

Presented by Karla Schultz
I. Introduction

Title IX was originally aimed at banning discrimination against women in the area of education. When asked about the scope of the proposed law, sponsor Senator Birch Bayh explained: “[W]e are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.” See Discrimination Against Women: Hearings on Section 805 of H.R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970) (1970 Hearings).

Signed into law in 1972, the plain language of Title IX reads: “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. §1681 et seq. Neither the law, nor subsequent regulations, have defined the meaning of “sex.” To further complicate the matter, the Supreme Court has routinely, and without explanation, used the terms sex and gender interchangeably. See, e.g., North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).

The “on the basis of sex” language of Title IX is similar, but not identical, to the “because of” and “based on” one’s sex (and race, color, national origin, and religion) language found in Title VII of the Civil Rights Act of 1964 and the federal courts have tended to hew closely to Title VII judicial interpretations when applying Title IX’s anti-discrimination mandates. In the Title VII context, the courts initially defined the term “sex” to mean simply the biological sex assigned to a person at birth. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (writing that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth”); Ulane v. Eastern Airlines, Inc., 742 F. 2d 1081, 1085 (7th Cir. 1984) (opining that the Title VII phrase “based on sex” means “it is unlawful to discriminate against women because they are women and against men because they are men...[the words] do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born”).

However, that judicial approach to anti-discrimination statutes began to evolve in the late 1980s. More recent Title IX case law, looking to Title VII jurisprudence for direction, has begun to examine more expressly what exactly is meant by “sex” under Title IX. Does “sex” mean only biological or birth sex? Does it contemplate gender (e.g. traits that are stereotypically associated with being male or female)? Or does it include sexual orientation, gender-identity, transgender status, and, if so, when?

“This case, like other cases involving alleged discrimination against transgender individuals, raises important, but difficult, questions of what is sex and what is gender, what are the differences between sex and gender, and to what extent are sex and gender synonymous or interchangeable for purposes of federal statutes, such as Title IX. Black’s Law Dictionary defines ‘sex’ as ‘[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender.’ Black’s also uses the terms ‘sex discrimination’ and ‘gender discrimination’ interchangeably, defining ‘sex discrimination’ as ‘[d]iscrimination based on gender,’’ but also noting: ‘The terminology is gradually shifting. Increasingly in medicine and sociology, gender is distinguished from sex. Gender refers to the psychological and societal aspects of being male or female; sex refers specifically to the physical aspects.’ Nevertheless, the 9th Circuit Court of Appeals has opined, ‘under *Price Waterhouse*, “sex” under Title VII encompasses both sex—that is, the biological differences between men and women—and gender’ and that, for Title VII purposes, ‘the terms “sex” and “gender” have become interchangeable.’

The difficulty of linking sex and gender becomes remarkably apparent in a case, such as this one, where an individual’s assigned birth sex is different from that individual’s gender identity...This Court will not attempt to sort out this perplexing difference in definitions. However, the Court notes that, regardless of the interplay between the two concepts, there is a distinction between birth sex and gender identity. For the purposes of this opinion, the Court will refer to ‘birth sex’ as an individual’s biological sex in the binary sense—either male or female—that is assigned at birth, as reflected on that individual’s birth certificate, and typically assigned on the basis of an individual’s genitalia. But, the Court recognizes the importance of numerous other considerations in defining a person’s sex such as sex chromosomes, internal reproductive organs, hormone concentrations, and other relevant indicators. Indeed, one district court has evaluated three factors, ‘[b]ased on the standards of commonly accepted medical science,” to determine an individual’s biological sex: “(1) phenotypic characteristics; (2) endogenous hormonal characteristics; and (3) chromosomal characteristics.”’ [internal citations omitted]

The Fourth Circuit’s *Grimm v. Gloucester County School Bd.* case, currently pending before the Supreme Court, may soon resolve the meaning of “sex” under Title IX. Until then, the dissent in the Fourth Circuit’s denial of the petition for *en banc* review, succinctly hits on the head of the legal nail the now politicized nature of the matter:

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“...the [Obama] Administration’s...politically correct acceptance of gender identification as the meaning of ‘sex’ even when the statutory text of Title IX provides no basis for the position. . . [leads them to] conclude that . . .they can override these provisions by redefining sex to mean how any given person identifies himself or herself at any given time...”

_G.G. ex rel. Grimm v. Gloucester County School Bd.,_ 824 F.3d 450, 452 (4th Cir. 2016) (Niemeyer, J. dissenting from mem. op. denying pet. for en banc review).

Given the absence of legal consensus, coupled with the political pressures that face elected school board members, what is a school lawyer to advise clients, and what are the consequences of reading “sex” to mean only one thing or many things?

II. _Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)_

In many respects, the legal debate and its subsequent evolution started here. By now, the facts of the _Price Waterhouse_ case are familiar to those of us who have addressed issues of gender-based discrimination. In review, these are the most pertinent facts from that case:

At the Price Waterhouse corporation, when an individual was nominated for partnership, the partners had the opportunity to submit their feedback and comments on the candidate and the firm’s Admissions Committee would then recommend that individual be accepted for partnership, put on hold for a period of time, or denied partnership.

