



HUSCH BLACKWELL

LGBTQ+ Issues

Stockton University – Faculty Development Series
November 1, 2022



Agenda

- Terminology
- Legal overview
- Title IX proposed rules
- Key case developments
- Pronouns, restrooms, & other practical issues



Terminology

Sexual Orientation

- An inherent or immutable enduring emotional, romantic or sexual attraction to members of the same and/or opposite sex
- Separate from an individual's gender identity

Gender Identity

- One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves
- One's gender identity can be the same or different from their sex assigned at birth



Terminology

- **L** (Lesbian): a woman who is emotionally, romantically or sexually attracted to other women.
- **G** (Gay): a person who is emotionally, romantically or sexually attracted to members of the same gender.
- **B** (Bisexual): a person who is emotionally, romantically or sexually attracted to more than one sex, gender or gender identity though not necessarily simultaneously, in the same way or to the same degree.
- **T** (Transgender): An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation.
- **Q** (Queer or Questioning): Queer: a term people often use to express fluid identities and orientations; often used interchangeably with LGBTQ. Questioning: a term used to describe people who are in the process of exploring their sexual orientation or gender identity
- **+** (Plus): The 'plus' is used to signify all gender identities and sexual orientations that are not specifically covered by the other five initials.



Terminology

Gender Nonconforming

A broad term referring to people who do not behave in a way that conforms to the traditional expectations of their gender, or whose gender expression does not fit neatly into a category

Gender Stereotypes

Stereotypical notions of masculinity and femininity, including expectations of how people represent or communicate their gender to others through behavior, clothing, hairstyles, activities, voice or mannerisms





Terminology

Gender Transition

- The process by which some people strive to more closely align their internal knowledge of gender with its outward appearance.
- Some people socially transition, whereby they might begin dressing, using names and pronouns and/or be socially recognized as another gender. Others undergo physical transitions in which they modify their bodies through medical interventions.

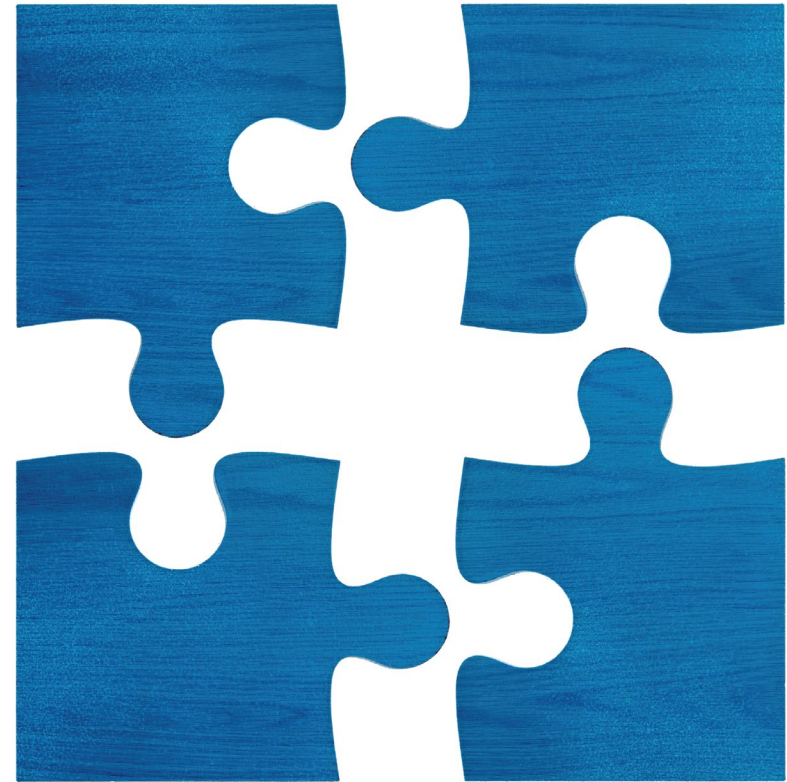
Gender Dysphoria

- Clinically significant distress caused when a person's assigned birth gender is not the same as the one with which they identify. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), the term – which replaces Gender Identity Disorder – “is intended to better characterize the experiences of affected children, adolescents, and adults.”
- Diagnosis that protects access to medical treatment options.



