25 Wis. J.L. Gender & Soc'y 353

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SECTION 504 OF THE REHABILITATION ACT OF 1973: A DOUBLE-EDGED SWORD FOR THE PROTECTION OF STUDENTS WITH GENDER IDENTITY DISORDER

Introduction 354
I. An Environment of Social Torture: The Current Framework Fails 358
A. A Serious Problem with Dire Consequences 358
B. Defining Gender Identity Disorder 360
i. Medical Definition: DSM-IV-TR 360
ii. Common Definitions 361
iii. LGBTQI Community: Preferred Terms 362
iv. The ADA/504 Inconsistencies 364
C. Federal Framework Protecting Students with Gender Identity Disorder 365
i. The First Amendment: Freedom of Expression 366
ii. Title IX: Gender 370
iii. Equal Protection and § 1983 371
iv. Section 504 of the Rehabilitation Act of 1973 373
D. State and Local Protections 374
II. An Existing System of Individual Accommodations Ignored: Section 504 as a Solution 375
III. Section 504 May Be Foreclosed as an Option: Legislative and Policy Brainstorming 377
A. Individualized Bullying Rehabilitation 377
B. Gender Identity Education Protection Act 377
Conclusion 378
APPENDIX A: States Prohibiting Discrimination on the Basis of Gender Identity 380
APPENDIX B: School Laws Addressing Gender Identity 382
APPENDIX C: Pending Legislation Related To Gender Identity 383
APPENDIX D: Cities and Counties Protecting Gender Identity from Discrimination 385
APPENDIX E: Jurisdictions with Hate Crime Legislation, Including Gender Identity 387
APPENDIX F: States with Pending Hate Crimes Legislation, Including Gender Identity 388

*354 Introduction

Public schools fail to protect students with gender identity disorder [1] (GID). Even where protective policies or legislation are present, schools rarely implement those mandates in a meaningful manner, exposing students with GID to harassment and discrimination. [2] Such inadequate protection of these unique learners exposes schools to various forms of discrimination and tort liability. [3] Thorough policy development and implementation can aid school districts in protecting against liability, while, most importantly, providing equal access to education for students with GID. However, even where adequate policy development and implementation is present, an individualized plan is necessary for students with GID because every student and every school

setting is different. One size does not fit all. Individualized plans via section 504 of the Rehabilitation Act of 1973 (Section 504)[4] could be the safeguard these unique students need. Though both the Americans with Disabilities Act (ADA) and Section 504 specifically exclude GID, a loophole is present in both statutes, which would cover GID in the presence of a physical condition related to GID, such as having undescended testicles, missing ovaries, hermaphroditic conditions, genetic anomalies, or an androgen receptor disorder.[5] Recent ***355** studies support a physiological or biological cause for GID.[6] Yet, to protect a student with GID via Section 504 would be a controversial decision because Section 504 requires the presence of a "disability" that limits a major life activity (in this scenario, learning), and whether GID should be considered a disability is hotly contested.[7] In fact, the United Kingdom and France have already declared that gender dysphoria[8] is not a mental health disorder.[9]

The case of Stephanie H. shows what is, unfortunately, a typical scenario. Stephanie H. was a client of this author in 2006. She was then a fifteen-year-old student with GID attending a rural Florida high school. She contacted me via the ACLU (American Civil Liberties Union) because upon announcing to the school, with her parents' support, that she would be attending the tenth grade under an assumed female name, rather than her given male name, and that she would be dressing "as a girl," the principal informed her that she would not be permitted to enroll. Having no other school option in the rural community and a lack of financial means to attend a private school, Stephanie felt she had no choice but to drop out.

Florida protects individuals with GID,[10] and the Principles of Professional Conduct for the Education Profession in Florida prohibits educators from ***356** discriminating against students,[11] including the categories of gender, social background, and sexual orientation. Yet, weeks of negotiating with the school principal and district school attorney ensued, eventually resulting in Stephanie starting school one week late. The specific needs of a transgender student were not present in the general policies, such as bathrooms, locker rooms, and gender specific extra-curricular activities. We created a plan for Stephanie, which the school refused to maintain in writing, specifically accommodating her needs. After overcoming the hurdles to access, her daily experience was torture. Many teachers refused to implement the individualized verbal plan. For example, several teachers refused to update their grade books or to call her Stephanie; they complained about her use of the faculty restrooms, and they sat idly as they witnessed her physical and verbal harassment nearly every minute of the school day.

A court order was necessary to allow Stephanie to change her name and to use it at school. I encouraged Stephanie to keep a journal of every incident and to follow the school's anti-harassment policy explicitly. After only a few months, tracking the harassment consumed so much of her time, compounding her depression, and the blatant indifference of the administration to her complaints was so apparent (not to mention the gun shots and burnt crosses at her family's home) that she felt she had no choice but to leave school. Her family, after a second attempted arson against their home, did not wish to pursue a case against the school district for fear further publicity in the small town would create greater dangers for their family. They should never have been placed in this position. It was apparent that the school setting was the primary impetus for violence that trickled into the community after the media became aware of the situation.

***357** Fortunately, Stephanie eventually obtained a general education diploma, and as of my last communication with her, she was enrolled in a community college, earlier than she would have been had she stayed at the high school. Her experience is not unique.[12] Stephanie's experience shows that mere access pursuant to anti-discrimination laws is not enough to protect a student, such as her, from harassment and discrimination. A plan specifically under the auspices of Section 504 would have carried more influence with the teachers, and the new frameworks I propose in Part IV of this paper would have provided her even more protection, at least during the school day.

In this paper, I argue that mere inclusion in "one size fits all" anti-discrimination and anti-harassment policies and their implementation are insufficient to protect the educational rights of students with GID, and despite these "safeguards," discrimination and harassment against students with GID continue to thrive. The existing legal framework, focused on remediation of discrimination and harassment rather than prevention, is failing. There is little deterrent effect realized from civil rights litigation beyond the school district office.[13] It is at the direct student-to-student level where true safeguards must be employed. Section 504 could be a viable option for the protection of transgender youth now that science indicates a biological cause for the disorder.[14] However, given the stigma attached to labeling an individual with GID as "disabled" or "disordered" and the fierce lobbying among interest groups to prevent its inclusion as a mental health disorder in the fifth edition of the

Diagnostic and Statistical Manual of Mental Disorders (DSM-V) (to be published in 2013), [15] Section 504 may be foreclosed as a solution very soon. Thus, new legislation and policies that specifically address the needs of students during the school day are necessary. Legislatures must take a new look at protecting these learners and direct schools to develop specific policies addressed at their practical accommodation and protection.