Ann Hopkins was a senior manager with Price Waterhouse and in 1982 she was nominated for partnership by the partners in her local office. In total, 88 people were nominated for partner that year; Ann was the only woman nominated. Though the majority of partners who offered feedback supported her partnership, many commenters also said she was “overly aggressive, unduly harsh, difficult to work with and impatient with staff.” Some of the comments also related to her sex; she was referred to as “macho,” and it was also said that she “overcompensated for being a woman” and could use “a course at charm school.” Apparently she also had an affinity for swearing, prompting one partner to state that he disliked her use of profanity “because it's a lady using foul language.” Finally, a key partner remarked that Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

Ultimately, Ann Hopkins’ partnership was put on hold and she was not re-proposed for partner at any later time. She likely used some profanity, and then sued under Title VII, alleging that she had been discriminated against “on the basis of her sex.”

The High Court agreed with Hopkins, writing its now infamous line from that case: “…we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group for ‘[i]n forbidding employers to discriminate
against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” 490 U.S. at 251 (citations omitted). Added the Court, “It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course at charm school’…[n]or…does it require expertise in psychology to know that, if an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.”

The Price Waterhouse decision set out a new and more expansive standard for sex discrimination, conflating the terms gender (undefined in the decision) and sex, and confirming that “sex stereotyping” was discriminatory disparate treatment under Title VII. Since then, Price Waterhouse’s concepts of gender nonconformity and sex stereotyping in the Title VII sex discrimination context have been highly influential not only in Title VII cases but also in those examining sex discrimination under Title IX.

III. Post-Price Waterhouse Case Law: “Sex,” Sex-Stereotyping, Sexual Orientation, and Transgender Status

Following Price Waterhouse, many federal courts held that Title VII prohibited discrimination against a transgender person who “fail[ed] to act and/or identify with his or her gender” in the same way that it prohibited ‘sex-stereotypical’ discrimination against Ann Hopkins for her failure to ‘act like a woman.” Smith v. City of Salem, 378 F.3d 566, 574-75 (6th Cir. 2004); see also, Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000), Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2006); but see, Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007) (stating that the “definition of sex should be given its ‘common and traditional interpretation’ for purposes of interpreting Title VII…[meaning] the statute’s prohibition on sex discrimination means only that it is ‘unlawful to discriminate against women because they are women and men because they are men.’”). Typically, those decisions also reached the conclusion that while gender-based or sex-stereotyping was prohibited sex discrimination under Title VII, harassing conduct based solely on an individual’s sexual orientation or status as a transgender person could not form the basis of a hostile environment claim under Title VII.

Almost a decade after it was decided, federal courts also began applying Price Waterhouse’s more expansive interpretation of sex to Title IX discrimination claims, and echoing the same limitations being set in Title VII case law.

Miles v. New York University, 979 F.Supp. 248 (S.D. N.Y. 1997) was one of the earlier cases to look at the meaning of “sex” under Title IX. There, Jennifer Miles, a female transgender graduate student at New York University, faced sexual advances from her professor including the fondling of her breasts, buttocks, and crotch, forcible attempts to kiss, and repeated
propositioning for a sexual relationship. When she complained to the university, the professor was only given a written reprimand. The student sued.

The court observed that “the issue before us is whether Title IX protects a biological male who has been subjected to discriminatory conduct while perceived as female.” *Id.* The court flatly rejected the university’s argument that Title IX did not protect a “male-to-female transsexual who, at the time of the professor's alleged conduct, was in the process of becoming a female.” Concluded the court, “transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII,” and so too would a transgender plaintiff in a Title IX claim. *Id.* *(citing to Holloway v. Arthur Andersen, Inc., 566 F.2d 659 (9th Cir. 1977)).*

In denying the university’s motion for summary judgment, the court ruled that there was “no doubt” the professor’s conduct towards the student, if proven, “related to sex and sex alone;” therefore, the student was protected by Title IX because it “was enacted precisely to deter that type of behavior, even though the legislators may not have had in mind the specific fact pattern here involved.” *Id.*

Another early decision was *Montgomery v. Independent Sch. Dist. No. 709*, 109 F.Supp.2d 1081 (D. Minn. 2000). That case involved a male student who sued the school district after experiencing years of harassment due to his perceived sexual orientation. He was regularly called “faggot,” “fag,” “gay,” “Jessica,” “girl,” “princess,” “fairy,” “homo,” “freak,” “lesbian,” “femme boy,” “gay boy,” “bitch,” “queer,” “pansy,” and “queen.” The student argued that his harassers engaged in the conduct “not only because they believed him to be gay, but also because he did not meet their stereotyped expectations of masculinity.” *Id.* at 1090. The school district countered that the student’s Title IX claim should be dismissed, because Title IX did not protect individuals from discrimination based on sexual orientation or perceived sexual orientation.

In considering those arguments, the court observed that no federal court seemed to have addressed whether or not the conduct at issue constituted “discrimination ‘on the basis of sex’ within the meaning of Title IX.” *Id.* After looking to case law analyzing comparable claims under Title VII, the court concluded that “no logical rationale appears to exist for distinguishing Title VII and Title IX in connection with the issue raised here regarding the circumstances under which abusive or offensive conduct amounts to harassment ‘based on sex.’” *Id.* at 1091.