Applicable Laws

- Title VII
- Title IX
- ADA/Section 504
- State and local laws





Title VII

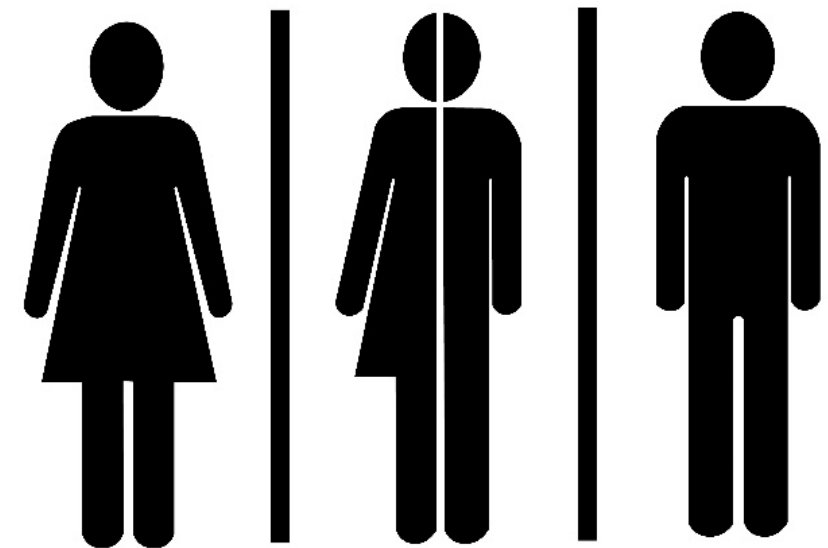
- Prohibits discrimination in employment because of sex.
- SCOTUS previously ruled that Title VII prohibits same-sex harassment (1998) and sex stereotyping (1989).
- SCOTUS ruled in 2020 that Title VII's prohibition against sex discrimination encompasses sexual orientation and gender identity. (*Bostock v. Clayton County*)
 - “An employer who fires an individual merely for being gay or transgender defies [Title VII]. “



Title IX

“[N]o 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.”

32 C.F.R. § 106.31





Title IX (cont'd)

- SCOTUS has not ruled on how Title IX applies to LGBTQ+ students, but some federal courts have addressed the rights of LGBTQ+ students.
- The Biden Administration has issued guidance and proposed Title IX regulations addressing this issue.



Title IX (cont'd)

- **Mar. 8, 2021:** Executive Order Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity
 - Authorizes the Secretary of Education to take additional action to enforce this policy
- **June 16, 2021:** Department of Education says Title IX prohibits discrimination based on sexual orientation and gender identity

Title IX Proposed Regulations

- On June 23, 2022, the Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020
- Public comment period closed September 12th





Title IX Proposed Regulations

- Prohibit all forms of sex discrimination, including discrimination based on sexual orientation, gender identity, and sex characteristics.
- There are limited circumstances which permit different treatment or separation based on sex (e.g., toilet, locker room, and shower facilities).
- Under those limited circumstances, such different treatment could not be conducted in a manner that subjects a person to more than *de minimis* harm.



Title IX Proposed Regulations

- When an institution adopts a policy or engages in a practice that prevents a person from participating consistent with the person's gender identity and that policy or practice is not explicitly allowed under Title IX, then the institution subjects the person to more than *de minimis* harm.



Title IX Proposed Regulations

- ED will issue a separate notice of proposed rulemaking for amendments to § 106.41 to address what criteria, if any, institutions may use to establish student eligibility to participate on a particular male or female athletics team.



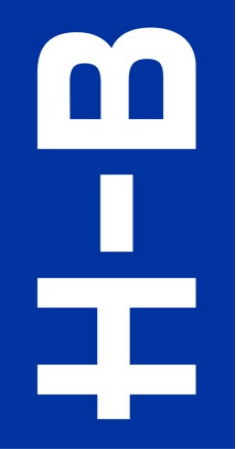
ADA / Section 504

- Federal laws that prohibit disability discrimination and require institutions to make reasonable accommodations to qualified individuals with a disability.
- Disability = A physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.