***358** In Part I, I discuss the existing legal framework that fails to protect students with GID from harassment and discrimination. Part II goes on to discuss Section 504 as the best existing statutory framework to protect students with GID before harassment and discrimination occur. Part III explains the likelihood that Section 504 will be foreclosed as an option and offers two possible solutions: individualized bullying rehabilitation and a gender identity education protection act.

I. An Environment of Social Torture: The Current Framework Fails

It would be cruel for anyone to argue that school attendance for a student with GID is an easy and comfortable experience. One need only look to studies by the Gay, Lesbian and Straight Education Network (GLSEN) [16] and other organizations [17] to see that these students are the victims of daily mental, and sometimes physical, abuse at the hands of peers and, sadly, even adults at school. [18] The existing framework of protection for students with GID, including state laws and constitutions, local school policies, Title IX, and Section 504 are clearly not enough to protect these students from harassment and discrimination. Had the current framework been effective, GLSEN would have found more positive results from its safety surveys, or such studies would not be necessary.

A. A Serious Problem with Dire Consequences

The diagnosis of children and adolescents with GID is currently met with intense criticism. [19] Some mental health professionals and pediatricians believe that adolescence is not an appropriate developmental stage at which to diagnose GID because the long-term consequences of such a diagnosis--the very identity that will shape one's adulthood--are too dire to rush such a diagnosis. [20] Others believe that the sooner an individual with GID identifies and finds comfort with himself or herself, the better adjusted he or she will be in adulthood. [21] Ignorance and lack of acceptance from medical and education professionals and other adults trickle down to impressionable youth, classmates of students with GID, resulting in peer-to-peer harassment. [22] A recent study by ***359** GLSEN found that 90% of transgender students experienced harassment from peers, and a third of those students heard derogatory remarks by a teacher or school administrator. [23] Less than a fifth of those students said teachers intervene when they hear insulting remarks made by classmates against transgender students. [24] Sadly, 53% of transgender students are physically harassed for gender expression, 87% are verbally harassed for gender expression, and 54% did not report their bullies. [25] Of those who did not report the harassment and bullying, a third of the students said they did not do so because they believe teachers and administrators are ineffective at solving the problem. [26]

The GLSEN study found that transgender students are more likely to quit school or miss school due to concerns for their safety, achieve lower grade point averages, and maintain lower educational aspirations, including doubt that they will attend college. [27] Thirteen states and the District of Columbia, as well as at least one hundred and nine cities and counties, [28] specifically include gender identity in their anti-discrimination laws, while several other states' courts have interpreted non-inclusive policies and statutes to include GID. [29] Yet, in most of the United States, there is a total absence of such protections. [30] Combining these few protections with the data from GLSEN and other organizations makes it apparent that the status quo method of implementing these statutes and policies is failing America's youth. Despite that these policies and existing laws are aimed at redressing harassment and discrimination, they do little to protect a student from ever experiencing harassment and discrimination in the first instance. [31] Section 504 or a new framework could do just that.

***360** B. Defining Gender Identity Disorder

A basic problem that challenges school administrators is defining "gender identity disorder." Faced with a number of sources with inconsistent definitions, one can understand why school districts may be confused by its obligations and students' rights. How a student is labeled is a significant factor in charting the school's obligations to protect a particular student from harassment and discrimination. [32] For example, whether hate crime laws or specific anti-bullying statutes will apply to a particular student depends on how that student is defined. [33] Below, I discuss the various sources to which an educator may turn to define GID.

i. Medical Definition: DSM-IV-TR

According to the text revision of the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR), there are four diagnostic criteria for gender identity disorder: [34]

> Criteria A: There must be evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex.
>
> Criteria B: This cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex. There must also be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex.
>
> Criteria C: The diagnosis is not made if the individual has a concurrent physical intersex condition (e.g., partial androgen insensitivity syndrome or congenital adrenal hyperplasia).
>
> Criteria D: To make the diagnosis, there must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning.

***361** As addressed above, whether the current definition of GID in DSM-IV-TR will be changed or deleted in the upcoming DSM-V, set for publication in 2013, is a hotly debated topic. [35] Thus, defining a student with GID under this medical criterion may be meaningless in the future, and reliance on other sources will become the norm.

ii. Common Definitions

While the DSM-IV-TR medical/diagnostic definition may satisfy the needs of the medical profession, it is feasible that an educator may look to lay sources for a definition, all of which have significant overlap and confusion. For example, the definitions of transvestite, transsexual, and gender identity disorder are strikingly similar, and all are listed as exclusions to the definition of a "person with a disability" in the Americans with Disabilities Act. [36] Merriam-Webster's Dictionary defines:

> Transvestite: A person and especially a male who adopts the dress and often the behavior typical of the opposite sex especially for purposes of emotional or sexual gratification. [37]
>
> Transsexual: A person who strongly identifies with the opposite sex and may seek to live as a member of this sex especially by undergoing surgery andhormone therapyto obtain the necessary physical appearance (as by changing the external sex organs). [38]

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> Transgender: Of, relating to, or being a person (as a transsexual or transvestite) who identifies with or expresses a gender identity that differs from the one which corresponds to the person'ssexat birth. [39]

All three definitions include a strong identification with the opposite sex, and despite the similarities, subtle differences must be observed. Transvestism ***362** is focused on "sexual gratification" or emotional gratification, both of which can be ambiguous terms, depending on the context. [40] Transsexuality is focused on an affirmative act to alter one's anatomy to conform to the perceived gender identity, through surgery and/or hormone therapy, so that one may live as the opposite sex. [41] Transgender, however, is focused solely on the mental state of identity. [42] One with GID may or may not take an action to become a transsexual and may or may not find emotional or sexual gratification from expressing his or her identity by living as the opposite sex. [43] Thus, one who is a transvestite or transsexual may also be labeled under the more general category of transgender. [44] As addressed below, these overlapping definitions, coupled with the medical definition of gender identity disorder, exhibit a great challenge that the United States Congress must have faced in enacting the ADA and Section 504 with inconsistent definitions of gender identity disorder and transgender.