Deciding in favor of the student, the court observed that the facts alleged in his complaint supported his characterization of the students’ behavior, observing that some of the students called the young man “‘Jessica,’ a girl's name, indicating a belief that he exhibited feminine characteristics.” *Id.* at 1090. Noting also that the students had begun harassing the boy as early as kindergarten, when it was “highly unlikely that at that tender age plaintiff would have developed any solidified sexual preference, or for that matter, that he even understood what it meant to be ‘homosexual’ or ‘heterosexual,’” the court found it “much more plausible that the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy.” *Id.* In other words, the male student seemed to have
been harassed “based on the perception that he did not fit his peers’ stereotypes of masculinity.” *Id.* Deciding that the student had been harassed due to his failure to meet masculine stereotypes, the court held that he had “stated a cognizable claim under Title IX.” *Id.* at 1092. See also, Doe *v.* Brimfield Grade Sch., 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008) (writing that “[d]iscrimination because one’s behavior does not ‘conform to stereotypical ideas’ of one’s gender can amount to actionable discrimination ‘based on sex’” under Title IX after a student who has been repeatedly hit in the testicles by other students was told he needed to “stick up for himself” and “to toughen up and stop acting like a little girl ….”).

Although the federal courts found that Title IX’s prohibition “on the basis of sex” barred such gender- and sex-stereotyping based discrimination or harassment, as in Title VII jurisprudence, the courts are split about whether Title IX prohibits discrimination or harassment solely on the basis of one’s sexual orientation or transgender status.

For example, in *Howell v. North Cent. Coll.*, 320 F. Supp. 2d 717 (N.D. Ill. 2004), the court applied Title VII’s broader definition of sex to a Title IX sex discrimination claim, but also set comparable limitations on what actionable discrimination looked like. *Howell* involved a female student who sued the college, alleging that she was forced to quit the basketball team in retaliation for her complaints about sex discrimination. The student complained that she was excluded from certain team activities after she voiced her opposition to homosexuality, that she received less playing time for resisting “lesbian [indoctrination],” and that she was not allowed to wear ribbons in her hair because they were “too feminine.” The college argued that the student’s Title IX claim should be dismissed because neither Title VII nor Title IX protect individuals on the basis of sexual preference or orientation.

In considering the arguments presented, the court found that “Title VII, and presumably Title IX, protect persons from not only discrimination on the basis of sex, but also from retaliation for complaining about the types of discrimination they prohibit.” *Id.* at 720. The court also noted that in the context of Title VII, the Seventh Circuit had consistently held that harassment based only on one’s sexual preference or orientation was not actionable. *Id.* at 722. Instead, in same-sex harassment cases, “same-sex harassment is actionable [only] when it constitutes discrimination ‘against women because they are women and men because they are men.’” *Id.*

The court agreed with the college. According to the student’s complaints, the alleged harassment began after she voiced her opposition to homosexuality. *Id.* at 723. She was pressured to either change her views or keep them to herself, and any “harassment” was motivated not because she was heterosexual, but on achieving these ends. *Id.* Further, the court observed that the student had not even stated a claim for gender stereotyping because she “fit … the stereotypical notions about how women should appear and behave.” *Id.* at 724. Lastly, the student’s own characterization of her case, that “‘had she been homosexual, this case would not exist’” matched the court’s, and because neither Title VII nor Title IX protect individuals from harassment on the basis of sexual preference or orientation, the court dismissed the Title IX claim. *Id.* at 725. See
also, Youngblood v. School Bd. of Hillsborough County, Case No. 8:02-cv-1089-T-24MAP (M.D. Fla. September 24, 2002) (holding that the school committed no discriminatory act, including any act in violation of Title IX, because, among other things, the plaintiff was a girl whose gender identity as female was consistent with social expectations for her birth sex).

Likewise, in Hoffman v. Saginaw Public Schools, 2012 WL 2450805 (E.D. Mich. June 27, 2012) (unreported), the court found that “while discrimination based on noncompliance with sexual stereotypes may be actionable under federal law, discrimination based on sexual orientation is not.” In that case, a male student claimed he was bullied by his peers, who “began repeatedly wishing [him] ‘Happy Birthday’” when it was not his actual birthday, refused to sit by him on the bus, began mocking him for not attending a school dance, referred to him as “lesbian, gay, or a hermaphrodite,” and made an obscene gesture indicating that the student had male genitalia in his mouth. The court found that no inference of sex-based discrimination or harassment could be drawn based on his allegations. While acknowledging that calling the student gay and suggesting he had male genitalia in his mouth “indisputably [had] sexual connotations,” the court said that such conduct did not constitute harassment on the basis of sex. Reiterating that “the conduct of jerks, bullies, and persecutors is simply not actionable unless they are acting because of the victim’s gender” Id., citing to Wasek v. Arrow Energy Servs., 682 F.3d 463 (6th Cir. 2012).

In Ray v. Antioch Unified School Dist., 107 F.Supp.2d 1165 (N.D. Cal. 2000), however, the court held that a student had put forth a valid sex discrimination claim under Title IX after he was harassed and attacked based on peers’ perception that the student was homosexual. In so ruling, the court said that “although Plaintiff’s complaint makes no specific characterization of the harassing conduct as ‘sexual’ in nature, it is reasonable to infer that the basis of the attacks was a perceived belief about Plaintiff’s sexuality, i.e. that Plaintiff was harassed on the basis of sex.” Id. at 1170. According to the court, this interpretation of Title IX was logical because there is “no material difference between the instance in which a female student is subject to unwelcome sexual comments and advances due to her harasser's perception that she is a sexual object, and the instance in which a male student is insulted and abused due to his harasser’s perception that he is a homosexual, and therefore a subject of prey. In both instances, the conduct is a heinous response to the harasser’s perception of the victim's sexuality, and is not distinguishable...” Id.

