

Transgender Panic in Higher Education: An Argument for the Expansion of Title IX

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ABSTRACT

Title IX has evolved to include gender identity, specifically transgender status, under the definition of “sex” within the law, but that inclusivity has wavered under different administrations and under different courts. While the Supreme Court ruled in *Bostock v. Clayton County* that “sex” under Title VII included sexual orientation and gender identity, Title VII and Title IX apply differently to employees versus students. Additionally, court rulings have varied on whether gender identity is covered under Title IX, and *Bostock* does not specifically rule on this issue, which means the only way to protect America’s transgender students is through expanding discriminatory protections under Title IX to include more than “sex.” Transgender students are currently facing heightened discrimination and outright bans in collegiate athletics nationwide, and the Supreme Court has not yet ruled on the constitutionality of these attacks. Through a comparison of cases and concerning legislation, this piece will argue that the language of Title IX is too vague, and protections against transgender students in America’s higher education institutions must remain cemented in an expansion of law to include “gender identity” in writing, which specifically protects this extremely vulnerable group.

TABLE OF CONTENTS

INTRODUCTION.....	63
I. DISCUSSION.....	66
A. HISTORY OF TITLE IX.....	66
B. ARGUMENT FOR THE EXPANSION OF TITLE IX.....	67
1. CONCERNING LEGISLATION.....	67
2. BOSTOCK V. CLAYTON COUNTY.....	69
3. RELEVANT CASE LAW.....	72
4. WHY AMEND TITLE IX?.....	74
CONCLUSION.....	77

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INTRODUCTION

Attacks against LGBT individuals, especially transgender individuals,¹ have risen significantly in recent years. This current wave of anti-Queer and anti-transgender legislation and hysteria across the United States, heightened through the media, is a targeted, purposeful effort to “exclude Queer people, especially transgender people, from full recognition and participation in public life.”² Anti-transgender legislation, including “bathroom bills,” book bans and collegiate athletic bans,³ both reinforce the gender binary and ostracize transgender students from their own education. From personal to political violence, transgender college and university students remain a particularly vulnerable subset facing these attacks.

According to a 2017 study, transgender college students, compared to cisgender male students, experience the highest odds of involvement in crimes involving sexual victimization, including attempted sexual penetration, sexual penetration without consent, and being in a sexually abusive relationship.⁴ Additionally, researchers found that, compared to male and female students, transgender students are also more likely to experience victimization regarding violent crimes.⁵ Based on college survey data, a majority of the estimated one million transgender individuals in the United States are either of college age (ages 18–24) or belong to the age group approaching college age (ages 13–17).⁶ Despite their prevalence in the “college age” category, transgender individuals are less likely to attend college than non-transgender individuals.⁷ The disparity in college attendance between transgender individuals and their cisgender peers emphasizes the need for promotion of enrollment, attendance and graduation of transgender individuals in higher education.⁸

In order to promote equality in higher education and to protect transgender college students, gender-based violence at colleges and universities must be reduced. Transgender students are more likely than non-transgender students to experience (1) physical fights, (2) physical assault,

¹ Stacey B. Griner, Cheryl A. Vamos, Erika L. Thompson, Rachel Logan, Coralia Vázquez-Otero, & Ellen M. Daley, *The Intersection of Gender Identity and Violence: Victimization Experienced by Transgender College Students*, 35 J. INTERPERSONAL VIOLENCE 5704, 5706 (2020) (“Although transgender people are in the statistical minority, population-based samples have indicated that up to 0.5% of the population identify as transgender, which is estimated to be about one million people.”) [hereinafter Griner].

² Sara Brightman, Emily Lenning, Kristin J. Lurie, & Christina DeJong, *Anti-Transgender Ideology, Laws, and Homicide: An Analysis of the Trifecta of Violence*, 2023 HOMICIDE STUD. 1, 3, 7 (studying homicides and fatal violence against transgender individuals using the framework of the “trifecta of violence”—violent ideology, violent policies and laws, and violent actions).

³ See *id.* at 3–4, 10.

⁴ Griner, *supra* note 1, at 5705.

⁵ *Id.*

⁶ *Id.* at 5707.

⁷ *Id.*

⁸ See KERITH J. CONRON, KATHRYN K. O’NEILL, & LUIS A. VASQUEZ, UCLA WILLIAMS INST. & THE POINT FOUND., EDUCATIONAL EXPERIENCES OF TRANSGENDER PEOPLE, (Apr. 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Apr-2022.pdf>.

(3) verbal threats and (4) sexual assault;⁹ 35% of transgender students reported experiencing harassment in school.¹⁰ Additionally, 87% of transgender students who reported harassment stated that the motive behind said harassment was their gender identity.¹¹ This mistreatment of transgender students leads to a particularly troubling cycle of violence and victimization, as those who have been victimized during college are “more likely to experience incarceration, homelessness, participation in sex work, unemployment, and increased rates of health concerns, including smoking, drug and alcohol use, HIV diagnoses, and suicide later in life.”¹² Many transgender students leave higher education, and among those who leave, only 30% return to receive a degree.¹³ Transgender students report considering abandoning their higher education institutions at high rates, for fear of violence due to their gender identity.¹⁴ Despite these significant concerns, transgender students are less likely to report that their universities responded positively to reports of harassment.¹⁵ The prevalence and allowance of the mistreatment of transgender college students remains significantly concerning, as one historic piece of legislation has been established and interpreted to protect against this discrimination and harassment.

