



Transgender Students and School Bathroom Policies: Title IX Challenges Divide Appellate Courts

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In the past several years, federal courts have disagreed about whether school policies that prohibit transgender students from using the school bathroom consistent with their gender identity violate [Title IX of the Education Amendments of 1972](#) (“Title IX”). Title IX prohibits discrimination on the basis of sex in education programs or activities that receive federal financial assistance. Transgender students and their parents have challenged school board policies that *prohibit* students from accessing the bathrooms consistent with their gender identities, arguing that such treatment is illegal sex discrimination. The Courts of Appeals for the [Fourth Circuit](#) and [Seventh Circuit](#) have ruled that school policies prohibiting bathroom access consistent with a transgender student’s gender identity can violate Title IX. The full [Eleventh Circuit](#) (sitting en banc) rejected a Title IX challenge to such a policy. (A similar division exists with respect to whether such policies violate the Constitution’s Equal Protection Clause; another [Legal Sidebar](#) addresses that question.) Other students and parents have brought lawsuits alleging Title IX violations against school policies that *permit* transgender students to access the bathrooms consistent with their gender identities. The [Third](#) and [Ninth](#) Circuits have ruled against these claims.

Aside from the text of the statute and implementing regulations, at least two legal considerations have featured prominently in decisions interpreting Title IX in this context. First, in determining whether sex discrimination under Title IX includes discrimination based on gender identity, courts have looked to Supreme Court decisions interpreting [Title VII of the Civil Rights Act of 1964](#), which bans sex discrimination (among other things) in employment. Second, because Title IX is generally understood to rest on Congress’s authority to legislate under the Constitution’s [Spending Clause](#), courts require that recipients have notice of any obligations that flow from accepting federal funds.

This Legal Sidebar begins with a summary of Title IX’s statutory and regulatory treatment of sex-segregated facilities, a brief picture of relevant Supreme Court decisions interpreting Title VII, and an overview of relevant aspects of legislation passed pursuant to Congress’s power under the Spending Clause. The Sidebar then examines how federal appellate courts have treated Title IX claims brought against schools regarding bathroom policies that either permit or prohibit transgender students’ use of facilities aligning with their gender identities.

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Title IX: Background on Separate Facilities

While Title IX prohibits sex discrimination in federally funded education programs, the statute and implementing regulations contain various exceptions. Relevant here, the statute [explicitly](#) allows schools to maintain separate living facilities “for the different sexes.” The Department of Education’s (ED’s) Title IX [regulations](#) more specifically authorize schools to provide separate restrooms, locker rooms, and showers on the basis of sex, as long as students enjoy comparable facilities. Thus, as a threshold matter, schools do not violate Title IX when they distinguish between men and women (or boys and girls) by operating sex-segregated bathrooms.

Supreme Court: Title VII’s Prohibition Against Sex Discrimination

Courts interpreting Title IX’s prohibition against sex discrimination in federally funded education programs often draw upon cases interpreting Title VII’s ban against sex discrimination in employment. Two Supreme Court cases interpreting Title VII have particularly informed Title IX’s application to transgender students. In the 1989 case *Price Waterhouse v. Hopkins*, a four-Justice plurality determined that discriminating against individuals based on a failure to conform to stereotypes about how men or women should behave is unlawful discrimination under Title VII. In 2020’s *Bostock v. Clayton County*, the Court ruled that Title VII’s sex discrimination ban extends to discrimination based on sexual orientation or gender identity. The Court’s decision assumed, but did not decide, that the term “sex” in Title VII refers to biological distinctions between females and males. According to the Court, even [proceeding](#) on that assumption, an employer cannot discriminate based on a person’s sexual orientation or gender identity without considering their sex. Thus, in the Court’s view, because sex is a [but-for cause](#) of sexual-orientation and gender-identity discrimination, such discrimination violates Title VII.

Spending Clause Legislation: Contract and Notice

In addition to Title VII, courts interpreting Title IX also sometimes consider the Spending Clause basis for that law. [The Spending Clause](#) grants Congress the power to spend money to provide for the general welfare. Congress can also set conditions under which federal funds will be dispersed. Exercising that power, Congress has [enacted](#) a number of laws, including Title IX, that prohibit recipients of federal funding from discriminating on certain bases.

The Supreme Court has [characterized](#) legislation enacted under the Spending Clause as contractual in nature—in [exchange](#) for funds, recipients agree to follow federal obligations. The Court has [explained](#) that the “‘legitimacy of Congress’ power’ to enact Spending Clause legislation rests” on whether recipients “voluntarily and knowingly” agree to the contract’s terms. For Congress to [impose](#) conditions on federal funding, requirements must be “clear” and “unambiguous[.]” so that recipients [have](#) “notice” of their obligations.