The cases above seem to show a judicial consensus that Title IX’s “because of sex” language, as with Title VII, incorporates discrimination based on gender nonconformity and sex stereotyping. However, there is no agreement about whether one’s status as a heterosexual, gay, lesbian, transgender, or bisexual person creates a valid Title IX claim.

IV. Along Comes the OCR

In 2001, the U.S. Department of Education published guidance on Title IX and sexual harassment of students. U.S. Dep’t of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment Of Students By School Employees, Other Students, or Third Parties
(2001). Responding to commenters’ requests to include “gender-based harassment predicated on sex stereotyping” as a form of sexual harassment, the agency noted that, while it was “concerned with the important issue of gender-based harassment,” it considered “harassment of a sexual nature” to be unique and distinguishable from gender-based harassment.

However, citing to Price Waterhouse, the Department of Education conceded that: “…gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim’s failure to conform to stereotyped notions of masculinity and femininity.” That same guidance added that “gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student’s ability to participate in or benefit from the educational program.”

There were relatively few regulatory changes and guidance documents from the Department of Education and OCR between 1972 and 2010. However, in that latter year the U.S. Department of Education’s definition of “sex” discrimination under Title IX began to expand in a series of “Dear Colleague” guidance letters and resolution agreements interpreting that law.

In its October 2010 letter on bullying, the agency wrote that Title IX “prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping,” adding that “it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity.” That letter conceded that Title IX does not prohibit discrimination “based solely on sexual orientation,” but added that if students are harassed on the basis of their LGBT status that could constitute sex discrimination under Title IX.

Following the 2010 guidance, the agency entered into several resolution agreements applying its more expansive – but perhaps no better defined – concept of “sex” under Title IX.

In July of 2013, for example, OCR reached a resolution in a California case involving a district’s alleged sex-based discrimination against a transgender student. Specifically, the transgender male student claimed that the district was denying him equal access to its education program and activities “because he is transgender.” In its determination letter, OCR wrote that: “Under the Title IX regulations, a school district may not treat individuals differently on the basis of sex with regard to any aspect of services, benefits, or opportunities it provides. All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX and Title VI.” OCR Case No. 09-12-1020 (July 24, 2013). [https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf)
support of the apparent assertion that a transgender student was necessarily treated differently “on the basis of sex” because of a failure to “conform to sex stereotypes,” the agency pointed to Title VII case law, which it said supported the proposition that discrimination based on sex included “discrimination against transgender individuals based on sex, including nonconformity with sex stereotypes and gender identity.” The resolution letter did nothing to clarify legally how OCR had arrived at this now broader interpretation of what constituted discrimination under Title IX.

In another resolution agreement, in October of 2014, OCR used somewhat narrower language, writing that “[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX.” OCR Case No. 09-12-1095 (October 14, 2014), http://www2.ed.gov/documents/press-releases/downey-schooldistrict-letter.pdf. In that resolution, the agency’s analysis more clearly aligned with Price Waterhouse.

Then, in February of 2015, OCR submitted a Statement of Interest in Tooley v. Van Buren Public Schools, a federal case filed in Michigan in which a transgender boy argued that his school violated Title IX and the Equal Protection Clause. Statement of Interest in Tooley v. Van Buren Pub. Schs., No. 2:14-cv-13466-AC-DRG (E.D. Mich. Feb. 24, 2015). Specifically, the transgender male student sued the school for not allowing him to use the bathroom consistent with his gender identity, “outing” him to other students and parents, referring to him as “Olivia,” and using feminine pronouns when referring to him in class. In its statement, OCR wrote that Title IX’s “on the basis of sex” language includes discrimination based on the fact that an individual is transgender or the perception that an individual has undergone, or is undergoing, a gender transition. Id. at *9.

The agency also issued in May of 2016 guidance aimed specifically at schools’ obligations towards transgender students. In that “Dear Colleague” letter, the agency explained that “[g]ender identity refers to an individual’s internal sense of gender. A person’s gender identity may be different from or the same as the person’s sex assigned at birth.” The letter also explicitly directed state and local education agencies to “treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.”

In its resolutions above, OCR had defined a transgender student as “a student who consistently and uniformly asserts a gender identity different from the student’s assigned sex [at birth], or for which there is documented legal or medical evidence that the gender identity is sincerely held as part of the student’s core identity.” However, in the May 2016 letter, the agency told school districts that “when a student or the student’s parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student’s gender identity.” Dear Colleague Letter on Transgender Students, at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
V. Case Law Following OCR Resolutions and “Dear Colleague” Guidance

Subsequent to OCR’s shifting and expanding interpretation of “sex” under Title IX, the courts have more carefully and explicitly considered how to interpret the statute’s “on the basis of sex” language. Most recently, the current debate has focused on the legislative history and intent behind Title VII and Title IX, and on whether (or how much) judicial deference should be given to federal agencies, especially in the absence of formal rulemaking.

