

Article

Sex Discrimination in Schools: The Law and Its Impact on School Policies

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Abstract: The law has the potential to influence school policy in the United States. Specifically, statutes, constitutional provisions, and the outcomes of court cases can impact the civil rights of students, which, in turn, can presumably lead to policies that prohibit discriminatory practices. For example, Congress has enacted federal laws (statutes) that prohibit discrimination based on race, sex, and disability; these laws arguably impact school practice. After setting the legal context, through an analysis of statutes, constitutional provisions and case law, this article examines how law has the potential to influence education policy related to sex discrimination. In doing so, a few illustrative cases related to sexual harassment, single-sex programs, pregnant and parenting teens, dress codes, transgender student rights, and athletics are discussed to provide examples about how case outcomes may help create more equitable school environments.

Keywords: discrimination; policy; law; equity; sex; gender



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1. Introduction

The law influences school policy in the United States (Chemerinsky 2003; McCarthy 2016; Superfine 2009). Specifically, statutes, constitutional provisions, and the outcomes of court cases impact the civil rights of students, which, in turn, can lead to policies that prohibit discriminatory practices. Congress has enacted federal laws (statutes) that prohibit discrimination based on race, sex, and disability. For example, Title VI of the Civil Rights Act of 1964 forbids discrimination on the basis of color, race, or national origin in federally funded programs/activities (Title VI 1964); Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in educational institutions that receive federal funds (Title IX 1972); and Section 504 of the 1973 Rehabilitation Act bans discrimination against people with disabilities in schools receiving federal funds (Section 504 1973).

Constitutional provisions can impact school policy as well. To illustrate, the Equal Protection Clause (EPC) of the Fourteenth Amendment has been at issue in a variety of significant education law-related cases. From race-based discrimination claims and beyond, court opinions involving the EPC have influenced school policies and addressed issues of equity. The EPC requires that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws” (U.S. Const. amend. XIV, §1). This clause has been interpreted to mean that all persons similarly situated should be treated alike (*City of Cleburne v. Cleburne Living Center* 1985). Thus, when school officials create policies that classify one group of students differently than another group of students, there may be equal protection concerns.

Courts are called upon to interpret statutes and constitutional provisions. For instance, in *Brown v. Board of Education* (1954), the U.S. Supreme Court found that government-sponsored racially segregated public schools were unconstitutional under the EPC. In *U.S. v. Virginia* (1996), the Court ruled that the Virginia Military Institute’s male only admissions policy violated the EPC. In sum, the law plays a role in shaping more equitable school policies; it is a “powerful tool that educators can use to advance their most important aims” (Heubert 1997, pp. 574–75).

After setting the legal context, through an analysis of statutes, constitutional provisions and case law, this article examines a few illustrative cases and discusses how law can influence education policy related to sex discrimination as it affects students. Specifically, this article explores the following issues: sexual harassment, single-sex programs, pregnant and parenting teens, dress codes, transgender student rights, and athletics.

2. Legal Context

When examining claims of sex discrimination in U.S. public schools, Title IX and the EPC are most often at issue. Additional background information on these laws will help set the context for the discussion.

Title IX. As noted above, Title IX prohibits discrimination on the basis of sex. Specifically, Title IX states, “no person . . . 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(a)). Federal funding will only be given to institutions, organizations, or programs that do not engage in discrimination based on sex. The Office for Civil Rights (OCR) of the U.S. Department of Education is responsible for enforcement of Title IX ([Chaudhry and Greenberger 2003](#)). The law covers two main objectives: to prohibit using federal money to support discriminatory practices, and to give individual citizens effective protection against those practices ([Eckes 2017a](#)).

Equal Protection Clause. The Fourteenth Amendment of the Constitution includes the Equal Protection Clause, which requires states to provide “equal protection under the law” to all, regardless of certain classifications. When analyzing an EPC claim, the U.S. Supreme Court has created three levels of judicial scrutiny for certain classifications of individuals (i.e., strict scrutiny, intermediate scrutiny, and rational basis review) ([John and Rotunda 2010](#)). Race falls under strict scrutiny, which requires both a compelling governmental objective and a demonstration that the classification is narrowly tailored to serve that interest. Sex falls under intermediate scrutiny; the government must demonstrate that the classification based on sex serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The third level of judicial scrutiny is referred to as rational basis, which requires a legitimate government objective with a minimally rational relation between the means and the ends. Classifications based on disability fall under rational basis review. Rational basis review is a very low level of judicial scrutiny, and as a result, if this level of analysis is applied, it is much easier to justify a school policy that treats individuals with disabilities differently from others without disabilities. Thus, it is more difficult for a school to make a race-based classification (strict scrutiny review) than a disability-based classification (rational basis review) ([Eckes and McCall 2019](#)).