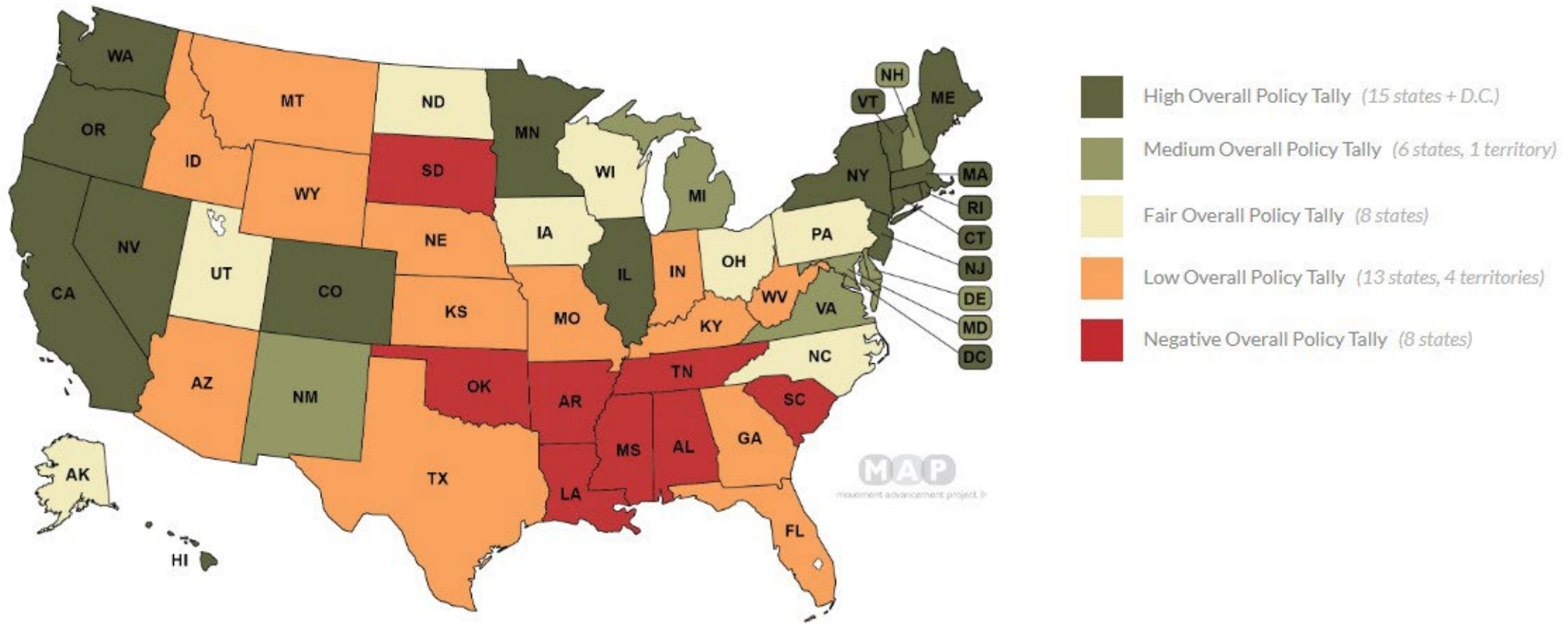


ADA / Section 504

- ADA explicitly excludes: “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.”
- A federal appeals court ruled in August 2022 that gender dysphoria can be a disability under federal disability discrimination law.

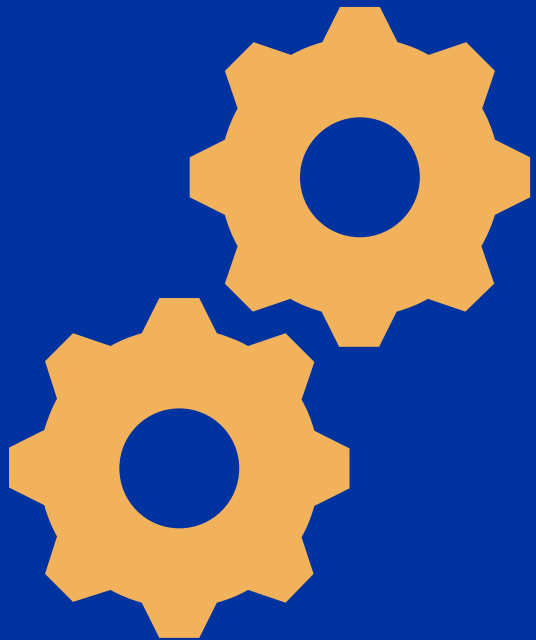


State Laws: LGBTQ Equality



Source: <https://www.lgbtmap.org/equality-maps/>

Poll Scenario



Student employee who identifies as male works with Professor Clueless for two semesters providing classroom assistance. At the start of the following semester, Student notifies Professor Clueless that she has changed her name and should be identified by female pronouns. Professor Clueless continues to refer to Student as “he” and “him” and calls her a “nice young man” on several occasions. Professor Clueless also refers to Student by her dead name. Student files a complaint alleging sex harassment.