For example, in Wolfe v. Fayetteville Sch. Dist., 648 F.3d 860, 867 (8th Cir. 2011), a student argued that discrimination “on the basis of sex” does not necessarily require a harasser to be motivated by his victim’s failure to conform with gender stereotypes, but rather it would be sufficient under Title IX to show the harassers used name-calling and spread rumors in an effort to debase his masculinity. Id. at 865. The district countered that the motive underscoring the conduct towards the plaintiff was not sex-based, but was instead a response to the student’s mistreatment of other students. Therefore, the student had not made a valid Title IX claim. Id. at 863. The court held that the plaintiff was required to prove the “harasser intended to discriminate against him ‘on the basis of sex,’ meaning the harassment was motivated by either [his] gender or failure to conform with gender stereotypes.” The court disagreed with the student’s position, writing that the “mere use of sex-based language in rumors or name-calling” does not per se establish sex-based discrimination. Rather, proof of sex-based motivation is required for a Title IX claim. Id. at 868.

On the other end of the spectrum, in Videckis v. Pepperdine University, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015), the federal court dismantled any distinction between discrimination based on gender stereotyping and discrimination based on sexual orientation under Title IX, writing that such a distinction was “illusory and artificial, and that sexual orientation is not a category distinct from sex or gender discrimination.” Id. In Videckis, two female students sued the university, claiming they were repeatedly harassed and treated differently from other similarly situated students because of their perceived sexual orientation. Id. at 1161. Coaches, trainers, and support staff frequently questioned the students—who were dating—about their sexual orientation, their private sexual behavior, and their dating lives. Id. The students were told “lesbianism would not be tolerated on the women’s basketball team,” and they were prevented from playing because of the university’s discriminatory views against lesbianism, including the belief that lesbianism “was a reason why teams lose.” Id.

According to the California district court, claims based on sexual orientation are gender stereotype or sex discrimination claims under Title IX. Id. In arriving at its decision, the court gave deference to a recent EEOC decision which said that sexual orientation discrimination is sex discrimination “because it involved treatment that would not have occurred but for the individual’s sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.” Id. See also What You Should
While some courts are giving federal agencies deference, and interpreting Title VII and Title IX as providing protection against sex discrimination for individuals based on sexual orientation and transgender status, this trend is not uniform. Other federal courts, pointing to the Title IX regulations which expressly permit some sex-segregated activities and facilities, have taken an opposite approach.

In *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657, 671 (W.D. Pa. 2015), for example, the court wrote that while the transgender “[p]laintiff might identify his gender as male, his birth sex is female. It is this fact—that Plaintiff was born a biological female, as alleged in the complaint—that is fatal to Plaintiff’s sex discrimination claim.”

In that case, a male transgender student sued the university for refusing to let him use the sex-segregated bathrooms or facilities that were consistent with his gender identity. *Id.* at 664. The student acknowledged that he had listed his sex as “female” when he initially applied to the university, but argued that he later transitioned to living in accordance with his male gender identity, changing his gender marker to male on his driver’s license and passport, registered with the Selective Service (required only of male citizens at the time), and amended his Social Security record to reflect that he was male. *Id.* at 662. Despite these efforts, as well as his having amended his university school records to show that he was male, the university banned the student from using the men’s locker room. *Id.* at 663. When the student continued to use the men’s locker room, rather than the unisex locker room which was normally reserved for referees, the university expelled him. *Id.* at 664.

In considering the arguments presented, the court noted that Title IX prohibits discrimination “on the basis of sex” and at issue was the parties’ disagreement over whether discrimination “on the basis of sex” applies to claims of discrimination by transgender students.

The court observed that “Title IX prohibits discrimination in education programs on the basis of sex, [but] the statute does not mention gender identity, gender expression, or gender transition.” *Id.* at 672. According to the court, this meant that “transgender is not a protected characteristic under the statute.” *Id.* at 674. After examining relevant Title VII cases and legislative history, the court concluded that “on a plain meaning of the statute,” the term “sex” is limited to the “traditional binary conception of sex consistent with one’s birth or biological sex,” and excludes gender identity. *Id.* at 676.

Thus deciding, the court went on to write that it was “particularly compelling” that “Title IX and its implementing regulations clearly permit schools to provide students with certain sex-segregated spaces, including bathroom and locker room facilities, to perform certain private
activities and bodily functions consistent with an individual's birth sex.” *Id.* at 678. This, said the court, made “the University's policy of separating bathrooms and locker rooms on the basis of birth sex . . . permissible under Title IX.” *Id.*

The plaintiff countered that he had been subjected to sex-stereotyping, found unlawful under both Title VII and Title IX. However, the court disagreed and said that the student had not been discriminated against “because of the way he looked, acted, or spoke. Instead, Plaintiff allege[d] only that the University refused to permit him to use the bathrooms and locker rooms consistent with his gender identity rather than his birth sex.” *Id.* at 680. Added the court, “at least one court has reasoned that prohibiting a transgender student from using a restroom consistent with his or her gender does not constitute discrimination under Title IX, because ‘it would be a stretch to conclude that a “restroom,” in and of itself, is educational in nature and thus an education program’ as required to state a prima facie case under the statute.” *Id.* at 682 (citing to *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1121-1122 (10th Cir. 2007)).

In *G.G. v. Gloucester Cty. Sch. Bd.*, the case currently pending before the Supreme Court, the lower and appeals courts addressed head-on how much deference should be accorded to federal agencies. The case arose from a transgender male student’s challenge to a restroom policy passed by his school board. As the student transitioned from female to male (including a name change and use of hormones), he requested and was permitted to use the boys’ restroom. However, some members of the community disapproved of the student’s use of male restrooms and demanded that the school board pass a policy restricting the use of sex-segregated facilities to students’ birth sex. The board did so and adopted a policy that its male and female restroom and locker room facilities “shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative private.” Minor modifications were later made to the policy which remained, substantively, unchanged.