3. Sexual Harassment

When students are sexually harassed in schools, they often bring Title IX claims and sometimes EPC claims, as well. Recent complaints involving sexual harassment in K-12 schools have attracted national attention. This interest is not surprising; as of 1 May 2020, the U.S. Department of Education’s OCR had 239 open investigations concerning sexual harassment or sexual violence within K-12 school districts ([U.S. Department of Education 2020a](#)). The “Me Too” movement has also helped expose this issue ([Eckes and McCarthy 2019](#)). The following section provides a few illustrative examples of case law and statutory guidance regulating schools’ obligations in addressing issues of sexual harassment, specifically student-student harassment in schools.

Case law. The U.S. Supreme Court’s *Davis v. Monroe County Board of Education* (1999) decision provides clarity for school districts that are involved in student-to-student sexual harassment challenges involving Title IX. In the *Davis* case, a female student plaintiff had allegedly been subjected to unwelcome sexual touching as well as sexually charged commentary from a fellow student while at school. At one time, the perpetrator put a doorstop in his pants and acted in a sexually suggestive manner toward the plaintiff. The

student plaintiff and her mother notified school personnel of these incidents, and the school officials took no disciplinary action. The Court ultimately found that school districts could be found liable under Title IX for peer-harassment under certain circumstances. Specifically, the *Davis* Court proposed a two-part test that is used to determine school district liability in Title IX peer sexual harassment cases: (1) whether school officials acted with deliberate indifference to known acts of harassment, and (2) whether the harassment was so severe, pervasive, and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit.

Since the *Davis* decision, several courts have examined incidents involving peer harassment under Title IX (*C.R. v. Novi Community School District* 2017; *Johnson v. Northeastern School Corporation* 2019). In one case, a female student claimed that a group of students in the school began to sexually harass her after she was sexually assaulted by another student. The Tenth Circuit ruled that the student's Title IX claim was erroneously dismissed because the school had never investigated her sexual assault complaints and did nothing to stop any continuing harassment. The student, who stopped attending classes, was found to have been deprived of educational benefits (*Doe v. School District No. 1* 2020). The court also noted that she adequately alleged that the harassment she experienced was severe and pervasive; the harassment became so intolerable that she needed to transfer to another school.

When these controversies arise, plaintiffs sometimes have difficulty proving that school officials had actual knowledge of the harassment, that school officials acted with deliberate indifference, or in some cases, that the harassment was severe enough ([Daw et al. 2020](#)). For example, a student's Title IX claim failed because she was not able to demonstrate that her male classmate's bullying was severe and pervasive and deprived her of an educational opportunity. Upholding the lower court's decision granting the school district's motion for summary judgment, the Eleventh Circuit held that the alleged conduct would not be considered "objectively offensive harassment." The conduct involved included pushing, pulling her hair, knocking books out of her hand, and shaking her chair. The court noted that while the battery involved was severe, it had been limited to one incident, which did not deprive the student of an educational benefit. Further, the court did not find school officials to be deliberately indifferent in responding to the harassment because they took fast action by conducting an investigation and disciplining the perpetrator by removing him from the class that the two students took together (*GP v. Lee County School Board* 2018).

Department Guidance. Sexual harassment is prevalent in K-12 schools and in universities. Thus, it is not surprising that in 2020, the U.S. Department of Education ("the Department") released new Title IX regulations addressing this issue ([U.S. Department of Education 2020b](#)). The document includes several changes from the previously issued guidance that will apply to K-12 schools. For example, sexual harassment is now defined more broadly to include sexual assault, dating violence, domestic violence, and stalking ([Rippner et al. 2020](#); [Eckes and Russo 2020](#)).

Under the new regulations, school officials are required to respond to harassment when they have "actual knowledge." The earlier guidance expected school personnel to respond to sexual harassment if they "reasonably should" have been aware of it ([Ali 2011](#)). For elementary and secondary schools, "actual knowledge" occurs when *any employee* has notice of *actual or alleged* sexual harassment. The regulations also require K-12 schools to use a narrower definition of sexual harassment than what was recommended in earlier guidance documents; it is now defined as conduct that is unwelcome and so severe, pervasive, and objectively offensive that it effectively denies a student equal access to an education. In the past, it had been defined as "unwelcome conduct of a sexual nature" ([Ali 2011](#), p. 3). According to the Department, some instances of sexual assault (e.g., rape) do not need to be evaluated for severity because they are automatically considered serious enough to deprive a person of equal access to an education ([U.S. Department of Education 2020b](#)).