Appellate Courts Consider Bathroom Policies Denying Access Consistent With Gender Identity

Title IX challenges brought by transgender students to school bathroom policies that prohibit them from using facilities consistent with their gender identities have divided federal appellate courts.

Seventh and Fourth Circuits: Such Policies Can Violate Title IX

In a 2017 case (prior to the Supreme Court’s *Bostock* decision), the Seventh Circuit [ruled](#) that a transgender boy could bring a Title IX suit against a school district policy that barred him from accessing the boys’ bathroom under the sex-stereotyping theory of *Price Waterhouse*. According to the [panel](#), “[b]y

definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.” The panel **reasoned** that requiring an individual to use a bathroom that does not conform to their gender identity “punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” The policy also treats transgender students differently than those students who are not transgender, according to the court. The court took care to **indicate** that the school district’s position that the student could not “unilaterally assert” his gender mischaracterized the student’s claims and dismissed his transgender status, as the student had a medically diagnosed and documented condition and had lived in accordance with his gender identity since that diagnosis.

A divided Fourth Circuit panel reached a similar result in a 2020 case that followed *Bostock*. The policy at issue in that case **limited** the use of bathrooms “to the corresponding biological genders,” which apparently would be determined by the sex indicated on a student’s birth certificate. The Fourth Circuit **indicated** that *Bostock*’s interpretation of Title VII guided the court’s analysis of Title IX. Under the reasoning of that decision, application of the school board’s policy to the transgender student discriminated against him on the basis of sex, according to the Fourth Circuit. The court reasoned that the school board could not bar the student from the boys’ bathroom without consideration of his “biological gender” (defined under the policy as the sex marker on the student’s birth certificate), **rendering** sex a but-for cause of the board’s action. The panel majority also ruled that the policy harmed the transgender student in the case. The alternative gender-neutral restrooms made available were far from his classes, causing him to be tardy and miss more class time than others. At after-school events, the student “had to be driven away” to **find** a bathroom. Further, the court held, the stigma of being forced to use separate restrooms was sufficient in itself to constitute harm.

Having determined that sex was a but-for cause of the school board’s action that harmed the student, the panel majority **concluded** that the policy unlawfully discriminated against him. According to the court, the student was treated worse than similarly situated students, as he was not allowed to use the bathroom “corresponding with his gender.” Unlike other boys at school, he was only allowed to use the girls’ bathroom or a single-stall option. Finally, the Fourth Circuit **rejected** the argument that the Title IX regulations **authorizing** sex-separated facilities justified the policy. For the court, those regulations **indicated** that sex-segregated facilities in and of themselves are not discriminatory, but they did not authorize the school board to “rely on its own discriminatory notions of what ‘sex’ means” in applying policies to transgender students.

The Fourth Circuit’s decision drew a dissent. The dissent **determined** that “sex” under Title IX refers to “traditional biological indicators” rather than gender identity. It continued that the statute and regulations allow for separate living accommodations and bathrooms because of the important privacy interests individuals have when using those facilities, interests only heightened when persons of the opposite biological sex are present. The dissent took the **position** that requiring the school to allow “a biological female who identifies as male” to use the male restroom would contradict the separation explicitly allowed by Title IX. The dissent also **rejected** the majority’s conclusion that the school board applied a discriminatory reading of what “sex” means, arguing that the board relied on the commonly accepted definition referring to anatomical and physiological differences between males and females.

Eleventh Circuit: Such Policies Do Not Violate Title IX

In 2022, the en banc Eleventh Circuit, in an opinion by Judge Lagoa, ruled that separating school bathrooms based on “biological sex” does not violate Title IX. The court first observed that the school board bathroom policy at issue **separated** male and female students and distinguished between them on the basis of biological sex, determined by reference to documents such as birth certificates submitted when enrolling in the district. The board did not accept updated documents conforming to a student’s gender identity, although sex neutral bathrooms were available to students.

The Eleventh Circuit indicated that, unlike Title VII, Title IX contains express [statutory](#) and [regulatory](#) carve-outs permitting sex-segregated facilities. Because of this [distinction](#), the majority opinion reasoned that it was not enough for the court to decide whether discrimination based on transgender status constitutes sex discrimination (as the *Bostock* Court did under Title VII). Instead, the court framed the applicable question as whether the regulatory provision [authorizing](#) separate bathroom facilities on the basis of sex “means to provide separate bathrooms on the basis of *biological* sex.” The court [concluded](#) that Title IX prohibits discrimination based on “biological sex,” and its implementing regulations authorize bathrooms separated on that same basis. The court [ruled](#) that because the school board policy separated bathrooms along those lines, it complied with Title IX.