iii. LGBTQI Community: Preferred Terms

None of the definitions seem to satisfy the preferences of the LGBTQI [45] community. I suggest that there is no better source in defining a minority group than the minority group at issue. These individuals have experienced the labels in the past and present and should be allowed great deference for how labels are to evolve in an accurate and non-offensive manner. The Gay and Lesbian Alliance Against Defamation (GLAAD) offer several preferred and disfavored labels in its Media Reference Guide: [46]

> Gender Identity: One's internal, personal sense of being a man or a woman (or a boy or a girl). For transgender people, their birth- ***363** assigned sex and their own internal sense of gender identity do not match.

> Gender Expression: External manifestation of one's gender identity, usually expressed through "masculine," "feminine" or gender-variant behavior, clothing, haircut, and voice or body characteristics. Typically, transgender people seek to make their gender expression match their gender identity, rather than their birth-assigned sex.

> Transgender: An umbrella term for people whose gender identity and/or gender expression differ from the sex they were assigned at birth. The term may include but is not limited to: transsexuals, cross-dressers, and other gender-variant people. Transgender people may identify as female-to-male (FTM) or male-to-female (MTF). Use the descriptive term (transgender, transsexual,cross-dresser, FTM, or MTF) preferred by the individual. Transgender people may or may not choose to alter their bodies hormonally and/or surgically.

> Transsexual (also Transexual): An older term which originated in the medical and psychological communities. Many transgender people prefer the term transgender to transsexual. Some transsexual people still prefer to use the term to describe themselves. However, unliketransgender,transsexualis not an umbrella term, and many transgender people do not identify as transsexual. It is best to ask which term an individual prefers.

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> Transvestite: DEROGATORY, see Cross-Dressing.
>
> Cross-Dressing: To occasionally wear clothes traditionally associated with people of the other sex. Cross-dressers are usually comfortable with the sex they were assigned at birth and do not wish to change it." Cross-dresser" should NOT be used to describe someone who has transitioned to live full-time as the other sex, or who intends to do so in the future.Cross-dressing is a form of gender expression and is not necessarily tied to erotic activity. Cross-dressing is not indicative of sexual orientation.
>
> Gender Identity Disorder (GID): A controversial DSM-IV diagnosis given to transgender and other gender-variant people. Because it labels people as "disordered," Gender Identity Disorder is often considered offensive. The diagnosis is frequently given to children who don't conform to expected gender norms in terms of dress, play or behavior. Such children are often subjected to intense psychotherapy, behavior modification and/or institutionalization. Replaces the outdated term "gender dysphoria."

***364** The GLAAD Media Reference Guide glossary shows that gender dysphoria is complex, both emotionally and socially, and the general public and legislators are probably ill-informed. [47]

iv. The ADA/504 Inconsistencies

All three of the layman's terms of gender dysphoria are included in the ADA and Section 504 as exemptions from the term "persons with a disability." [48] However, according to a congressional report, which was made an appendix to the Department of Justice regulations that define disability, none of the identities found in the ADA exclusions "necessarily" applied to Section 504 of the Rehabilitation Act of 1973: [49]

> Paragraph (5) of the definition lists certain conditions that are not included within the [ADA] definition of "disability." The excluded conditions are: Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, genderidentity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Unlike homosexuality and bisexuality, which are not considered impairments under eithersection 504***o***r the Americans with Disabilities Act (see the definition of "disability," paragraph (1)(iv)), the conditions listed in paragraph (5), except for transvestism, are not necessarily excluded as impairments undersection 504. (Transvestism was excluded from the definition of disability forsection 504by the Fair Housing Amendments Act of 1988,Pub.L. 100-430,section 6(b)). [50]

The ADA excludes transsexualism and GID (as if they are different issues; "transsexualism" is merely an outdated term for GID). [51] Transvestism, which includes sexual fetishism, is not, according to medical experts, gender identity disorder, and transvestism is excluded by both the ADA and Section ***365** 504 of the Rehabilitation Act. [52] Rather than recognize the psychological communities' expert opinion that GID is a mental health disorder, Congress, in enacting and amending the ADA, has treated GID as it would sexual fetishes, such as pedophilia, voyeurism, and exhibitionism. [53]

Note also that both the ADA and Section 504 would cover an individual with GID if his or her GID were a result of a physical impairment. [54] Yet, by medical definition in the DSM-IV-TR, it is not possible to be diagnosed with GID if the

gender identity arises from physical impairment. [55] The exception is meaningless if the student's diagnosis is psychiatric rather than physiological. A recent study by Prince Henry's Institute of Australia revealed that there is a genetic association among individuals with GID. [56] The study results fail to declare a definitive link to anatomy, and whether the ADA or Section 504 would cover such a genetic defect is unclear. Further, the recently enacted Genetic Information Nondiscrimination Act of 2008 (GINA) may be implicated, and the effects of applying GINA in a case of GID are yet to be realized. [57] I suggest that if GID, as a mental health disorder, becomes an obsolete concept in the event it is deleted from the forthcoming DSM-V, an argument may still exist for Section 504 protection by way of biological or physiological evidence of the disorder, such as the genetic mutation suggested by the Prince Henry's Institute study. To rely on a physiological or biological source as the cause of GID would be a much less stigmatizing path to qualifying as "disabled" under Section 504 than as a "mental health disorder."