Additionally, to find a school district legally liable for failing to respond to accusations of sexual harassment, the student would need to demonstrate that school officials responded with “deliberate indifference” toward the harassment. The regulations define this as actions that are “clearly unreasonable in light of the known circumstances” (U.S. Department of Education 2020b, p. 65). It is important to note that these regulations underwent the formal rule-making process, which includes a public comment period. Thus, unlike the previous Dear Colleague Letters (Ali 2011) on this matter, these new regulations have the force of law (Rippner et al. 2020; Eckes and Russo 2020).

4. Single-Sex Schools

There are approximately 1000 single-sex public schools in the United States (Mitchell 2017), and they have been described as a “growing trend” (Chen 2020). School districts considering single-sex schools, programs, or classes face a difficult dilemma, because the research on single-sex programs has often been mixed (Benham et al. 2019; Signorella et al. 2013). A 2008 review published by the U.S. Department of Education (ED) suggests “some support for the premise that single-sex schooling can be helpful, especially for certain outcomes related to academic achievement and more positive academic aspirations” (U.S. Department of Education, Office of Planning, Evaluation and Policy Development and Program Studies Service 2008, p. xi). However, another report that examined 184 previous studies from twenty-one (21) nations found little evidence that single-sex programs offer educational or social benefits (Pahlke et al. 2014). Indeed, single-sex schools, programs, and classes remain highly controversial (Benham et al. 2019; Salomone 2006).

Statutory guidance. Eckes and McCall (2014) explain that the increase in single-sex programs and classes likely is related to the amendment of Title IX’s regulations in 2006. These amended regulations permitted more leeway for public school districts to implement single-sex programs in non-vocational settings and were a result of language included in the No Child Left Behind Act of 2001 that encouraged school boards to experiment with public single-sex education programs. It remains to be seen how the Every Student Succeeds Act will affect this issue (Benham et al. 2019).

The 2006 amended Title IX regulations require that schools implementing single-sex educational programs make enrollment completely voluntary and offer equal educational opportunities to both sexes. A substantially comparable coeducational school or single-sex school for students of the other sex must also be available. Moreover, school districts that have implemented single-sex classes must conduct a self-evaluation every two years to ensure that they are not “relying on overly broad generalizations about the different talents, capacities, or preferences of either sex” (34 C.F.R. § 106.34(b)(4)(i) (2011)). Importantly, one of these two objectives must be satisfied before implementing a single-sex educational program: (1) the program must improve the educational achievement of a recipient’s students through an established policy to provide diverse educational opportunities, or (2) the program must meet the particular, identified educational needs of a recipient’s students (Eckes and McCall 2014; Title IX Regulations 2006).

Case law. The amended regulations and how public schools implement them have led to a few legal challenges. Within this litigation, the plaintiffs have not been successful in overturning the regulations entirely, but in some cases, they have raised viable concerns about the implementation of single-sex programs. A few illustrative legal cases highlight some of these issues (see Eckes and McCall 2014). In one instructive case, a school board in Louisiana gave a middle school principal leeway to experiment with offering a single-sex program in his building. The principal had explained to the board that some of his dissertation research had revealed several educational benefits that are linked to single-sex programs. However, in implementing the program, the school board did not provide any choice to parents. It was also alleged that special education students were placed in coed classes, whereas gifted students were placed in single-sex classes. Two female middle school students claimed equal protection and Title IX violations when their public school was unlawfully segregating students by sex in this way (*Doe v. Vermilion Parish School*

Board 2011). In their complaint seeking a temporary restraining order, they argued that the single-sex classrooms were not voluntary and that the girls were placed in a public single-sex class without receiving a coeducational option.

The Fifth Circuit Court of Appeals upheld the federal district court's decision denying the plaintiffs' motion for an injunction. The court, however, denied the school district's motion to dismiss the case. The court found that the students provided sufficient evidence that the single-sex program was harmful to the overall educational environment at the school and remanded the case (*Doe v. Vermilion Parish School Board* 2011). Eventually a settlement was reached and the school district agreed to halt the single-sex classes through the end of the school year (Eckes and McCall 2014).

Another case focused on parental notice requirements (see *A.N.A. v. Breckinridge County Board of Education* 2011). In this challenge, the plaintiffs alleged that school personnel assigned students to either single-sex or coeducational classes without input from families. Even though some of the parents were eventually notified that they could opt-out, several classes were not offered in a coeducational format. The federal district court judge in Louisiana distinguished this case from *Vermilion*, finding that some of the bad faith tactics allegedly employed in *Vermilion* (e.g., placement of special education students) were not present here. According to the court, the students did not suffer an injury when participating in the single-sex classes. The court also rejected that the amendments to the Title IX regulations violated both state and federal law because these programs were completely voluntary.