*G.G.* alleged that his exclusion from the boys’ bathroom was based on his male gender identity and constituted sex discrimination under Title IX, so he sued. In response, the school board argued that sex discrimination under Title IX does not include discrimination based on gender identity.

In *G.G. v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. Sept. 17, 2015), the district court dismissed the student’s Title IX claim, writing that the Title IX regulatory definition of “sex” “clearly includes biological sex.” Specifically, the court observed that Section 106.33 of the regulations allow the districts to have “separate toilet, locker room, and shower facilities on the basis of sex,” so long as the “facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex.”

When the student countered that the district had violated Title IX by determining that the student is biologically female, not biologically male, contrary to his gender identity, the court replied that the only way to square that claim with the Title IX regulations would be “to interpret the use
of the term ‘sex’ in Section 106.33 to mean only ‘gender identity’...[and] permit the use of separate bathrooms on the basis of gender identity and not on the basis of birth or biological sex.” But because the school district’s “policy of providing separate bathrooms on the basis of biological sex is permissible under the regulations,” the court concluded that it “need not decide whether ‘sex’ in the Section 106.33 also includes ‘gender identity.’” Id. at 745.

OCR had intervened in the case, urging judicial deference to its interpretation of Title IX, “which maintains that a policy that segregates bathrooms based on biological sex and without regard for students' gender identities violates Title IX.” The court declined to do so and delivered a blistering rebuke of OCR’s position. Said the court, OCR’s “interpretation does not stand up to scrutiny” because it was not derived from regulations, nor developed through notice and comment rulemaking. Rather, said the court, the agency’s “interpretations in opinion letters, policy statements, agency manuals, and enforcement guidelines ‘do not warrant Chevron-style deference.’” Continued the court:

“To begin with, Section 106.33 is not ambiguous. It clearly allows the School Board to limit bathroom access ‘on the basis of sex,’ including birth or biological sex. Furthermore, the Department of Education's interpretation of Section 106.33 is plainly erroneous and inconsistent with the regulation. Even under the most liberal reading, ‘on the basis of sex’ in Section 106.33 means both ‘on the basis of gender’ and ‘on the basis of biological sex.’ It does not mean ‘only on the basis of gender.’ Indeed, the Government itself states that ‘under Price Waterhouse, ‘sex’... encompasses both sex - that is, the biological differences between men and women - and gender.’ Thus, at most, Section 106.33 allows the separation of bathroom facilities on the basis of gender. It does not, however, require that sex-segregated bathrooms be separated on the basis of gender, rather than on the basis of birth or biological sex. Gender discrimination did not suddenly supplant sex discrimination as a result of Price Waterhouse; it supplemented it.”

Therefore, said the district court, G.G.’s school did not violate Title IX by requiring him to use either sex-segregated facilities, or unisex restrooms and locker rooms, in accordance with his female birth sex.

On appeal, a Fourth Circuit panel reversed the district court’s dismissal of the student’s Title IX claim, concluding that the court “did not accord appropriate deference to the relevant Department of Education regulations.” G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709, 715 (4th Cir. 2016). The panel stated that “[a]lthough the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with
reference to gender identity.” *Id.* at 720. Therefore, the panel determined that a letter containing the Department’s interpretation was entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997), which requires that an agency’s interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute.

The Fourth Circuit rejected an appeal for *en banc* review and the Fourth Circuit panel decision has been stayed pending the Supreme Court’s decision. *G.G. v. Gloucester Cnty. Sch. Bd.*, 654 Fed. Appx. 606 (4th Cir. 2016). The questions being put to the High Court are: (1) whether courts should extend deference to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought; and (2) whether, with or without deference to the agency, the Department of Education’s specific interpretation of Title IX and 34 C.F.R. § 106.33, which provides that a funding recipient providing sex-separated facilities must “generally treat transgender students consistent with their gender identity,” should be given effect.

The Supreme Court recently announced that *Gloucester Cnty. Sch. Bd. v. G.G.*, will not be slated for oral argument until the Court’s March or April sitting—increasing the chances that a ninth justice may have taken the bench by the time the case is heard. Additionally, the schedule change also means that the federal government’s position in the case will be determined by the incoming Trump administration, rather than the Obama administration, which has propagated the agency position under review.

VI. And the Beat Goes On

Subsequent to the OCR’s May 2016 guidance, and the Supreme Court’s acceptance of the *G.G.* case, there have been continuing legal challenges to OCR’s interpretation of the term “sex” under Title IX and the matter of deference to federal agencies.

On Aug. 21, 2016, a federal court in Texas issued a preliminary nationwide injunction in the suit brought against the U.S. Department of Justice and U.S. Department of Education on May 13, 2016, challenging OCR’s and EEOC’s positions that Title VII and Title IX require all persons “be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex.” *Texas, et. al. v. United States of America*, No. 7:16-cv-00054-O (N.D. Tex. Aug. 21, 2016). That injunction prohibits OCR from enforcing its May 2016 transgender student guidelines and from “initiating, continuing, or concluding any investigation” against any school district based on OCR’s view that Title IX prohibits discrimination against transgender students.