The United States Congress, in 1972, passed Title IX as part of the Education Amendments to the Civil Rights Act of 1964.¹⁶ Title IX provides legal protection against discrimination on the basis of sex, or gender, for both students and employees of educational institutions.¹⁷ Title IX states that, “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”¹⁸

Since its establishment, different jurisdictions and different administrations have interpreted “sex” under Title IX to include or exclude gender identity, or transgender status.¹⁹ During the Obama administration, the U.S. Departments of Education and Justice released a joint guidance document purporting that Title IX’s protections extend to transgender students.²⁰ However, the Trump administration reversed these protections in

⁹ Griner, *supra* note 1, at 5707.

¹⁰ *Id.* at 5708.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Griner, *supra* note 1, at 5708.

¹⁶ Iram Valentin, *Title IX: A Brief History*, 2 HOLY CROSS J. L. & PUB. POL’Y 123, 123 (1997).

¹⁷ *Id.* at 124.

¹⁸ 20 U.S.C. § 1681(a).

¹⁹ See Suzanne Eckes, *Sex Discrimination in Schools: The Law and Its Impact on School Policies*, 10 LAWS 1 (2021).

²⁰ *Id.* at 7–8; accord Catherine E. Lhamon, Assistant Sec’y for C.R., U.S. Dep’t of Educ. & Vanita Gupta, Principal Deputy Assistant Att’y Gen. for C.R., U.S. Dep’t of Just., Dear Colleague Letter on

2017.²¹ Currently, under the Biden administration, gender identity is meant to be included under Title IX, as President Biden stated “[i]t is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex . . . including discrimination on the basis of sexual orientation or gender identity.”²² Despite this statement, the Biden Administration has also proposed a rule which would allow for limitations on transgender college students’ participation in athletics.²³ The proposed rule would eliminate categorical bans under Title IX, but would also provide schools flexibility in developing their own participation policies based on “reasonable” restrictions.²⁴ While this rule has yet to be implemented,²⁵ the U.S. Department of Education, under the Biden administration, *did* release a final rule on April 19, 2024 regarding the expansion of Title IX’s protections to transgender students.²⁶ The 2024 rule applies the Supreme Court’s reasoning in *Bostock v. Clayton County*, prohibiting “discrimination and harassment based on sexual orientation, *gender identity*, and sex characteristics in federally funded education programs.”²⁷ However, five states have already sued the Biden administration over this rule, and other Republican officials have publicly refused to enforce it.²⁸ Additionally, the Supreme Court has not yet ruled on precisely what is covered under Title IX in the wake of athletic bans or the heightened violence towards transgender students, nor have they ruled on

Transgender Students 1 (May 13, 2016) (rescinded), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

²¹ Eckes, *supra* note 19, at 8.

²² Exec. Order No. 14021, 86 Fed. Reg. 13803 (Mar. 8, 2021).

²³ See NCAA, *Transgender Student-Athlete Participation Policy*, SPORT SCI. INST., <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx> (Apr. 17, 2023) (“Beginning Aug. 1, 2024, participation in NCAA sports requires transgender student-athletes to provide documentation no less than twice annually” demonstrating compliance with sport-specific inclusion standards for transgender athletes, e.g., testosterone levels and mitigation timelines); see also INT’L OLYMPIC COMM., *IOC Framework on Fairness, Inclusion and Non-discrimination on the Basis of Gender Identity and Sex Variations*, (2021) <https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf>. The NCAA’s new policy aligns with the International Olympic Committee’s framework; both collegiate and professional athletes remain affected in similar ways by new legislation or executive orders.

²⁴ U.S. DEP’T OF EDUC., *Fact Sheet: U.S. Department of Education’s Proposed Change to its Title IX Regulations on Students’ Eligibility for Athletic Teams*, (Apr. 6, 2023) <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams>.

²⁵ The new rules released by the Biden Administration are set to take effect on August 1st, 2024. Zach Montague & Erica L. Green, *Biden Administration Releases Revised Title IX Rules*, THE NEW YORK TIMES (Apr. 19, 2024), <https://www.nytimes.com/2024/04/19/us/politics/biden-title-ix-rules.html>

²⁶ 34 C.F.R. § 106 (2024) (Unofficial Version).

²⁷ *Fact Sheet: U.S. Department of Education’s 2024 Title IX Final Rule Overview* U.S. DEP’T OF EDUC. (2024), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf> (emphasis added).