A federal district court in West Virginia granted in part and denied in part a preliminary injunction prohibiting the school district from operating single-sex classes because the classes failed to comply with the requirement that they be completely voluntary (*Doe v. Wood County Board of Education* 2012). School officials automatically placed all students into the single-sex classes unless parents objected, which the court found to be in violation of the regulations. The court granted the plaintiffs injunctive relief on this issue. The plaintiffs had also argued that single-sex classes should never be permissible under the U.S. Constitution or Title IX. However, the court stressed that both the amended regulations and U.S. Supreme Court precedent permits single-sex programs if they are properly implemented.

In a case involving a charter school, a federal district court in Delaware granted the parents' request for a preliminary injunction. Parents of female students were concerned that the state only provided one single-sex charter school; there was only one school available for boys. The court found that the group of parents met their burden in demonstrating that indefinitely depriving girls of access to single-sex programs, while providing the option to boys, violated the EPC and Title IX (*Reach Academy for Boys & Girls, Inc. v. Delaware Department of Education* 2014).

The limited litigation in this area seems to suggest the importance of allowing parents to opt into such programs and the need for school officials to carefully implement the program around an important objective or an exceedingly persuasive justification. As a result of some of these legal questions, the ED issued "Guidance" in 2014 to raise awareness about when single-sex programs are permissible and to offer more clarity around this issue for school personnel (U.S. Department of Education 2014).

5. Pregnant and Parenting Students

Pregnant and parenting students have the right to access an education (Ryan 2017). Thus, schools need to ensure that they are providing equitable educational opportunities to this often-marginalized population of students. In doing so, school officials may need to make accommodations to allow for excused absences related to doctor's appointments, for example. Title IX's regulations provide guidance, and there are a few court decisions that will help school officials navigate this topic as well.

Statutory guidance. Under Title IX, it is illegal for schools to exclude a pregnant or parenting student from participating in any part of an educational program (Title IX Regulations, 34 C.F.R. § 106.40(b)(3)). Prior to Title IX, some districts transferred pregnant

students to alternative schools or expelled them (Lee 2017). Title IX's regulations require that pregnant students have access to education and that if an alternative school is also available, that they get to choose whether to attend this school or the school they attended when they became pregnant. If the student chooses the alternative school, it must be comparable to the original placement (see Gough-McKeown et al. 2015).

In 2013, the OCR issued a "Dear Colleague Letter" providing details about the Title IX regulations regarding pregnant and parenting students. For example, the Letter provides that pregnant students should have access to extracurricular activities without needing a doctor's note unless a note is required for all students before they can participate in an activity. Additionally, absences related to pregnancy are to be excluded if a doctor notes that they were medically necessary (Title IX Regulations, 34 C.F.R. § 106.40(b)(5)).

If a pregnant or parenting student has faced discrimination, there are typically the following three avenues for complaints: (1) students can file an internal complaint with the school under the Title IX grievance procedures; (2) students can file a complaint with the OCR within 180 days from when the discrimination took place; or (3) students can file a complaint in federal or state court.

Case law. There are a few court decisions related to pregnant and parenting students (see Gough 2011). One illustrative lawsuit involved a school that was specifically designed for pregnant and parenting students in Detroit (see *D.W. v. Blanche Kelso Bruce Academy* 2013). The school, known as CFA, had a graduation rate of 90 percent and 100 percent of its graduates were accepted into a post-secondary education program. Attending CFA was not required for pregnant and/or parenting students, but some students provided evidence indicating that they felt pushed or even forced to attend the school. For example, they were allegedly told that the Detroit Public Schools (DPS) could not guarantee public safety for pregnant students.

In 2011, DPS announced that due to financial reasons, management of CFA would be transferred to a strict-discipline charter school. The female students argued that the school environment dramatically changed after it became a charter school. For example, formal classes were replaced with independent studies and certified teachers were replaced with uncertified teachers. The lawsuit alleged that DPS made changes to the management of the school that decreased the quality of educational opportunity for students.

The plaintiffs argued that the various defendants violated Title IX by depriving them of an educational opportunity that was comparable to that offered to their nonpregnant and/or nonparenting peers. The court found that the plaintiffs' complaint clearly established that the education being offered was "inferior to the education plaintiffs' male and non-pregnant female counterparts are receiving at DPS" (5). In a later proceeding, however, the school district's motion to dismiss was granted. Even though the case only addresses early procedural matters, it still provides helpful information about some of the legal issues surrounding pregnant and parenting teens in schools. For example, the case emphasizes the potential concerns related to "push out" policies; the students felt pushed to leave their public schools to attend this particular school. Likewise, the case highlighted other legal concerns, namely, that if a school district offers separate educational programming for pregnant and parenting students, it must meet the Title IX requirement of being *comparable* to the programming offered to non-pregnant and parenting student peers (Gough-McKeown et al. 2015).