The states and entities that brought the claim complained, among other things, that nothing in Title IX “opens all bathroom and other intimate facilities to members of both sexes.” *Id.* In clarifying their interpretation of federal law, the plaintiffs argue that, under Title VII, “sex” means “the biological differences between a male and a female.” They also argued that the
agencies have engaged in a “swift move to supplant the traditional, biological meaning of sex with a definition based on gender identity,” thereby inflicting harm on school districts through enforcement of that new interpretation.

In granting the injunction, the court observed that OCR’s interpretation of “sex” provided no “safe harbor.” Rather, it forced schools to allow students to use sex-segregated facilities in accordance with their gender identity, allowing no option for transgender students to be required to use comparable individual, unisex facilities. The court agreed with the plaintiffs that OCR had gone beyond Congress’ unambiguous intent to use “sex” in the “exclusively biological context” without engaging in proper notice and comment rulemaking. Therefore, the court concluded that the agencies’ interpretations were not entitled to Auer deference.¹

Nearly simultaneous to that injunction, the Women’s Liberation Front, an organization whose web site says that “gender is a hierarchical caste system that organizes male supremacy” which “must be abolished,” also sued in federal court. In Women’s Liberation Front v. U.S. Dep’t of Justice, No. 1:16-cv-00915 (D.N.M. filed Aug. 11, 2016), the organization challenges OCR’s May 2016 guidance, specifically its position that the term “sex” under Title IX is equivalent to gender identity. According to the plaintiffs, such a “redefinition effectively renders sex meaningless as a legally protected category in federally funded schools and universities.” Id. The organization also argues that conflating the terms “sex” and “gender identity” “effectively strips women and girls of their legal protections, as it eliminates the ability to legally distinguish between males and females in federally funded schools.” Adds the organization in its complaint, “there is no way for a school to objectively determine an individual’s internal sense of ‘gender identity’” and “with the stroke of a pen” at OCR, men “are simply free” to use women’s sex-segregated facilities.

The Women’s Liberation Front also asserts that Congress knows how to add “gender identity” to a statute when it wishes to do so, pointing out that in amending the Violence Against Women Act, Congress added to “sex” the term “gender identity” as a separate basis for discrimination. Says the organization: Congress did not define the terms to be the same there and so they should not be interpreted to be the same under other federal laws such as Title IX. The Women’s Liberation Front also seeks to have the guidance enjoined and points approvingly to the Texas action, though it says it intends to inject a feminist perspective into those arguments.

¹ Also, in a New Year’s Eve injunction enjoining provisions of the ACA that prohibited health care discrimination on the basis of “gender identity” and “termination of pregnancy,” the same federal district court in Texas that suspended OCR’s transgender student guidance wrote: “[t]he government's usage of the term sex in the years since Title IX's enactment bolsters the conclusion that its common meaning in 1972 and 2010 referred to the binary, biological differences between males and females...[and] prior to the passage of the ACA in 2010 and for more than forty years after the passage of Title IX in 1972, no federal court or agency had concluded sex should be defined to include gender identity.” Franciscan Alliance v. Burwell, et. al., Civ. Action No. 7-16-cv-00108-O (Dec. 31, 2016 N.D. Tex.)
VII. Parallel EEOC Developments Redefining the Meaning of “Sex” under Title VII

Given Title IX courts’ embrace of Title VII case law, it is helpful to remember that the meaning of “sex” under Title VII has also transformed in recent years. The EEOC interprets and enforces Title VII’s prohibition on sex discrimination to mean that any employment discrimination based on gender identity or sexual orientation is unlawful. Courts, however, continue to wrestle with whether to distinguish between discrimination on the basis of gender stereotypes, discrimination on the basis of sexual orientation, and whether Title VII covers transgender individuals.

In November 2016, a federal court denied a motion to dismiss a sex discrimination lawsuit filed by the EEOC, ruling that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII. *U.S. EEOC v. Scott Med. Health Ctr., P.C.*, No. 16-225 (W.D. Pa. Nov. 4, 2016). In this case, the EEOC charged that a gay employee was subjected to sex discrimination in the form of harassment because of his sexual orientation because he was forced to quit his job rather than endure his supervisor’s discriminatory harassment. *Id.* The employee’s manager allegedly regularly called the employee “fag,” “faggot,” and “queer,” and asked intrusive and inappropriate questions about his sex life and relationships. *Id.*

In its ruling, the district court held that discrimination on the basis of sexual orientation is a form of sex discrimination because “[t]here is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality.” *Id.* The court’s decision is consistent with EEOC’s enjoined interpretation of sex discrimination under Title VII, though it is unclear whether the court gave any deference to the agency position when making its ruling.

Similarly, in a case involving a transgender employee, another federal court denied the employer’s motion for summary judgment, finding that the employee pled facts sufficient to state a claim of sex discrimination on the basis of her transgender status. *Dawson v. H & H Electric, Inc.*, No. 4:14CV00583 (E.D. Ark. Sept. 15, 2015). There, the employee began transitioning from male to female after she was hired and repeatedly asked to use her female legal name at work and was denied. *Id.* Instead, her supervisor instructed her not to discuss her gender transition with anyone at work, not to wear women’s clothing, or not to use the women’s restroom. When terminating her, her supervisor said, “You do excellent work, but you’re too much of a distraction.” *Id.* While the court noted that the EEOC had filed an *amicus* brief in the employee’s support, it did not specifically address the EEOC’s arguments. Instead, it based its decision on an analysis of gender nonconforming behavior, rather than on the employee’s status as a transgender individual. *Id.*