C. Federal Framework Protecting Students with Gender Identity Disorder

Three federal frameworks have been successful in remedying discrimination against students with GID: the First Amendment of the United States Constitution, Title IX of the Civil Rights Act of 1964, and equal protection via the Fourteenth Amendment, as well as equal protection enforcement by § 1983 actions. [58] However, the First Amendment, Title IX, and ***366** the Fourteenth Amendment, though capable of remedying past wrongs and theoretically offering a deterrent effect against future discrimination, do little to prevent those wrongs from occurring in the first instance. [59] While it cannot be denied that these anti-discrimination rulings have some deterrent effect, discrimination and harassment still occur, particularly against students with GID. [60] Cruel teen peers do not feel the burdens of anti-discrimination litigation--the school district does. [61] Thus, the primary instigators of the harassment and discrimination go unpunished and the cycle continues. The policies that develop in response to First Amendment, Title IX, and Fourteenth Amendment equal protection litigation are simply ineffective. [62] Peer and adult misunderstandings and ignorance about GID [63] result in failed implementation of even the best-intentioned policies. Civil rights litigation is an ongoing battle, one school to the next, offering no significant or prompt change nationally. Further, the burdens placed on the district due to the expense of litigation and the fact that the student has already been adversely affected warrant a proactive approach. Policymakers must find a better way to protect these students before discrimination or harassment occur. Thus, the disability framework in educational settings, specifically Section 504, is preferable in a transgender scenario--solving problems before they arise maximizes student learning and district resources.

i. The First Amendment: Freedom of Expression

The First Amendment of the United States Constitution implies a right of freedom of expression, including in attire. [64] The United States Supreme Court has routinely held this right to apply to students and teachers in school settings, noting in Tinker v. Des Moines Independent Community School District, "First ***367** Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." [65] However, students' right to freely express themselves can be limited where such expression creates or could lead to a disruption to the school environment. [66] Courts draw the line on student and teacher free speech when the expression causes an "interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." [67]

In Tinker, high school students in the Des Moines Independent Community School District organized a "silent" protest of U.S. involvement in the Vietnam conflict. [68] The students wore black armbands to school to express their disagreement with the Vietnam conflict. [69] "Only a few of the 18,000" students participated. [70] Five students were suspended. [71] Though there were some hostile remarks and insults, there were no threats or acts of violence towards the students wearing black armbands, and no classes were disrupted. [72] The Court explained the balance of maintaining students' right to expression and maintaining an orderly and safe educational environment, noting its earlier ruling in Burnside v. Byars: [73]

> [The school district] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no

> finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. [74]

The Court in Tinker found that the Des Moines Independent School District offered no evidence that the students' expression, represented via black armbands, caused a disruption, holding that the school district's actions violated the students' First Amendment right to freedom of expression. [75] The trial record for Tinker revealed that the administration and teachers were more ***368** concerned with the fact that a former student of the district had been killed in Vietnam. [76] Many of his friends were still in school, and other students had suggested they would start wearing other colored armbands to express their viewpoints on the war. [77] Meanwhile, the faculty and staff felt school was an inappropriate place to hold even a silent demonstration. [78]

The fact that teachers, administrators, or other students may dislike or object to a student's expression, as exhibited by his or her clothing, does not constitute sufficient disruption of the learning environment. Nor does such expression interfere with other students' First Amendment rights. [79] However, schools may restrict student speech if the message is similar to speech that has caused actual disruption in the past, such as student altercations. [80] Schools may also establish dress codes if they are reasonably related to a school's interest in ensuring an effective educational environment, including concerns about school "values." [81]

Sex-specific dress codes have been upheld with findings that school concerns about safety, discipline, distraction from learning, and promoting community values are

valid grounds for the differences. [82] At least one court has declared unconstitutional a school decision prohibiting a male student, who identified as female, from wearing girls' clothes, absent specific evidence that her attire, as opposed to her behavior, would cause substantial disruption. [83] Yet, given the ***369** broad standards of substantial disruption and maintenance of community values, an argument for substantial disruption might prevail in a rural community with few, if any, transgender individuals. In contrast, such an argument may not find justification in a large metropolitan area, such as San Francisco or New York City, where young people are exposed to a variety of lifestyles and diversity on a daily basis.

Further, it is unclear whether dressing as the opposite sex to express one's gender rises to the level of a constitutionally protected "expression." The Supreme Court has explained:

> [A]ctivity [must be] sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments . . . for "[the Court] cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." But the nature of appellant's activity, combined with the factual context and environment in which it was undertaken [must be considered]. [84]

Under such reasoning as employed in Olesen v. Board of Education of School District No. 228, mere clothing to express individuality is not sufficient, particularly when disruption is a concern. [85]

Finally, the First Amendment would only protect a student's ability to dress according to his or her gender, again, as a remedial measure after discrimination has occurred. It would not offer protection from harsh treatment in the first instance. Thus, the First Amendment is not a reliable source for guaranteeing students with GID an equal access to education.

***370** ii. Title IX: Gender

Though probably more effective than the United States Constitution in protecting students with GID, Title IX also is limited because of its remedial nature. [86] Policies exist, but neither the policies nor the implementation of Title IX policies were designed with GID as a focus. [87] It is only through case law that GID has become protected in the Title IX context. [88]

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." [89] A variety of liability theories have been asserted under Title IX. Liability is not limited to disparate impact or quid pro quo harassment. It also includes hostile educational environment claims. [90] It is the hostile educational environment claim [91] we are concerned with in a scenario involving a student with GID. The Supreme Court in Davis v. Monroe County Board of Education followed its holding in Gebser v. Lago Vista Independent School District, [92] a teacher-on-student harassment case, and explained that a school district could be liable for harassment under Title IX:

> [W]here the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. . . . [W]e conclude that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit. . . .
>
> ***371** These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. (emphasis added) [93]

The acts of harassment that lead to a successful Title IX case are undefined, but the Court explained, "[A]cts of teasing and name-calling among students, even where these comments target differences in gender [is not enough]. Damages are available only where the harassment constitutes such severe gender-based mistreatment that it denies a victim the equal access to education that Title IX is designed to protect." [94]

In the Davis case, LaShonda Davis had been severely harassed by her classmate G.F. until ultimately, he was arrested for sexual battery. [95] His actions included fondling LaShonda and her classmates' breasts, making lewd comments about sexual acts, threats of sexual acts, and name-calling. [96] Despite their knowledge, the school faculty and staff never disciplined G.F. [97] La Shonda became depressed. [98] Her grades dropped significantly, and she even wrote a suicide note. [99] Facts such as these are common among students with GID. [100] Though Title IX is certainly an option, it is insufficient because the damage has already occurred.