²⁸ Jo Yurcaba, *Five Republican-led States Sue Over Biden’s New Title IX Transgender Protections*, NBC NEWS (Apr. 29, 2024, 6:26 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/five-republican-led-states-sue-bidens-new-title-ix-transgender-protect-rcna149855> (“Republican attorneys general in Louisiana, Mississippi, Montana and Idaho filed a separate lawsuit [from Texas Attorney General Ken Paxton] . . . arguing that the rule exceeds the Education Department’s authority, in part because it redefines sex to include gender identity.”).

the Biden Administration's rule. However, in the case of *West Virginia v. B.P.J., by Jackson*, dissenting Justices Alito and Thomas stated that the issue of transgender bans regarding participation in women's sports will likely reach the Supreme Court soon, and that they would have ruled in favor of the State in granting their application to vacate an injunction which allows a transgender student to participate on teams which align with her gender identity.²⁹

Although Title IX has evolved to include gender identity under "sex," that evolution has depended upon each administration since Title IX's inception.³⁰ Additionally, when the Supreme Court does rule on Title IX in the context of higher education, these rulings will remain subject to challenges, loopholes and potential overruling in the future. From discrimination to harassment to outright bans in extracurricular activities or facilities, transgender students are already finding it hard enough to attend and complete university. Student protections should not depend upon the current political climate, or upon whether a student cannot only argue that they have faced discrimination, but that their discrimination fits under the definition of "sex" within Title IX. Title IX's language is too vague, and despite the general understanding that transgender students remain protected under Title IX, the only way to ensure that these students are *always* protected, and that this discrimination is reasonable and accessible to prosecute, is to expand the language of Title IX to include "on the basis of sex, sexual orientation and gender identity, including transgender status." Finally, the United States Congress must introduce guidelines for the interpretation of Title IX regarding collegiate athletic bans, access to intimate facilities and general discrimination specifically, as these areas remain particularly challenging for both universities and courts to navigate.

I. DISCUSSION

A. History of Title IX

The establishment of Title IX marked an important milestone in the United States' higher education policy. In response to sex discrimination within colleges and universities nationwide, Title IX served to increase access to higher education, specifically targeting women.³¹ This shift in the law brought attention to discriminatory admissions policies, creating new safeguards for women in higher education at the federal level.³² Title IX demonstrated gender-consciousness in higher education policy, which

²⁹ *West Virginia v. Jackson ex rel. B.P.J.*, 143 S. Ct. 889, 889 (2023) (Alito, & Thomas, JJ., dissenting).

³⁰ See generally Eckes, *supra* note 19, at 7–8.

³¹ See generally Paul J. Van de Graaf, *The Program-Specific Reach of Title IX*, 83 COLUM. L. REV. 1210 (1983).

³² *The History, Uses, and Abuses of Title IX*, 102 BULL. AM. ASS'N UNIV. PROFESSORS 69, 71–72 (2016).

unlike previous education laws directly called for gender equality in education.³³ Changing the dynamic of higher education, the aftermath of Title IX's passage saw a drastic increase in the proportion of women enrolled in colleges and universities, and by the 1980s, more women were receiving bachelor's degrees than men.³⁴

Over the years since Title IX's establishment, the law's coverage has expanded. In the 1990s, Title IX's protections were extended to victims of sexual harassment, and the Supreme Court has stated, "[h]aving previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute."³⁵ In addition to the inclusion of sexual harassment, varying courts and administrations have expanded Title IX further to include sexual orientation.³⁶ Gender identity has also been included under the expansion of Title IX, but the extent of this expansion, especially in the context of higher education, is largely debatable. Unlike the inclusion of sexual harassment under Title IX, which remains heavily supported nationwide, transgender individuals have not been afforded that security. Court decisions, like varying administrations, may always be overturned or worked around, which is why protections for transgender individuals under the umbrella of gender identity must be concrete.

B. *Argument for the Expansion of Title IX*

1. *Concerning legislation*

Transgender individuals, including college students, have been facing legislative attacks in numerous states, in addition to the federal level. On April 20 of 2023, the House of Representatives passed H.R. 734, or the "Protection of Women and Girls in Sports Act of 2023," which seeks to prohibit all transgender women and girls from participating on sports teams which align with their gender identity.³⁷ The bill would amend the Education Amendments of 1972, or Title IX specifically, "to provide that for purposes of determining compliance with title IX of such Act in athletics, sex shall be recognized based solely on a person's reproductive biology and genetics at birth."³⁸ While transgender students are already facing discrimination both publicly and politically, our federal government aims to undermine the purpose of Title IX, arguing for blatant discrimination against transgender

³³ Deondra Rose, *Regulating Opportunity: Title IX and the Birth of Gender-Conscious Higher Education Policy*, 27 J. POL'Y HIST. 157, 176 (2015).

³⁴ *Id.*

³⁵ *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

³⁶ *E.g.*, Exec. Order No. 14021, *supra* note 22, at 13803.

³⁷ H.R. 734, 118th Cong. §§ 1–2 (2023).