6. Dress Codes

Dress codes in public schools have been adopted across the country for a variety of reasons, including safety and discipline. Oftentimes school dress codes have created much controversy and have invited legal challenge when the policies discriminate on the basis of sex. For example, girls have challenged school administrators who found their attire to be distracting (Sherwin 2017; Zhou 2015), and gender expansive students have challenged policies that require gender-specific clothing (Associated Press 2013; Phillips 2010; Yanamoto 2013). In some cases, involving gender-specific dress codes, students

have questioned whether the policies violate their rights. There is little explicit statutory guidance on this matter, but a Title IX violation is often alleged in cases involving dress codes. The EPC is relied upon by plaintiffs as well.

Case law. When adopting gender-based dress codes, the EPC requires that schools have at least a legitimate basis for gender-based restrictions. Under Title IX, dress codes that enforce sex stereotypes are also problematic. A few legal controversies have involved prom and yearbook pictures. In one illustrative case from 2011, a school corporation in Indiana reached a settlement agreement after a transgender female student was prohibited from attending prom in a dress. The principal said that the student violated the school's dress code policy, which stated: "Clothing/accessories that advertise sexual orientation, sex, drugs, alcohol, tobacco, profanity, negative social or negative educational statements" are prohibited. The student alleged that the principal's actions violated her First and Fourteenth Amendment rights, as well as other claims. The federal district court denied the school district's motion to dismiss the case (*Logan v. Gary Community School Corporation* 2008).

Another student in Mississippi sued when she was not permitted to wear a tuxedo for her senior picture (*Sturgis v. Copiah County School District* 2011). The student identified as female but preferred to wear more commonly masculine clothing. She alleged violations under Title IX, the EPC and other claims. The school district's policy required that female students wear a dress-like outfit and that male students wear tuxedos. When the student refused to do wear the dress, her picture was excluded from the yearbook. The court denied the school district's motion to dismiss the case, finding that not allowing her to wear the tuxedo constituted sex discrimination.

In addition to clothing, school officials should consider hairstyles, as well. Specifically, it might be considered sex discrimination if a school policy targets boys' hair in a different way than girls' hair. In a case on this issue, the Seventh Circuit Court of Appeals ruled that a school policy requiring male interscholastic basketball players to keep their hair short raised both equal protection and Title IX concerns; the policy treated male and female athletes differently (*Hayden v. Greensburg Community School Corporation* 2014). Other related controversies that have not yet been addressed in court include disciplining boys who wear nail polish to school ([Burke 2020](#)); prohibiting boys from wearing nail polish would likely be a violation of Title IX and the EPC as well.

7. LGBTQ Students

Lesbian, gay, bisexual, transgender, and questioning (LGBTQ) students have experienced sex discrimination in schools. While the litigation addressed harassment claims in the 1990s and early 2000s, more recent legal challenges have involved discrimination against transgender students and access issues. In these cases, students have often alleged Title IX and EPC violations.

Harassment. Courts have sometimes found equal protection violations when school officials failed to address bullying or harassment against LGBTQ students (*Flores v. Morgan Hill Unified School District* 2003; *Nabozny v. Podlesny* 1996). In *Flores*, students argued that school officials failed to respond to complaints of student-to-student anti-gay harassment, which denied them their rights under the EPC. The Ninth Circuit denied the school district's motion for summary judgment, finding there was sufficient evidence for a jury to reasonably conclude that this group of students was treated differently than other similarly situated students. Likewise, in *Nabozny*, a gay student claimed that when he was harassed by other students at the school based on his sexual orientation, school officials failed to protect him. The Seventh Circuit denied that school district's motion for summary judgment because school officials violated the student's Fourteenth Amendment right to equal protection.

Transgender Access. During the Obama administration, the U.S. Departments of Education and Justice released a joint guidance document in 2016 clarifying that transgender

students are protected under Title IX ([U.S. Department of Education 2016](#)).¹ However, the Trump administration rescinded that guidance in February 2017 ([U.S. Department of Justice, and U.S. Department of Education 2017](#)). President Biden issued an Executive Order (EO) in January 2021 that was designed to combat discrimination based on gender identity and sexual orientation ([White House 2021](#)). This EO may signal a shift on how the new administration will address the rights of LGBTQ students.