iii. Equal Protection and § 1983

Another federal cause of action is available pursuant to 42 U.S.C. § 1983 for violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. [101] A student may bring an equal protection ***372** claim against a state actor. [102] This federal statute allows a private right of action against government entities, including schools, for deprivation of rights, but section 1983 also reaches individuals (e.g., the teacher who discriminates or allows discrimination to occur). [103] The analysis is similar to Title IX. To demonstrate an equal protection violation, a student with GID would need to show that the school "acted with a nefarious discriminatory purpose" based on association or belonging to a definable class and that the school "acted with intentional or deliberate indifference to [his or her] complaints of harassment." [104] In the case of a student with GID, the rational basis standard would apply. [105] To succeed as a section 1983 action, the student would also need to "show that the harassment was [a] result of municipal custom, policy, or practice." [106]

Equal protection alone or via section 1983 are difficult claims. Schools need only meet the intermediate scrutiny level of review to justify their discriminatory conduct towards students with GID. [107] Students with GID are usually the sole transgender individuals at their school, [108] and thus, assertion that a custom, policy, or practice was present would be extremely difficult to prove. Most schools will have never dealt with a transgender student. [109] Further, as we see again, this is a solution to an existing problem, not a solution that actually protects students before the damage occurs. Thus, equal protection and section 1983 are poor frameworks for the inclusion and protection of students with GID.

***373** iv. Section 504 of the Rehabilitation Act of 1973

The ADA, Section 504, and the Individuals with Disabilities Education Act (IDEA) [110] exclude students with GID from protection. [111] As argued above, recent studies indicating a physical or biological cause for GID may allow an exception so that students with GID can find protection via the ADA or Section 504. [112] However, the ADA regulations do not provide the same level of procedural safeguards that Section 504 regulations provide, such as regular review of accommodation plans, evaluations that draw information from a variety of sources, regulations specific to the educational setting, notice prior to a change in placement, and a mandate to provide a free appropriate public education. [113] It is these types of procedural protections that students with GID need. Thus, the only practical federal regulatory protection available to a student with GID is Section 504 of the Rehabilitation Act of 1973. [114]

To be protected under Section 504, a student must be determined to: (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of such an impairment; or (3) be regarded as having such an impairment. [115] Section 504 requires that school districts provide a free appropriate public education (FAPE) in the least restrictive environment (LRE) to qualified students in their jurisdictions who have a physical or mental impairment that substantially limits one or more major life activities. [116] It provides procedural safeguards, such as notice and opportunity for administrative hearings in certain circumstances. [117] 34 C.F.R. § 104.3(j)(2)(i) defines:

> ***374** Physical or mental impairment [as] (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. [118]

The regulation is not an exhaustive list of specific diseases and conditions [119] because of the difficulty of ensuring the comprehensiveness of such a list.

It should be noted that some confusion lies in the dichotomy of "disability" as defined in the ADA and Section 504. The Americans with Disabilities Act Amendments of 2008 (ADAA) became effective January 1, 2009. [120] The ADAA includes "a conforming amendment to the Rehabilitation Act of 1973 that affects the meaning of disability in Section 504." [121] The Amendments Act broadens the interpretation of disability; [122] however, it "does not require the [U.S. Department of Education] to amend its Section 504 regulations." [123] "[The] Section 504 regulations as currently written are valid and [the U.S. Department of Education Office for Civil Rights (OCR)] is enforcing them consistent with the Amendments Act." [124] OCR is still evaluating the impact of the ADAA and its enforcement responsibilities under Section 504, including whether any changes in regulations are appropriate. [125] Thus, it is possible that Section 504 regulations will be brought consistent with the ADA.

D. State and Local Protections

State and local protections for individuals with GID vary widely, and to address the full range with sufficient detail is beyond the scope of this paper. While thirteen states and the District of Columbia have adopted anti-discrimination and/or anti-bullying laws that include GID, [126] other states have ***375** proposed legislation in the 2009 legislative session. [127] Cities have been the most successful in adopting protective ordinances. Approximately one hundred and nine cities have adopted such ordinances. [128]

Where state civil rights statutes do not include transgender individuals, it may be possible to bring a tort action. State courts have often upheld claims alleging that schools have been negligent in failing to protect their students from the torts of their peers. [129] Thus, it is possible that when a transgender student experiences physical harassment or taunting that leads to emotional damages, a tort action may be available. Even where specific statutes protecting "transgender" are absent, several states have interpreted protection for individuals with GID through disability statutes. [130] Further, several states have adopted hate crime laws that include gender identity, [131] and where the harassment and abuse rises to the level of a crime (e.g., battery), hate crimes and penal codes will apply. [132] Like the federal framework, these are reactive laws, doing little to prevent damage from occurring.

II. An Existing System of Individual Accommodations Ignored: Section 504 as a Solution

As long as GID is a mental health diagnosis in the Diagnostic and Statistical Manual, Section 504 may be the best option for proactively ensuring access to education, free from harassment and discrimination, for transgender students. Even as explained above, Section 504 requires development of an individualized plan addressing a student's disability and what accommodations or modifications are necessary to ensure a free, appropriate public education in the least restrictive environment. [133]

What would go into a 504 plan for a student with GID? The answer depends on the individual student's needs, the school facilities, and the cultural climate of the school. For example, the level of protection at a school in a major metropolitan area would differ greatly from one in a rural community. However, some basic issues should probably be reflected in 504 plans universally. Below are some examples:

> Name Protocol: If the student has already taken legal action to change his or name, this should be a non-issue. However, as I experienced representing Stephanie H., a legal name change alone is ***376** not always enough to ensure school recognition by obstinate faculty and administration. Thus, the 504 plan for a student with GID should consider compliance with name and pronoun preferences of the student and ensure school-wide compliance.
>
> Dress Code: The student with GID should not be seeking special rights but equal rights. Thus, the extent to which the dress of the transgender student is addressed by the plan should be limited to noting that the student will comply with the dress code of the identified gender.
>
> Bathrooms and Locker Rooms: This issue is one of the more contentious because it implicates the safety and comfort of other students. Some schools have allowed students with GID to use faculty restrooms. Others have made special private time for locker rooms.
>
> Sex-Specific Classes: Schools sometimes offer classes segregated by sex, such as sex education and physical education. The school should address which class the student with GID will attend, keeping in mind the cultural climate and whether attendance at a segregated class would disrupt learning.