Poll Question #1

Does this constitute prohibited sex harassment?

- ☐ Yes
- ☐ No
- ☐ It depends



Poll Question #2

Does it make a difference if Professor Clueless says he is absent-minded and this was only a mistake?

- ☐ Yes
- ☐ No
- ☐ It depends



Poll #3

Does it make a difference if Professor Clueless objected to using the student employee's preferred pronoun for religious reasons?

- ☐ Yes
- ☐ No
- ☐ It depends



OCR Response to Inquiry (March 9, 2020)

“By itself, refusing to use transgender students’ preferred pronouns is not a violation of Title IX and would not trigger a loss of funding or other sanctions. To the extent any prior OCR subregulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative.

However, sex-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 an education program or activity. Thus, harassing a student—including acts of verbal, nonverbal, or physical aggression, intimidation, or hostility—based on the student's failure to conform to stereotypical notions of masculinity and femininity can constitute discrimination on the basis of sex under Title IX in certain circumstances. Schools have a responsibility to protect students against such harassment.”



EEOC FAQ (June 15, 2021)

Q.11. Could use of pronouns or names that are inconsistent with an individual's gender identity be considered harassment?

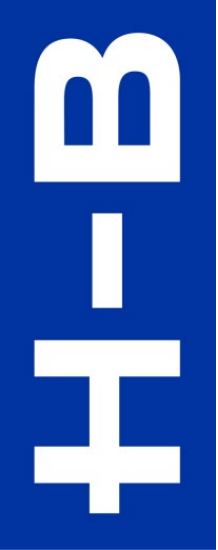
Answer: Yes, in certain circumstances. Unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*, the Commission explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.



Meriwether v. Hartop

(6th Cir. 2021)

- Institution adopts mandatory preferred pronouns policy
- Faculty member wishes to refer to transgender student by last name instead of preferred honorific or pronoun
- Institution finds faculty member engaged in hostile environment harassment and/or adverse treatment discrimination
- Faculty member files lawsuit asserting free speech, freedom of religion, and due process claims



Meriwether v. Hartop (6th Cir. 2021)

- Faculty member's claims survive a motion to dismiss; school eventually pays him a \$400k settlement
- Court says: “there is no suggestion [faculty] member’s speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits.”
- “[Faculty member’s] decision not to refer to Doe using feminine pronouns did not have a [systematic effect of denying the victim equal access to an education program or activity].”



Kluge v. Brownsburg Community School Corp. (S.D. Ind. 2020)

- Public school teacher filed suit claiming he was discriminated against & forced to resign because his religious beliefs prevented him from following school's preferred name/pronoun policy.
- The Court said the teacher's choice how to address students was not protected by the First Amendment & teacher did not assert successful claim for violation of the Free Exercise Clause.
- Claims for retaliation & failure to accommodate religious beliefs ("last name only" arrangement) under Title VII were allowed to proceed.



Loudoun County School Board v. Cross (Supreme Court Va. 2021)

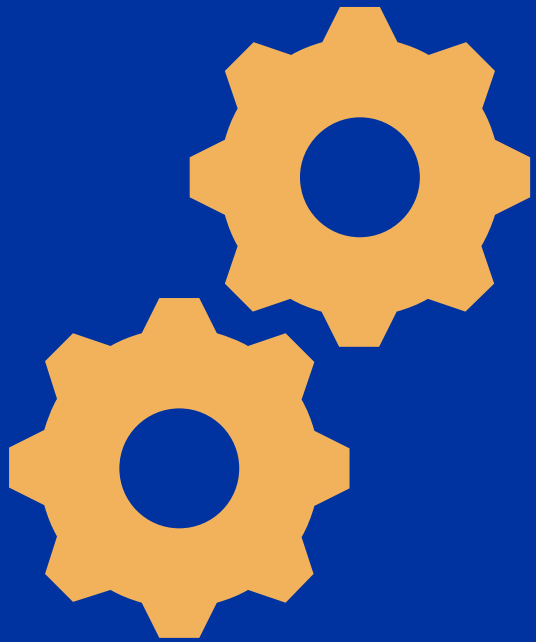
- Public school teacher was suspended & banned from future meetings after speaking at school board meeting and opposing transgender policy.
- The proposed policy would require use of preferred pronouns and allow use of school facilities/participation in activities based on a student's gender identity.
- The teacher was ultimately reinstated; the courts found his suspension & restriction from future meetings burdened his freedoms of expression & religion.