There have been a series of disputes related to transgender students being able to use restrooms that align with their gender identities. However, there is no U.S. Supreme Court decision addressing this issue. Federal and state courts that have analyzed this issue involving access in K-12 schools have generally produced favorable results for transgender students. For example, after a case that spent several years winding its way through the federal courts, the Fourth Circuit weighed in on this matter in 2020. In this case, a transgender male student who had been diagnosed with gender dysphoria, a condition that is related to stress stemming from conflict between one's gender identity and physical sex at birth, wanted to use the restroom that aligned with his gender identity. Based on his physician's advice, school officials permitted him to use the boys' restroom for several weeks; however, after some complaints from adults in the community, the board changed its policy. The student challenged the school's decision. After several different proceedings, the Fourth Circuit issued its decision, finding both a violation of the EPC and Title IX when the student was prohibited from using the boys' restroom (*Grimm v. Gloucester County School Board* 2020). A federal district court within this same circuit (Maryland) examined a similar controversy and denied the school district's motion to dismiss, as well (*M.A.B. v. Board of Education* 2018).

The Seventh Circuit reached a similar conclusion when it granted a transgender male student's motion for injunctive relief after he challenged his high school's policy that did not permit him to use a restroom that aligned with his gender identity. The student—who had also been diagnosed with gender dysphoria—had used the boys' restroom for six months without any problem or controversy. After school officials revised the policy, which no longer allowed him to use the boys' restroom, the student alleged that denying him access caused him depression, medical concerns, and that he contemplated suicide due to the stress he experienced. When affirming the grant of the preliminary injunction requested by the student, the Seventh Circuit Court of Appeals found that it would cause irreparable harm to deny him access to the boys' restroom because the use of the boys' restroom was necessary for both his emotional well-being and transition (*Whitaker v. Kenosha Unified School District No. 1 Board of Education* 2017). A federal district court in the same circuit (Indiana) also granted a transgender student's motion for a preliminary injunction, allowing him to use the restroom that aligns with his gender identity (*J.A.W. v. Evansville Vanderburgh School Corporation* 2018). Finally, the Eleventh Circuit Court of Appeals affirmed a federal district court's opinion, finding the school's policy prohibiting a transgender male student from using the boys' restroom as a violation of the EPC and Title IX (*Adams v. School Board* 2020). The court ruled that the policy was administered in an arbitrary way and that it lacked any factual support.

Several other federal district courts also have sided with transgender students. In Pennsylvania, a federal district court granted two transgender students' motion for a preliminary injunction on their equal protection claims in a case involving school restrooms. In granting the motion for the transgender students, the court observed that they were treated differently from other students who are similarly situated simply because they are transgender (*Evancho v. Pine-Richland School District* 2017). Another federal district court within the same circuit reviewed a case involving an eight-year-old transgender student who challenged a district's policy requiring her to use the restroom that aligned with her sex at birth. The school district's motion to dismiss was denied for both the Title IX and

¹ The term transgender is used because this is the language often used by the courts. However, the issues before the court may apply to students who identify as gender expansive or gender fluid.

the EPC claims (*A.H. ex rel. Handling v. Minersville Area School District* 2017). In a case with similar facts, an Ohio federal district court granted a transgender student's motion for a preliminary injunction (*Board of Education v. U.S. Department of Education* 2016). In that case, the court posited that the transgender student demonstrated irreparable injury; she felt stigmatized when she was forced to use a separate restroom. The school district's subsequent motion for a stay was denied by the Sixth Circuit Court of Appeals (*Dodds v. U.S. Department of Education* 2016). State courts have examined the matter as well and have found in favor of the student (*Doe v. Regional School Unit 26* 2014; *N.H. v. Anoka-Hennepin School District No. 11* 2020).

Privacy Rights. There have been a few recent court cases where cisgender student plaintiffs alleged constitutional right to privacy claims. These students took issue with sharing a restroom with a transgender student. Interestingly, all of these cisgender student plaintiffs' claims were unsuccessful in court ([Eckes and Lewis 2019](#)). For example, in affirming the district court's decision, the Third Circuit Court of Appeals upheld the denial of the cisgender plaintiffs' motion for a preliminary injunction. The court reasoned that the presence of a transgender student in the school district's locker rooms or restrooms was not any more offensive to the constitutional privacy interests than the presence of other students who are not transgender (*Doe v. Boyertown Area School District* 2018). Federal district courts in Oregon (*Parents for Privacy v. Dallas School District No. 2* 2018) and in Illinois (*Students & Parents for Privacy v. U.S. Department of Education* 2017) also ruled against the cisgender plaintiffs for similar reasons.