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Extracurricular Activities: High school state athletic associations have specific gender rules for sports, as well as size and weight requirements. Thus, a school should consult those rules when planning extracurricular participation for a student with GID. The spirit of Section 504 is full inclusion, so the school should aspire to allow full participation if at all possible.

Safety: This is probably the most important issue to consider. Schools should plan for reporting and response in instances of harassment or violence, for example, a safe place to where the student with GID can retreat, scheduling flexibility to eliminate contact with bullies, prompt discipline of offending bullies, etc.

Diversity Training for Students, Faculty, and Staff: Training is not something typically seen in a 504 plan. However, particularly in a school that has never had experience with a student with GID, it could prove beneficial and help faculty and staff show compassion and appropriate interaction and responses.

Again, these are only suggestions, and the issues to be addressed are individual to the student with GID and the unique characteristics of the school culture and facilities.

*377 III. Section 504 May Be Foreclosed as an Option: Legislative and Policy Brainstorming

Because GID may be deleted from the Diagnostic and Statistical Manual when it is republished in 2013, [134] disability laws, such as Section 504 may be foreclosed to students with GID unless science pointing to a physiological or biological cause is further developed. [135] Thus, it is imperative that we create an entirely new framework of protection. I propose two approaches. The first would focus on rehabilitating bullies, a system that could benefit the entire school population. The second is a law creating student-specific plans, using an approach similar to the Individuals with Disabilities Education Act and Section 504.

A. Individualized Bullying Rehabilitation

An approach that could benefit the entire school community is a rehabilitative approach to stop bullying at its source. In this system, once a student reports an incident of violence or bullying, the perpetrator should be punished promptly. However, punishment alone will not solve the underlying problem [136] and may sometimes perpetuate the problem with retaliation. I propose that a reported bully be placed under an individualized rehabilitation plan that would include diversity training, community service, counseling, anger management, and other activities specifically targeted to the offensive action that occurred. One could think of it as a highly detailed, written, and individualized detention program. Upon completion of the plan, the bully would be rehabilitated such that he or she would be less violent and more respectful of other students, possibly trickling his or her new attitude to other students. Such a program could be accomplished through legislative action requiring schools to adopt such a system, or schools could create local policy adopting a similar system.

B. Gender Identity Education Protection Act

My second proposal would probably be met with more controversy and would be difficult to get through the legislative process, particularly given the difficulty the Matthew Shepard Hate Crimes Act faced, which finally passed in ***378** October 2009 after a decade of lobbying. [137] Convincing legislatures to fund such a system of protection for a very limited student population would be very difficult under the current budget shortfalls schools are already facing. [138] Assuming the obstacles of the legislative

process were overcome, a "Gender Identity Education Protection Act" could be set-up similar to IDEA or Section 504, including procedural safeguards for a school's violation of a student's rights under the act.

Like IDEA and Section 504, an identification process would be necessary, though I do not think an elaborate "child find" program, as found in IDEA, would be required. The student with GID would need to identify him or herself to the school and seek out protection under the act. After identification, the school and student should enter into an individualized education plan, stating the needs of the student, including safety, and the accommodations and modifications that are necessary to provide the student with equal access. Key components from IDEA and Section 504 would be present in such a law, such as a "free and appropriate public education" in the "least restrictive environment." [139] Like IDEA and 504, the plan should be updated as needed but no less than every third year. [140] Violations by the school could be handled under the same process as IDEA due process hearings and mediations. [141]

Conclusion

Students with GID suffer greatly from discrimination and harassment perpetrated by their peers and adults. [142] The controversial issue is reaching further into the mainstream, and more and more students are bending gender norms. [143] Schools can no longer ignore the reality of transgender teens. Though it is a double-edged sword to label someone with GID as "disabled," in the sometimes violent and hostile school setting, the disability label is a necessary evil for these unique learners. The effect of harassment and discrimination on the student with GID is significant, adversely affecting educational progress ***379** and aspirations. [144] Section 504 plans may be the only proactive protection available to students with GID. Civil rights litigation, as a reactive tool, is not sufficient because the damage has already occurred, and any deterrent effect remains at the administrative school level, without trickling down to the student-to-student day.

With revision of the Diagnostic and Statistical Manual set for publication in 2013, Section 504 may be foreclosed as a protective device because GID may be removed. [145] Though science is now indicating a physiological or biological cause for GID that would make GID eligible for ADA or Section 504 protection, it has not been perfected, and such a physical diagnosis may be rare. Thus, a new proactive framework is necessary to protect students with GID. Individualized bullying remediation or a gender identity specific education act could be the solution.

Schools should be a place where all students feel safe, and if logical solutions can overcome ignorance, every young person will be able to reach their full educational potential. In turn, America will be strengthened by a more tolerant and intelligent upcoming generation.

***380 Appendix A States Prohibiting Discrimination on the Basis of Gender Identity**

California: Cal. Gov't. Code §§ 12926, 12949 (2003).

Colorado: Colo. Rev. Stat. §§ 24-34-401, 402 (2004).

Connecticut: Conn. Gen. Stat. § 46a to 81c-m (2001). While gender identity is not explicitly included in the state's anti-discrimination law, the Connecticut Commission on Human Rights and Opportunities has ruled that transgender individuals can pursue anti-discrimination claims under the category of sex discrimination. Declaratory Ruling on Behalf of John/Jane Doe (Conn. Human Rights Comm'n 2000).

District of Columbia: D.C. Code §§ 2-1401.01, .02; 2-1402.11, .21, .31, .41, .71, .73 (2006).

Florida: No provision of Florida law explicitly addresses discrimination based on gender identity. However, a Florida court has ruled that an individual with gender dysphoria is within the disability coverage of the Florida Human Rights Act, as well as

the portions of the act that prohibit discrimination based on perceived disability. Smith v. City of Jacksonville Corr. Inst., 1991 WL 833882 (Fla. Div. Admin. Hrgs. Oct. 15, 1991).

Hawaii: Only in housing and public accommodations, Haw. Rev. Stat. §§ 515-2 to -7; 378-1 to -3; 489-2 to -3 (2006).