³⁸ *Id.*

individuals based on their gender identity.³⁹ The amendment, which affects all levels of education, also includes, “It shall be a violation of subsection (a) for a recipient of Federal financial assistance who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls.”⁴⁰ Similar bills have been proposed federally prior to H.R. 734, but this is the first bill of its kind to have passed through Congress.⁴¹ H.R. 734 remains a significant concern for the inclusion of gender identity under Title IX, and the amendments would undue how Title IX has been interpreted as recently as the Biden Administration.⁴² Not only are these amendments incompatible with Title IX, but they directly target transgender individuals,⁴³ thereby calling into question if Title IX covers gender identity more broadly than athletics.

In addition to attacks on the federal level, in 2023 alone state lawmakers have filed at least 340 anti-LGBTQ+ bills, with at least 25 passing.⁴⁴ While few of these bills directly target higher education, not only does how the law treat transgender individuals expand to *every* level of federally assisted education, but transgender college students are suffering indirectly from these national attacks on gender identity.⁴⁵ Despite not being directly targeted by discriminatory legislation across the nation, many queer and transgender college students’ mental health will be affected, and while cisgender students focus on their studies, transgender students are worrying about their rights and whether they are protected under the law. For example, Alex Noon, a second-year law student at the University of Florida, is transgender.⁴⁶ Noon reports that, despite some supportive faculty members, other instructors have deadnamed⁴⁷ him in class.⁴⁸ Regarding the current wave of discriminatory legislation, Noon reported, “[i]t’s a huge mental

³⁹ See generally Eric Bradner, Steve Contorno, & Kate Sullivan, *Republicans Ramp Up Attacks on Transgender People, in Statehouses and on the Campaign Trail*, CNN POL. (Apr. 30, 2023, 8:06 AM), <https://www.cnn.com/2023/04/30/politics/republicans-transgender-attacks-statehouse-haley-trump/index.html>.

⁴⁰ H.R. 734 § 2.

⁴¹ Kel O’Hara, *‘Equity’ or Exclusion? How H.R. 734 Strips Trans Students of Their Civil Rights*, EQUAL RTS. ADVOCS. (May 16, 2023), <https://www.equalrights.org/viewpoints/equity-or-exclusion-how-h-r-734-strips-trans-students-of-their-civil-rights/>.

⁴² See, e.g., Exec. Order No. 14021, *supra* note 22.

⁴³ See Delphine Luneau, *House Majority — Instead of Doing Literally Anything that Would Actually Make Schools Better or Safer — Opts to Attack Trans Kids by Passing Discriminatory H.R. 734*, HUM. RTS. CAMPAIGN (Apr. 20, 2023), <https://www.hrc.org/press-releases/house-majority-instead-of-doing-literally-anything-that-would-actually-make-schools-better-or-safer-opts-to-attack-trans-kids-by-passing-discriminatory-h-r-734>.

⁴⁴ Olivia Sanchez, *Many LGBTQ+ College Students Feel the Weight of a National Pile-up of Negativity*, HECHINGER REP. (Dec. 9, 2022), <https://hechingerreport.org/many-lgbtq-college-students-feel-the-weight-of-a-national-pile-up-of-negativity/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Deadname*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/deadname> (last visited Mar. 23, 2024) (“The name that a transgender person was given at birth and no longer uses upon transitioning.”).

⁴⁸ Sanchez, *supra* note 44.

weight that a lot of queer people now have to deal with tenfold.”⁴⁹ Noon goes on to state “[a] lot of people just exist as they are and then do their school. But to be queer or trans or anything under the LGBTQ identity and be dealing with emotional and mental exhaustion—plus, then having to still give yourself enough energy and resources to complete schoolwork—is really difficult.”⁵⁰ Noon’s account of his own experiences in higher education illustrates how, even if legislation is not directly targeting higher education students, these bills and acts *are* negatively impacting students.

2. *Bostock v. Clayton County*

*Bostock v. Clayton County*⁵¹ remains the closest Supreme Court interpretation of “sex” under Title IX, through Title VII, available to us. Based upon the principles of statutory interpretation, “sex” under both Titles may be read with similar definitions.⁵² *Bostock* comprised multiple cases of employment discrimination on the basis of sexual orientation or gender identity.⁵³ Clayton County, Georgia, fired Gerald Bostock for his “conduct,” which consisted of participating in a gay recreational softball league.⁵⁴ Altitude Express fired Donald Zarda just days following Zarda mentioning being gay.⁵⁵ Finally, R.G. & G.R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, but later informed her employer of her intentions to “live and work full-time as a woman.”⁵⁶ Each of these employees sued under Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of sex.⁵⁷ Title VII states that it is “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”⁵⁸ The Supreme Court held that “[a]n employer who fires an individual merely for being gay or transgender defies the law,”⁵⁹ thereby establishing the rule that an employer violates Title VII when it intentionally fires an employee based *in part* on the employee’s sex. Additionally, “sex” includes gay or transgender individuals because discrimination based on an employee being gay or transgender still requires the employer to intentionally consider an employee’s sex. Therefore, “an employer who intentionally penalizes an

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

⁵² U.S. DEP’T JUST., C.R. DIV., TITLE IX LEGAL MANUAL, <https://www.justice.gov/crt/title-ix> (Sept. 4, 2023) (“It is generally accepted outside the sexual harassment context that the substantive standards and policies developed under Title VII apply with equal force to employment actions brought under Title IX. . . . In many areas Title VII case law is also looked to for guidance in how to establish a Title IX violation.”).