As noted, the U.S. Supreme Court has not yet addressed this issue, but the cases above indicate that in some states, courts have provided guidance on this matter. It should also be noted that the number of states that have non-discrimination policies allowing transgender students to use the restroom of their choice continues to grow. In those states with court decisions or in those locales that have adopted non-discrimination policies, the school district should not maintain discriminatory policies against transgender students. Of course, in a state where there has been no guidance from courts or state policies, school leaders should still be encouraged to adopt anti-discriminatory policies.

Emerging Areas. Finally, litigation involving athletic participation of transgender students has begun to increase. In one recent challenge, plaintiffs argued that an Idaho law that prohibited the participation of transgender women and girls in women's student athletics was discriminatory. The law would have prohibited participation on women's teams without confirming the "reproductive anatomy" if the student's gender/sex was questioned. In this lawsuit, the plaintiffs sought a preliminary injunction, which the court granted (*Hecox v. Little* 2020). In rendering this decision, the judge quoted an earlier U.S. Supreme Court decision and stated, if "equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest" (85). At this stage of the litigation, the court was only discussing the "likelihood" of success based on the record (*Hecox v. Little* 2020). At least three other states have had challenges arise involving transgender students and athletics ([Eckes and Lewis 2020](#); [Holcombe and Rose 2020](#)); these cases are ongoing. The OCR issued a "revised letter of impending action" that provide some additional guidance ([U.S. Department of Education 2020c](#)).

Although this article focuses on students, a 2020 U.S. Supreme Court case involving employment discrimination may provide some guidance on whether Title IX prohibits discrimination based on gender identity and sexual orientation (*Bostock v. Clayton County* 2020). The *Bostock* Court ruled that an employer who fires someone for being gay or transgender violates Title VII of the Civil Rights Act of 1964. The Court reasoned that [a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids" (*Bostock v. Clayton County* 2020, p. 9).

Even though Title VII is a federal law that prohibits discrimination based on sex in the *workplace*, courts examining Title IX issues often look to Title VII for guidance. Thus, this Title VII employment decision may influence future Title IX cases involving students, and at least two federal circuit courts have taken this approach. For example, the Fourth Circuit Court observed that after “the Supreme Court’s recent decision in *Bostock v. Clayton County*... we have little difficulty holding that a bathroom policy precluding Grimm from using the boys’ restrooms discriminated against him ‘on the basis of sex’” (*Grimm v. Gloucester County Sch. Bd.* 2020, p. 65). Likewise, the Eleventh Circuit stated that “[w]ith *Bostock*’s guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex” (*Adams v. School Board* 2020, p. 1305).

8. Athletic Participation

Since the passage of Title IX, athletic opportunities for girls have substantially increased. The law and its implementing regulations require that school districts must provide opportunities that accommodate both girls and boys. Although opportunities have improved over the last fifty years, one report suggests that nearly 4500 public high schools across the United States have large gender equality gaps in sports ([Wong 2015](#)).

Statutory guidance. Title IX does not specifically discuss athletic opportunities, but the law’s implementing regulations do. There are three areas of compliance that are generally examined when determining whether athletic programs provide equal opportunities to both males and females: (1) whether the school district effectively accommodated the interests and abilities of both males and females (“effective accommodations”) (44 Fed. Reg. 71, 413–14); (2) whether there was an equivalence in various athletic benefits, services, and opportunities (“equal treatment”) (Title IX Regulations, 34 C.F.R. § 106.41(c)(3)); and 3) whether there was an equivalence with regard to financial assistance (“equal financing”) (Title IX Regulations, 34 C.F.R. § 106.37(c)). When athletic teams or programs for boys are treated differently than those of girls, Title IX and equal protection concerns arise. For example, some have alleged sex discrimination when boys’ basketball games are scheduled on Friday nights with a band, cheerleaders, and a concession stand while the girls play on Thursday nights with no fanfare ([Eckes 2017a](#)).

In these types of legal challenges, female plaintiffs or their parents typically sue the school district, and they emphasize the existing requirements of school districts ([Eckes and Hutton 2019](#)). Federal guidance from the U.S. Department of Education highlights school officials’ obligations ([U.S. Department of Education 2005](#)). According to [Eckes \(2017a\)](#), Title IX regulations require that a school district’s athletic program be examined as a whole and not as a sport-specific analysis. Thus, if a school district disadvantages one gender in one part of the athletic program, it could be balanced out or offset if that gender has a comparable advantage in another sport. When examining the athletic program as a whole, courts will consider, among other factors, equity in terms of recruitment benefits, equipment, and game and practice schedules.