Illinois: 775 Ill. Comp. Stat. 5 / 1-102 (1994).

Iowa: Iowa Code, ch. 216; 216.2(10), (14) (1996).

Maine: Me. Rev. Stat. Ann. tit. 5, §§ 4553, 4571-76, 4581-83, 4591-94F, 4595-98, 4601-04 (2007).

Massachusetts: While gender identity is not explicitly included in the state's anti-discrimination law, several courts and the state Commission Against Discrimination have ruled that transgender individuals can pursue an anti-discrimination claim under the category of sex or disability discrimination. Liev. Sky Publ'g Corp., No. 013117J, 2002 WL 31492397 (Mass. Super. Ct. Oct. 7, 2002); Doe ex rel. Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000); Jette v. Honey Farms Mini Market, LEXIS 50 (Mass. Comm'n Against Discrimination 2001); Mass. Gen. Laws Ann. ch. 151B, §§ 3-4 (West 2003).

Minnesota: Minn. Stat. § 363A.01-41 (2009).

***381** New Jersey: N.J. Stat. Ann. §§ 10:2-1; 10:5-1 to -49 (2006).

New Mexico: N.M. Stat. Ann. §§ 28-1-2, -7, -9 (2003); 28-1-7 (2001).

New York: While gender identity is not explicitly included in the state's anti-discrimination law, courts have ruled that transsexual individuals can pursue anti-discrimination claims under the category of sex. Rentos v. OCE-Office Sys., 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996); Buffong v. Castle on the Hudson, 2005 N.Y. Misc. LEXIS 3194 (N.Y. Sup. Ct. 2005); N.Y. Exec. Law art. 15 §§ 296, 296-a (2003).

Oregon: Or. Rev. Stat. § 74.100(6) (2007).

Rhode Island: R.I. Gen. Laws §§ 28-5-3, 28-5-7, 34-37-4, 34-37-4.3, 11-24-2 (2001).

Vermont: Vt. Stat. Ann. tit. 21 § 495 (2007); Vt. Stat. Ann. tit. 9, § 4503 (2007); Vt. Stat. Ann. tit. 8, § 10403 (2009); Vt. Stat. Ann. tit. 8, § 4724 (2008); Vt. Stat. Ann. tit. 3, § 963 (2007).

Washington: Wash. Rev. Code § 49.60.130-175, -176, -178, - 180, -190, -200, -215, -222 to 2-25, -300 (2010); Wash. Admin. Code § 356-09-020 (2010).

***382 Appendix B School Laws Addressing Gender Identity**

Arkansas: A provision of state law requires school districts to adopt policies that prohibit bullying; however, there are no categories of protections required for these policies. Ark. Code Ann. § 6-18-514 (2010).

California: Cal. Penal Code § 422.76 (West 2001); Cal. Educ. Code § 220 (West 2002).

District of Columbia: D.C. Code §§ 2-1401.02, 2-1402.41. (2001).

Minnesota: Minn. Stat. § 363A.03(44), 363A.13, 363A.23 (2009).

New Jersey: N.J. Stat. Ann. § 18A:37-13 to -17 (West 2002).

North Carolina: N.C. Gen. Stat. § 115C-407.5 (2009).

***383 Appendix C Pending Legislation Related To Gender Identity**

Arizona: HB 2455 Would prohibit discrimination in employment, public accommodations and other areas based on sexual orientation and gender identity. SB 1368 Would prohibit discrimination in employment based on sexual orientation and gender identity.

Connecticut: HB 6425 Would update Connecticut's anti-discrimination laws to add gender identity or expression as protected categories.

Florida: HB 397/SB 2012 Would amend the Florida Civil Rights Act to add sexual orientation, and gender identity or expression, as well as pregnancy and familial status, as protected categories.

Georgia: HB 111 Would add sexual orientation and gender identity to the state hate crimes laws.

Indiana: HB 1250 Would extend existing anti-discrimination laws to apply to discrimination motivated by sexual orientation, gender identity, age, disability, and other traits.

Kansas: SB 169 Would extend existing anti-discrimination laws to apply to discrimination motivated by sexual orientation and gender identity.

Kentucky: HB 72 Would extend existing anti-discrimination laws to apply to discrimination motivated by sexual orientation and gender identity.

Massachusetts: HB 1728 Would expand existing hate crimes and anti-discrimination laws to prohibit discrimination in employment, places of public accommodation, real estate, and education based on gender identity or expression.

Michigan: HB 4192 Would update existing anti-discrimination laws to add sexual orientation, gender identity, and gender expression as protected categories.

Missouri: HB 701 Would amend existing laws to prohibit discrimination in employment, public accommodations, and housing based on sexual orientation and gender identity. SB 109 Would prohibit discrimination in employment, public accommodations, and housing based on sexual orientation, gender identity, or other traits.

Montana: HB 252 Would amend existing anti-discrimination law to prohibit discrimination based on sexual orientation and gender identity. SB 223 Would amend existing hate crimes law to add sexual orientation and gender expression as covered categories.

***384** New York: AB 5710/SB 2406 Would update existing anti-discrimination laws to apply to discrimination based on gender identity or expression.

North Carolina: HB 1049/SB 843 Would amend the state personnel act to prohibit employment discrimination based on sexual orientation or gender identity.

North Dakota: HB 2278 Would add sexual orientation, gender identity, and gender expression to existing anti-discrimination laws.

Pennsylvania: HB 300 Would prohibit discrimination in employment, housing, public accommodations and other areas based on sexual orientation and gender identity.

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South Carolina: SB 73 Would amend existing employment anti-discrimination law to add sexual orientation and gender identity as protected categories. SB 75 Would amend existing housing anti-discrimination law to add sexual orientation and gender identity as protected categories.

Texas: HB 538 Would prohibit employment discrimination based on sexual orientation, gender identity, or gender expression.

Virginia: HB 1624 Would provide model policy bullying on bullying and harassment or intimidation, including behavior motivated by actual or perceived sexual orientation or gender identity. HB 2385 Would prohibit discrimination in public employment based on sexual orientation, gender identity, and gender expression. SB 1247 Would add sexual orientation, gender identity, and gender expression to the categories protected under the Virginia Human Rights Act.