On the other hand, in *Evans v. Georgia Regional Hospital*, No. CV415-103 (S.D. Ga. Sept. 10, 2015), the court dismissed an employee’s claim that her employer discriminated against her because of her sexual orientation and nonconformity to gender-based stereotypes, stating that Title VII “was not intended to cover discrimination against homosexuals.” *Id.* In this case, the employee alleged that she was targeted by her supervisor because she “visually...presented”
herself as a male and so he perceived her to be homosexual. *Id.* In addition to holding that Title VII does not protect against discrimination on the basis of sexual orientation, the court also concluded that to say that an employer has discriminated on the basis of gender nonconformity is “just another way to claim discrimination based on sexual orientation.” In an interesting twist on the “what-does-the-law-mean-by-sex” question, the court wrote, in apparent contradiction to *Price Waterhouse*: “To inflict an adverse employment action (unfair discipline, denied promotion, etc.) because a male is too effeminate or a female too masculine is to discriminate based on sexual orientation (‘gender nonconformity’), which is reflected in the gender image one presents to others — that of a male, even if one is biologically a female. Hence, [*Plaintiff’s*] allegations about discrimination in response to maintaining a male visage also do not place her within Title VII’s protection zone, even if labeled a ‘gender conformity’ claim, because it rests on her sexual orientation no matter how it is otherwise characterized.” *Id.* See also, *Burrows v. Coll. of Cent. Fla.*, No. 5:14-cv-197-Oc-30PRL (M.D. Fla. Sept. 9, 2015) (holding that the employee’s claim of gender-based discrimination failed because it constituted a “repackaged” claim of sexual orientation discrimination, which is not prohibited under Title VII; and adding that while EEOC’s recognition of sexual orientation discrimination as sex based discrimination “is relevant and would be considered persuasive authority, it is not controlling”). Both *Burrows* and *Evans* are pending appeal to the Eleventh Circuit.

Most recently, in *Hively v. Ivy Tech Cmty. College*, No. 15-1720 (7th Cir. Jul. 28, 2016), the Seventh Circuit reiterated that discrimination based on sexual orientation did not create a cognizable Title VII claim, and acknowledged that such a position put the Seventh Circuit and other circuit courts “in the shadow of a criticism from the…EEOC.” The court added that this raises legal questions regarding how sexual orientation claims are distinguishable from gender non-conformity claims. Noting that the federal district courts “are beginning to ask whether the sexual-orientation denying emperor of Title VII has no clothes,” the court conceded that the matter will need to be addressed by the Supreme Court or Congress.

**VIII. Advising Clients on Compliance with Title IX’s Moving Target**

Given that the *Gloucester* case is pending, and the OCR transgender guidance, as well as OCR and EEOC enforcement positions on gender identity have been enjoined, what advice can be given regarding compliance with Title IX’s “on the basis of sex” anti-discrimination mandate? A few thoughts follow:

1) Be sure our clients maintain a civil and respectful school environment, regardless of any differences or dispute that may exist between staff, students, and/or parents.

2) Title IX cases analyzing sex discrimination and sexual harassment have been interpreted in a manner consistent with similar Title VII case law. Thus, *Price Waterhouse*, which remains binding law under Title VII, would seem to compel an obligation to ensure students are not harassed or discriminated against because of their failure to conform to sex-stereotypes.
• Be sure staff are trained in recognizing, reporting, investigating, addressing, and responding to these complaints.

3) If the district is faced with a legitimate request that a student be treated in accordance with the student’s gender identity, consider:
   • Any state and local law that may apply – same with state athletics rules.
   • While OCR’s Palatine, Illinois resolution could provide a good model, the Pennsylvania and Virginia cases are also instructive.
     o In the Palatine resolution, OCR required the district not only to allow use of sex segregated facilities based on a student’s gender identity, but also to offer to all students the option of private facilities for any student wishing to have greater privacy. https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05141055-a.pdf
     o In the federal court decisions, the transgender students were treated in accordance with their gender identity in all aspects except sex-segregated facilities where privacy could be a concern. There, the students were required to use sex-segregated facilities in accordance with their birth sex, or to use private unisex facilities.
       ▪ Be sure any private unisex facilities are not so inconveniently located that a student could arguably be deprived of equal access to education.
   • Keep communication lines open and check-in with students/parents about how any arrangements are going.
   • NSBA’s guide on transgender students is a balanced guide for districts and can be a great resource to share: http://www.nsba.org/nsba-faqs-transgender-students-schools.

4) Remind clients that the law is in flux and help them arrive at legally defensible practices; if they are seeking a more politically popular solution, be sure they are aware of and consider the legal risks.
   • In the context of sexual assault, at least one federal court has said that failure to follow OCR’s Dear Colleague “enforcement standards” did not amount to deliberate indifference per se, so long as the response to the claims was not clearly unreasonable under Davis. Karasek v. Regents of the University of California, Case No. cv-15-03717-WHO (N.D. Cal., Dec. 11, 2015).
   • Remember: a plaintiff could still prevail on a Section 1983 or Equal Protection claim, if not under Title IX.

5) Be sure districts identify and train a Title IX coordinator, and have in place/distribute information about district complaint policies and Title IX’s anti-discrimination mandates.

6) Some of these issues may be resolved if the new administration rescinds/modifies the current federal agency guidance or posture.