Case law. As noted above, plaintiffs sometimes seek relief in court when they are denied opportunities to participate on athletic teams or when schedules and facilities are inequitable. For example, in an illustrative case from Indiana, a member of the girls’ basketball team argued that half of her games were scheduled on Mondays through Thursdays, while the boys’ team had nearly all of their games scheduled on Friday and Saturday nights. Games on Friday and Saturday nights were characterized by the plaintiffs as “primetime slots.” The plaintiff’s mother and her daughter’s basketball coach had requested that the high school’s athletic director schedule more of the girls’ games during these more coveted primetime slots (*Parker v. Franklin County Community School Corporation* 2012). The athletic director explained that the state’s high school athletic association prevented her from modifying the schedule. In her Title IX lawsuit, the parent contended that school officials engaged in discrimination when they scheduled basketball practices and games in a way that adversely impacted the girls. The Seventh Circuit Court of Appeals

vacated the lower court's decision, finding that the Title IX claim survived summary judgment because a jury could determine that the present disparity was substantial enough to deny equal athletic opportunity (see [Eckes 2017a](#)).

A California school district was involved in a class action lawsuit in which the female student athletes maintained that they were intentionally and unlawfully discriminated against under Title IX due to inequities related to practice and competitive facilities, equipment, and funding. The plaintiffs filed for declaratory and injunctive relief; they wanted to see compliance with Title IX in all aspects of their athletic programs. Affirming the federal district court's decision granting the students injunctive relief, the Ninth Circuit Court of Appeals found that although the district had made some attempts to provide more equitable treatment and benefits, school officials did not meet all of their obligations under Title IX (*Ollier v. Sweetwater Union High School District* 2014).

Historically, boys have had more athletic opportunities than girls. Consequently, female plaintiffs have often sought relief in court when they were denied opportunities to participate on athletic teams. Current controversies in the media, however, suggest that boys might also be excluded from athletic opportunities based on sex ([Strauss 2017](#); [Trotter 2018](#)). One recent court decision highlights this issue and raises important questions related to gender stereotyping in athletics. In this case, the court examined a matter involving two boys (they attended different high schools) who were denied the opportunity to participate on their high school's athletic competitive dance team because of their sex (*D.M. v. Minnesota State High School League* 2019). Both boys had taken dance classes and were passionate about the sport. Claiming that the athletic league violated the EPC and Title IX, they sought injunctive relief that would allow them to participate on the all-girls' dance teams.

A national athletic league and a few state athletic leagues contended that girls are underrepresented in athletics nationally and that girls' overall athletic opportunities have been limited. Denying the boys' motion for preliminary injunction, the district court ruled that the boys were unlikely to prevail on the merits of their claim because an all girls' dance team was substantially related to the government objective of increasing girls' athletic opportunities. On appeal, a three-judge panel for the Eighth Circuit Court of Appeals reversed based on the EPC claim and instructed the district court to enter a preliminary injunction. The Court cited *U.S. v. Virginia* (1996) when it observed that the athletic league failed to demonstrate an exceedingly persuasive justification for excluding the boys from joining the dance team. Specifically, the court examined the data that had been provided by the athletic league regarding girls' opportunities; the figures actually demonstrated that girls were not underrepresented in Minnesota athletics. Thus, the athletic league failed to show that the underlying problem it sought to address by creating an all-girls' dance team existed. Without this underlying problem, the athletic league did not have an "exceedingly persuasive" justification to exclude the boys ([Eckes and McCall 2019](#)).

The athletic league also contended that there were other safety-related concerns involved with allowing boys on the dance team; the Eighth Circuit disagreed. Likewise, the athletic league's claim that preserving interscholastic athletic competition for boys and girls as an important government interest also failed because it did not offer evidence to the court about how girls would be deprived the opportunity to compete. It should be noted that the Title IX claim was ultimately not addressed because the court had already concluded that the boys would have a reasonable chance of success on the merits with their equal protection claim.

This decision reminds school officials to avoid outdated gender stereotypes. Taken as a whole, these cases reinforce the point that school officials and related athletic associations should continue to examine equity issues in athletics. Under the Title IX regulations, even though identical benefits, opportunities, and treatment are not required, the overall effect of any difference must be minor.

9. Conclusions

The law influences educational policy matters, and this discussion highlighted the role Title IX, the EPC, and case law have played in shaping school policy. Moreover, this discussion demonstrates how the law can help create more equitable school environments, particularly for students who have experienced discrimination based on sex. To be certain, civil rights laws and constitutional provisions have the potential to influence school policies related to sexual harassment, single-sex programs, dress codes, access issues for both pregnant/parenting students and transgender students, and equitable participation in athletics. Indeed, the law can be a powerful tool for students who seek to address sex discrimination in public schools.

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