Takeaways

- Misgendering or failure to use preferred names is not inherently discrimination as defined by law (but may be)
- Faculty members may have First Amendment free expression or academic freedom rights that limit institutional ability to compel language
- Faculty members with religious beliefs may be entitled to an accommodation

Poll Scenario

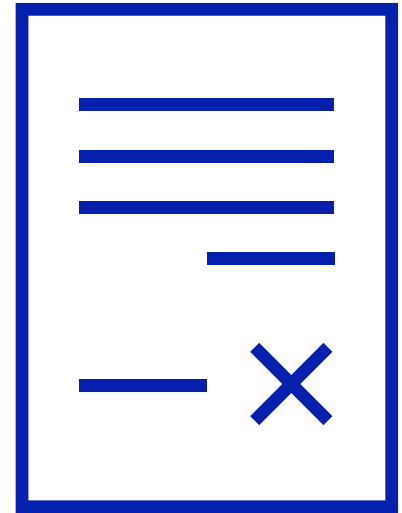


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Pronoun best practices

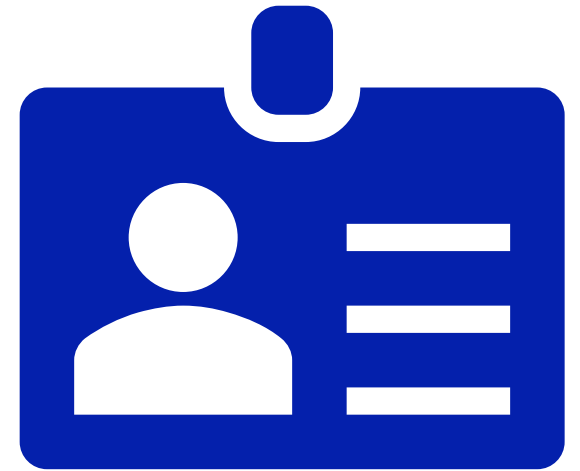
- Develop a pronoun policy & address preferred pronoun usage
- Avoid gendered language when possible
- Encourage students to use pronouns on signature lines in email
- Consider accommodation requests from objecting faculty





Name change best practices

- Ask students what their preferred names are
 - Legal name changes not required
- Develop a name change policy





Bathroom choice

- “Bathroom bans” – rules and laws that restrict which bathrooms transgender individuals are allowed to use
- State legislation to limit individuals using a bathroom that does not correspond with their gender on their birth certificate



Example Legislative Efforts (2022)

- Alabama: HB-322 requires that the use of bathrooms, locker rooms, changing rooms, and shower rooms be based on “biological sex,” meaning the sex assigned at birth.
- Tennessee: HB1233 requires students to use bathroom facilities designated for the sex they were assigned at birth. Allows legal action against schools if students believe the school intentionally allowed a member of the “opposite sex” to share a bathroom or locker room with them.



Whitaker v. Kenosha Unified School Dist. (7th Cir. 2017)

- Wisconsin high school prohibited plaintiff, a 17-year-old transgender male, from using the boys' restroom
 - Plaintiff alleged violations of Title IX and the 14th Amendment
 - 7th Cir. Held: “[t]here was irreparable harm because **use of the boys’ restroom was integral to the student’s transition and emotional wellbeing.**”





Grimm v. Gloucester Cty. Sch. Bd.

(4th Cir. 2019)

- Virginia high school prohibited plaintiff, a transgender male student, from using the boys' restroom at school
- Plaintiff suffered from urinary tract infections as a result of bathroom avoidance and endured suicidal thoughts
- Plaintiff alleged violations of Title IX and 14th Amendment



Grimm v. Gloucester Cty. Sch. Bd. (4th Cir. 2019) (*cont'd*)

- Court granted Plaintiff's motion for summary judgment
 - “there is no question that the [School] Board’s policy discriminates against transgender students on the basis of their gender nonconformity. . . . Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go.”
- Affirmed by 4th Circuit in 2020
- **SCOTUS** declined to hear an appeal to the *Grimm* ruling, leaving the 4th Circuit holding in place



EEOC Guidance: Restrooms

- Employers can maintain separate bathrooms, locker rooms, and showers for men and women.
- Employers cannot deny an employee equal access to a bathroom, locker room, showers that correspond to their gender identity.



EEO Guidance: Dress Codes

- Prohibiting an employee from dressing or presenting consistent with that person's gender identity constitutes sex discrimination
- Employers cannot segregate employees based on actual or perceived customer preference (ex. It is discriminatory to take an employee out of a public-facing position)

Questions