⁵³ *Bostock*, 590 U.S. at 653–54.

⁵⁴ *Id.* at 653.

⁵⁵ *Id.*

⁵⁶ *Id.* at 653–54.

⁵⁷ *Id.* at 654.

⁵⁸ 42 U.S.C. § 2000e–2(a)(1).

⁵⁹ *Bostock*, 590 U.S. at 683.

employee for being [gay] or transgender also violates Title VII.”⁶⁰ The Court stated that intent plays an important role in discrimination;⁶¹ in discriminating against gay or transgender employees, an employer *intends* to rely on “sex” in its decision to discriminate, which also connects sexual orientation and gender identity to “sex” under the Title VII.

The Court expands upon its ruling by outlining two principles behind discrimination under Title VII.⁶² First, the Court states that how an employer views their practices is irrelevant, and when an employer fires an individual on the basis of their gay or transgender status, the employer is intentionally discriminating against that individual at least *in part* due to their sex.⁶³ Second, the individual’s sex does not need to be the primary, or even the sole, cause of the discriminatory action.⁶⁴ Other factors aside from sex may include the employee’s same-sex relationship, or their presentation as a different sex from their assigned sex.⁶⁵

One point the Court addresses which remains relevant to Title IX is the statutory definition of “sex” versus the distinction between “sex” and “gender.”⁶⁶ The employers argued that,

discrimination on the basis of [gay] and transgender status aren’t referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today’s plaintiffs would likely respond that it was because they were gay or transgender, not because of sex.⁶⁷

However, the majority was unconvinced by this line of reasoning, purporting that conversational definitions of “sex” do not control Title VII’s legal analysis; discrimination against gay or transgender employees intentionally applies sex-based reasoning.⁶⁸ The employers argue that sexual orientation and gender identity do not fall under the definition of “sex,” and therefore remain distinct concepts, stating that if Congress meant to include sexual orientation and gender identity, they would have mentioned them specifically within Title VII.⁶⁹ The Court rejects that argument as well, as when Congress elects to establish a broad rule with no exceptions, the Supreme Court chooses how to apply said rule.⁷⁰

⁶⁰ *Id.* at 644.

⁶¹ *Id.* at 659–60.

⁶² *Id.*

⁶³ *Id.* at 660.

⁶⁴ *Id.* at 661.

⁶⁵ *Bostock*, 590 U.S. at 661.

⁶⁶ *Id.* at 655.

⁶⁷ *Id.* at 666.

⁶⁸ *Id.* at 666–67.

⁶⁹ *Id.* at 669.

⁷⁰ *Id.*

While the majority's points in *Bostock* remain promising for Title IX interpretation, the dissent, written by Justice Alito and joined by Justice Thomas, makes some troubling points.⁷¹ The dissent highlights how neither sexual orientation nor gender identity appears in Title VII.⁷² Over the years, bills have been introduced in Congress to include sexual orientation, and, more recently, gender identity.⁷³ However, Justice Alito notes that none of these efforts have proved fruitful.⁷⁴ The dissent also mentions Title IX in the context of women's sports, stating that the issue of transgender individuals competing on teams which align with their gender identity "has already arisen under Title IX, where it threatens to undermine one of that law's major achievements, giving young women an equal opportunity to participate in sports."⁷⁵

Numerous Justices on the Supreme Court view transgender protections under Title IX in direct competition with the protections which it provides women.⁷⁶ The dissent states that including gender identity under Title IX will effectively force women to compete against "biological males," which puts female students at a disadvantage.⁷⁷ Justice Alito also points to housing on college campuses, as "[t]he Court's decision may lead to Title IX cases against any college that resists assigning students of the opposite biological sex as roommates."⁷⁸ Title IX allows schools to maintain "separate living facilities for the different sexes," but the *Bostock* dissent worries that this decision may be utilized to argue that transgender students must be allowed to live in whichever facility aligns with their gender identity.⁷⁹

While the *Bostock* decision serves as a promising interpretation for transgender students under Title IX, differences between Title VII and Title IX, as the dissent highlights, may call for a different definition of "sex" under the respective statutes. Recent developments, including *Bostock*, in Title VII cases involving transgender individuals, will provide new arguments which plaintiffs may utilize in Title IX complaints,⁸⁰ but until gender identity is included in Title IX and cemented in the law, transgender students will continue to face legislative and judicial attacks on their protection in higher education.⁸¹

⁷¹ *Bostock*, 590 U.S. at 683 (Alito, J., dissenting).

⁷² *Id.* at 683.

⁷³ *Id.* at 683–84 (citing H.R. 5, 116th Cong. (2019)).