The Eleventh Circuit also [ruled](#) that even if the meaning of “sex” was ambiguous, the student’s claim still failed. The court [reasoned](#) that because Spending Clause legislation must provide a clear statement for states when imposing a funding condition, the school board’s understanding that the regulation allowing separate bathrooms meant division according to biological sex could violate Title IX only if “sex” unambiguously meant something other than “biological sex”; in that case, the school board would have notice that its interpretation was wrong. The court concluded that, because schools around the country separate bathrooms based on biological sex, it was “[untenable](#)” to argue that the school board was on notice that its policy violated Title IX.

The en banc decision drew a number of dissents. Judge Jill Pryor, for instance, criticized the majority’s definition of “biological sex.” Pointing to evidence in the record, her dissent [asserted](#) that “biological sex” includes gender identity, and that “birth-assigned sex and chromosomal structure take a back seat in determining a person’s sex when that person’s gender identity diverges from those two components.” Thus, in Judge Pryor’s view, a person [can](#) be male if “some biological components of sex, including gender identity, align with maleness, even if other biological components . . . align with femaleness.” Judge Pryor’s dissent [concluded](#) that the policy was discriminatory because other students were allowed to use the bathroom consistent with their gender identity, while transgender students were not. The student in the case was [excluded](#) from the boys’ bathroom because of his genital anatomy. Under the reasoning of *Bostock*, her dissent reasoned, [sex](#) was accordingly a but-for cause of his discriminatory exclusion from the bathroom.

Judge Pryor’s dissent also [disagreed](#) with the majority’s conclusion that Title IX’s carve-outs for separate bathrooms foreclosed the claim, arguing that the carve-outs do not [address](#) situations where a student’s biological markers of sex diverge. Pointing to the Fourth Circuit’s [ruling](#) on the point, she [argued](#) that Title IX’s carve-outs do not allow schools to rely on their “own discriminatory notions of what sex means.” The transgender student in the case had biological markers of sex indicating that he was female and indicating he was male, yet the policy categorically assigned students to bathrooms based on only one such marker—a person’s sex assigned at birth. Judge Pryor’s dissent argued that Title IX’s carve-outs did not [foreclose](#) a claim that this practice was discriminatory.

Appellate Courts Consider Policies Permitting Bathroom Access Consistent With Gender Identity

Other cases have considered school policies that allow transgender students to use the school facilities that match their gender identity. The two appellate courts that have heard these cases agreed that such policies do not constitute [sex-based harassment](#) under Title IX, which includes “unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access” to education.

The [Ninth Circuit](#) found no Title IX violation when reviewing a challenge to a school district’s “Student Safety Plan” that allowed transgender students to use bathrooms and locker rooms matching their gender identity. The plaintiffs, parents of students in the district, [alleged](#) that this policy constituted harassment of

their children, as they allegedly experienced “embarrassment, humiliation, anxiety, intimidation, fear, apprehension, and stress” in sharing a locker room and bathroom with a transgender peer. The court [reasoned](#) that the policy was not intended to harass cisgender students, nor did it treat any individual student differently on the basis of sex because it allowed *all* students to use facilities matching their gender identity. Thus, the court [held](#) that the policy was not “discriminatory or motivated by any gender animus,” nor was any alleged harm so “severe, pervasive, and objectively offensive to rise to the level of a Title IX violation.” Because the alleged harm was simply being in the presence of a transgender student, the court held that there was no harassment, and thus no Title IX claim.

The [Third Circuit](#) came to the same conclusion in a similar case, holding that a school policy allowing students to use bathrooms in accordance with their gender identity was not sex discrimination because all students were treated equally. The court [held](#) that the plaintiffs, a group of cisgender students, had not sufficiently established that allowing transgender people to use bathrooms in accordance with their gender identities could constitute harassment toward other bathroom users. To the contrary, the court found “[very persuasive](#)” the Seventh Circuit’s view that “barring transgender students from using privacy facilities that align with their gender identity would, itself, constitute discrimination under a sex-stereotyping theory in violation of Title IX.”

Considerations for Congress

Amidst these varying judicial interpretations of Title IX, the Department of Education has issued a [Notice of Proposed Rulemaking](#) to amend the agency’s Title IX regulations. As explained more fully in a previous [Sidebar](#), if adopted, those regulations would define the scope of Title IX’s prohibition against sex discrimination to include discrimination based on sexual orientation and gender identity.

While courts and agencies must interpret the current statutory text of Title IX, Congress could amend the statute to resolve disagreements. One option might be to address the statutory [provision](#) authorizing separate living facilities, which could avoid implicating other questions about Title IX’s scope (such as student athletes participating on teams that align with their gender identity rather than biological sex, an issue that is not discussed in this Sidebar). Congress could also choose to address other potential applications of Title IX to transgender students beyond the bathroom context. More broadly, Congress could provide a definition of what it means to [discriminate](#) “on the basis of sex” under Title IX. Congress could also opt to allow the judicial branch to determine the meaning of the current statutory text via rulings in response to litigation.

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