⁷⁴ *Id.*

⁷⁵ *Id.* at 727.

⁷⁶ See *id.* at 727. *Bostock*, 590 U.S. at 791 (Kavanaugh, J., dissenting) ("The women's rights movement was not (and is not) the gay rights movement. . .").

⁷⁷ *Id.* at 727 (Alito, J., dissenting).

⁷⁸ *Id.* at 728.

⁷⁹ *Id.*

⁸⁰ See Erin Buzuvis, "On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education, 28 WIS. J. L. GENDER, & SOC'Y 219, 236 (2013).

⁸¹ See, e.g., H.R. 734, 118th Cong. (2023).

3. *Relevant case law*

Another promising case, which cites *Bostock*, examines Idaho's "Fairness in Women's Sports Act,"⁸² a categorical ban on the participation of transgender women and girls in student athletics.⁸³ *Hecox v. Little* examined whether the Federal District Court for the District of Idaho abused its discretion by preliminarily enjoining the Act.⁸⁴ The Court of Appeals upheld the district court's decision, affirming the grant of preliminary injunctive relief.⁸⁵ Section 33-6202 of the Act set forth the "legislative findings and purpose," clarifying that the primary purpose of the law is to ban transgender women from "biologically female" teams.⁸⁶ Citing Idaho Code § 33-6202(11), the court finds that the Act explicitly targets *all* transgender women, as it states that "a man [sic] who identifies as a woman and is taking cross-sex hormones 'had an absolute advantage' over female athletes."⁸⁷ Additionally, the court noted that Representative Ehardt introduced the bill as a "preemptive" strike, allowing Idaho to "remove [transgender women] and replace them with the young gal that should have been on the team."⁸⁸ The court reasons that discrimination based on transgender status is a form of sex-based discrimination, which is subject to heightened scrutiny.⁸⁹ The court then cites *Bostock*, stating that the Supreme Court recently held, regarding Title VII, that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."⁹⁰

The *Hecox* court goes on to recognize that cisgender women athletes fear being ostracized from competition due to transgender athletes who "retain an insurmountable athletic advantage over cisgender women," which remains a prominent argument behind excluding transgender athletes specifically from protections under Title IX, as many view these protections as infringing on the rights which cisgender women have worked for.⁹¹ However, the court does not decide on whether *any* restriction on transgender participation in sports violates equal protection or Title IX.⁹²

Two prevalent issues regarding transgender discrimination in higher education include collegiate athletic bans and the use of facilities which remain designated by sex. The following cases outline the reasoning behind these bans well and illustrate how many jurisdictions view transgender access as a *hinderance* of Title IX, versus as a protection under the statute.

⁸² See Fairness in Women's Sports Act, Idaho Code §§ 33-6201-06 (2020).

⁸³ *Hecox v. Little*, 79 F.4th 1009, 1015 (9th Cir. 2023).

⁸⁴ *Id.* at 1016.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1022; Idaho Code § 33-6202 (2020).

⁸⁷ *Hecox*, 79 F.4th at 1022 (alteration in original).

⁸⁸ *Id.* (alteration in original).

⁸⁹ *Id.* at 1021, 1026.

⁹⁰ *Id.* at 1026 (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020)).

⁹¹ *Id.* at 1038-39.

⁹² *Id.* at 1039.

Johnston v. Univ. of Pittsburgh,⁹³ held that Title IX does not prohibit discrimination based on gender identity or transgender status. Despite its subsequent rejection by *Evancho v. Pine-Richland Sch. Dist.*,⁹⁴ the court's reasoning remains essential to the current debate on transgender protections under Title IX. In *Johnston*, a transgender university student sued his university following expulsion, alleging discrimination on the basis of sex and of his transgender status, as he was prohibited from using locker rooms and restrooms which were designated for men.⁹⁵ Based upon the language of Title IX and applicable case law, the court ruled that the Plaintiff failed to state a cognizable claim for discrimination under Title IX.⁹⁶ Stating, "the University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination,"⁹⁷ the court cites to the language of Title IX to support its position.⁹⁸ For example, Title IX expressly calls for educational institutions to provide separate toilet, locker room and shower facilities on the basis of sex.⁹⁹ Additionally, citing 34 C.F.R. § 106.61, the regulations implementing Title IX state that nothing in the regulations "shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex."¹⁰⁰ Thus, this court illustrates another argument regarding how transgender protections would directly contradict Title IX rather than uphold it, which many jurisdictions utilize to justify these bans.

In a similar ruling to *Johnston*, *Texas v. United States*¹⁰¹ held that Title IX does not prohibit discrimination based on gender identity or transgender status. Plaintiffs consisted of 13 states and agencies, as well as the Harrold Independent School District of Texas and the Heber-Overgaard Unified School District of Arizona.¹⁰² The respective plaintiffs sued the United States Departments of Education, Justice and Labor, the Equal Employment Opportunity Commission and various agency officials, challenging the Defendants' claims that Title VII and Title IX afford all individuals a right of access to restrooms, locker rooms, showers, and other facilities which match their gender identity rather than their biological sex.¹⁰³ In May of 2016, the defendants wrote a Dear Colleague Letter on Transgender Students, instructing plaintiffs to "immediately allow students to use the bathrooms, locker rooms and showers of the student's choosing, or risk

⁹³ *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015).

⁹⁴ *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017).

⁹⁵ *Johnston*, 97 F. Supp. 3d at 661, 663–64.

⁹⁶ *Id.* at 672.

⁹⁷ *Id.* at 672–73 (footnote omitted).

⁹⁸ *Id.* at 673.

⁹⁹ *Id.* at 678; 34 C.F.R. § 106.33 (2024).

¹⁰⁰ *Johnston*, 97 F. Supp. 3d at 678.

¹⁰¹ *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016).

¹⁰² *Id.* at 815.

¹⁰³ *Id.* at 815–16.

losing Title IX-linked funding.”¹⁰⁴ The Plaintiffs asserted that Defendants’ definition of “sex” as applied to Title IX, in addition to Title VII, was an unlawful interpretation.¹⁰⁵ The Defendants alleged that the Guidelines consisted of valid interpretations, because although Title IX and § 106.33¹⁰⁶ provide that federal recipients may provide separate, comparable facilities, the regulation and statute “do not address how they apply when a transgender student seeks to use those facilities.”¹⁰⁷ The court sided with the plaintiffs, concluding that § 106.33 is not ambiguous, and that “it cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth.”¹⁰⁸ Based on its interpretations of Title IX and § 106.33, the court granted the Plaintiff’s application for a preliminary injunction.¹⁰⁹ Therefore, the defendants were enjoined from enforcing the Guidelines against the plaintiffs.¹¹⁰

Relevant case law regarding the inclusion of gender identity under Title IX consists of both positive and negative holdings, and both illustrate that gender identity protections remain a fiercely debated and important discussion. Additionally, these cases purport that, under the umbrella of transgender protections within Title IX, there are multiple, complicated avenues of protection which require attention. From intimate facility access to athletics to basic discrimination and harassment, transgender individuals are facing numerous attacks, all of which compel different protections and solutions. Due to the complications associated with protecting transgender students, a particularly vulnerable population, from discrimination within higher education, Title IX must be amended to read not only “gender identity” along with “sex” under the statute, but must also include steps and guidelines for instituting these specific protections.

4. *Why amend Title IX?*

Based upon cases such as *Bostock* and positive legislative or judicial efforts towards the inclusion of gender identity under Title IX, many may argue that Title IX need not be amended. However, based upon the complexities surrounding the protection of transgender individuals, especially those struggling through college or university, courts and higher educational institutions *require* specific definitions and guidelines outlining their responsibilities to these students within a concrete law. As we have

¹⁰⁴ *Id.* at 816.

¹⁰⁵ *Id.*

¹⁰⁶ 34 C.F.R. § 106.33 (2024) (“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”).

¹⁰⁷ *Texas*, 201 F. Supp. 3d at 824.

¹⁰⁸ *Id.* at 833–34.

¹⁰⁹ *Id.* at 836.

¹¹⁰ *Id.*

seen through the relevant case law, in addition to recent legislative efforts, transgender students remain under attack, and, due to Title IX's ambiguity, challenging discriminatory practices of higher education institutions has proved difficult. Whether arguing against discrimination regarding intimate facilities, athletics or harassment based upon gender identity, the institutions hearing these challenges must have the ability to look to Title IX and see clearly an avenue for relief. Transgender students should not have to argue that their discrimination is covered under Title IX *in addition* to proving they were discriminated against based on their status. Therefore, Title IX must be amended to read "on the basis of sex, sexual orientation and gender identity, including transgender status." Additionally, further guidelines must be published to outline rules regarding intimate facilities, athletics and general discrimination within educational institutions.

Numerous prominent organizations, including the Women's Sports Foundation, have called for similar guidelines.¹¹¹ The Women's Sports Foundation, founded by Billie Jean King, acknowledges that the Equal Protection Clause and Title IX's prohibitions against sex discrimination have both been interpreted by state and federal courts to include discrimination based upon gender identity, encompassing transgender athletes.¹¹² The organization also acknowledges that, if transition occurs prior to puberty, the transitioning student should be "treated as any other competitor in girls' or women's sports."¹¹³ Additionally, when a student transitions after puberty, "medical experts increasingly agree that the effects of taking female hormones negate any strength and muscular advantage that testosterone may have provided and places a male-to-female transgender athlete who has completed her transition in the same general range of strength and performance exhibited by non-transgender females who are competing."¹¹⁴ Therefore, the Women's Sports Foundation calls for clear and reasonable criteria for determining a transgender student-athlete's eligibility to compete, which must be based on recent, expert legal and medical knowledge about the effects of gender transition on athletic performance.¹¹⁵ This criterion serves as just one example of possible supplemental guidelines to Title IX regarding collegiate athletics, and other recent data also supports an amendment to Title IX under the issue of intimate facility access.

In a 2018 study, researchers responded to opponents of gender identity inclusive intimate facilities, who often cite "fear of safety and privacy

¹¹¹ WOMEN'S SPORTS FOUND., PARTICIPATION OF TRANSGENDER ATHLETES IN WOMEN'S SPORTS 1, 4–5 (2023), <https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/participation-of-transgender-athletes-in-womens-sports-the-foundation-position.pdf>.

¹¹² *Id.* at 2.

¹¹³ *Id.* at 3.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 4.

violations” as arguments against inclusivity.¹¹⁶ The study presents findings from matched pairs analyses of localities in Massachusetts, both with and without gender identity inclusive intimate facilities.¹¹⁷ The utilized data emerges from public record requests of criminal incident reports related to assault, sex crimes, and voyeurism in public restrooms, locker rooms, and dressing rooms, which are used as measurements of safety and privacy violations.¹¹⁸ Researchers found no relation between the passage of inclusive laws and the number or frequency of criminal incidents within these intimate spaces;¹¹⁹ the inclusion of “gender identity inclusive public accommodations nondiscrimination ordinances” (GIPANDOs) had little relationship with victimization rates.¹²⁰ This study further supports the need for an amendment to Title IX, as a primary argument against inclusion of gender identity remains that opening intimate spaces to transgender individuals promotes victimization of women.¹²¹ Not only are opposing arguments to inclusion unfounded, but courts and public policy debates have utilized and promoted these same arguments.¹²² Therefore, Title IX must include specific guidelines on intimate facilities, which largely affect college students, in response to these unfounded accusations.

Finally, the most pressing and essential argument for an amendment to Title IX is that transgender higher education students remain particularly vulnerable to harassment. According to a survey on the relationship between transgender students’ access to college bathrooms or housing and suicidality, researchers report that transgender and gender non-conforming people regularly face discrimination, harassment, and marginalization across college and university campuses.¹²³ Using the National Transgender Discrimination Survey (NTDS),¹²⁴ this 2016 study analyzed the correlation between denial of access to intimate facilities and lifetime suicide attempts, and findings indicated a significant, positive correlation.¹²⁵ Researchers reported that denial of access based upon gender identity remains a statistically significant predictor of lifetime suicide attempts, which suggests a relationship between the stress associated with discriminatory practices regarding access to intimate facilities and adverse effects on the mental

¹¹⁶ Amira Hasenbush, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 *SEXUALITY RSCH. & SOC. POL’Y* 70, 70 (2019).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 80.

¹²⁰ *Id.* at 77.

¹²¹ See generally David B. Cruz, *Making Sex Matter: Common Restrooms as “Intimate” Spaces?*, 40 *MINN. J. L. & INEQ.* 99 (2022).

¹²² *Id.*

¹²³ Kristie L. Seelman, *Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 *J. HOMOSEXUALITY* 1378, 1378 (2016).

¹²⁴ *Id.* at 1390 (“The NTDS data indicate that a sizeable portion of trans* people continue to face a multitude of interpersonal stressors in college, as nearly one third of this sample had experienced harassment, bullying, or physical or sexual assault by other students, and 13.8% had experienced such victimization at the hands of teachers or staff in college or graduate school.”).

¹²⁵ *Id.*

health of transgender college students.¹²⁶ Transgender college students have suffered enough under the current higher education regime, which must serve as a catalyst behind an amendment to Title IX to include both protections and guidelines affirming said protections regarding not only access to intimate facilities, but to general discrimination as well.

CONCLUSION

For the aforementioned reasons, judicial decisions and state legislation are not enough to provide transgender college students the protections that they desperately need considering the current public and political climate. Any action aside from an amendment to Title IX, along with corresponding guidelines, will likely fail to cover all of the necessary protections for transgender individuals, or will vary across states, which remains unfair to transgender individuals nationwide.

Absent judicial decisions or state legislation, Title IX does not expressly prohibit discrimination against transgender students.¹²⁷ This assertion means that, without an amendment to its language, the interpretation of Title IX remains subject to change and ongoing litigation. In order for Title IX to serve an effective purpose for transgender students, access to this defense against discrimination must not only be available to transgender students specifically but must be reasonably accessible. Transgender students should not have to argue, in addition to proving discrimination, that they are included under Title IX's protections every time these incidents reach litigation. Instead, Title IX should read as inclusive of transgender individuals at all levels of education, with a list of supplemental guidelines outlining rules regarding access to intimate facilities, participation in athletics and harassment, among other areas of concern. All of these reasons for protection require different arguments and different guidelines, which is why one Supreme Court ruling or one piece of state legislation cannot and will not cover every necessary protection. Title IX's protections must extend to transgender individuals based on gender identity at the *federal* level, through a nearly un-revocable and concrete source of law, which may be achieved simply by focusing our efforts on calling for an amendment to Title IX.

¹²⁶ *Id.* at 1386–87.

¹²⁷ Buzuvis, *supra* note 80, at 220.