*385 Appendix D Cities and Counties Protecting Gender Identity from Discrimination [146]

ARIZONA: Tucson

CALIFORNIA: Los Angeles, Oakland, San Diego, San Francisco, Santa Cruz, Santa Cruz County, West Hollywood

COLORADO: Boulder, Denver

FLORIDA: Gulfport, Key West, Lake Worth, Miami Beach, Monroe County, Palm Beach County, Tampa, West Palm Beach

GEORGIA: Atlanta

ILLINOIS: Carbondale, Champaign, Chicago, Cook County, Decatur, Evanston, Peoria, Springfield, Urbana

INDIANA: Bloomington, Indianapolis

IOWA: Iowa City, Johnson County

KENTUCKY: Covington, Jefferson County, Lexington-Fayette County, Louisville

LOUISIANA: New Orleans

MARYLAND: Baltimore

MASSACHUSETTS: Boston, Cambridge, North Hampton

MICHIGAN: Ann Arbor, East Lansing, Ferndale, Grand Rapids, Huntington Woods, Lansing, Saugatuck, Ypsilanti

MINNESOTA: Minneapolis, St. Paul

MISSOURI: University City

NEW YORK: Albany, Buffalo, Ithaca, New York City, Rochester, Suffolk County, Tompkins County

OHIO: Cincinnati, Toledo

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***386** OREGON: Beaverton, Bend, Benton County, Hillsboro, Lake Oswego, Lincoln City, Multnomah County, Portland, Salem

PENNSYLVANIA: Allentown, Easton, Erie County, Harrisburg, Lansdowne, New Hope, Philadelphia, Pittsburgh, Scranton, Swarthmore, West Chester, York

TEXAS: Austin, Dallas, El Paso, Fort Worth

WASHINGTON: Burien, King County, Olympia, Seattle, Tacoma

WISCONSIN: Madison, Milwaukee

***387 Appendix E Jurisdictions with Hate Crime Legislation, Including Gender Identity**

CALIFORNIA: Cal. Penal Code § 422.76 (West 2001).

COLORADO: Colo. Rev. Stat. § 18-9-121 (2005).

CONNECTICUT: Conn. Gen. Stat. §§ 53a-181j to 53a-181*l* (2004).

DISTRICT OF COLUMBIA: D.C. Code §§ 22-3701 to -3702 and 22-3704 (2001), D.C. Code § 2-1401.02 (2001).

HAWAII: Haw. Rev. Stat. § 846-51, S.B. 616, Leg., 22d Leg. (Haw. 2003).

MARYLAND: Md. Code Ann., Crim. Law § 10-301 to 10-306 (LexisNexis 1998).

MINNESOTA: Minn. Stat. § 363A.03(44); Minn. Stat. §§ 609.2231(4), 609.595(1a), 609.748, 611A.79 (2009).

MISSOURI: Mo. Rev. Stat . § 557.035 (2003).

NEW JERSEY: N.J. Stat. Ann. § 2C:16-1 (West 2002).

NEW MEXICO: N.M. Comm. Subst./S.B. 38/249 (April 8, 2003).

OREGON: Or. Rev. Stat. §§ 166.155, 166.165 (1995).

VERMONT: Vt. Stat. Ann. tit. 13, § 1455 (2001).

WASHINGTON: Wash. Rev. Code Ann. § 9A.36.080 (as amended, 2009).

***388 Appendix F States with Pending Hate Crimes Legislation, Including Gender Identity**

ARIZONA: SB 1212 Would amend existing law regarding a central state repository for collecting information on hate crimes to add a requirement that information be collected for hate crimes based on gender identity or expression.

GEORGIA: HB 111 Would add sexual orientation and gender identity to the state hate crimes laws; SB 234 Would provide penalty enhancement for crimes motivated by the victim's sexual orientation, gender identity, or other traits.

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INDIANA: SB 91 Would make commission of a crime because of the victim's sexual orientation, gender identity, or other traits, an aggravating circumstance that can be considered by a judge when imposing sentencing for a crime.

MASSACHUSETTS: HB 1728 Would expand existing hate crimes and anti-discrimination laws to prohibit discrimination in employment, places of public accommodation, real estate, and education based on gender identity or expression.

MONTANA: SB 223 Would amend existing hate crimes law to add sexual orientation and gender expression as covered categories.

NEW YORK: AB 1450/SB 831 Would designate bias-related crimes, subject to penalty enhancement, to include certain crimes motivated by prejudice based on sexual orientation or other traits.

NORTH CAROLINA: HB 207 Would amend existing hate crimes law to add sexual orientation and gender identity as covered categories.

PENNSYLVANIA: HB 745 Would amend existing hate crimes law to add actual or perceived sexual orientation, gender identity, ancestry, or disability as protected categories.

SOUTH CAROLINA: SB 41 Would establish penalties for non-capital criminal offenses motivated by the victim's sexual orientation and gender identity. SB 76 Would require health care facilities to allow visitation by any visitor designated by a patient. Also contains hate crimes and anti-discrimination provisions.

SOUTH DAKOTA: SB 156 Would amend existing hate crimes law to add sexual orientation and gender identity as covered categories.

***389** TENNESSEE: HB 335/ SB 253 Would amend existing hate crimes law to add sexual orientation and gender identity as covered categories.

TEXAS: HB 2966 Would amend existing hate crimes law to add gender identity as a covered category.

Footnotes

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1 Gender identity disorder (GID) is a diagnosis by psychologists and physicians, describing individuals with significant gender dysphoria (discontent with the biological sex they were born with). See Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR 581 (4th ed., text rev. 2000).

2 See Bethany Gibson & Anita J. Catlin, Care of the Child with the Desire to Change Gender - Part I, 36 Pediatric Nursing 53 (2010), available at http://www.medscape.com/viewarticle/718619.

3 See Michael Bersani, School Liability for Bullying: Central New York Injury Lawyer Explains, Cent. N.Y. Inj. Law. Blog (Apr. 1, 2010, 12:05 AM), http://www.centralnewyorkinjurylawyer.com/2010/04/school-liability-for-bullying.html.

4 Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (2006)); 34 C.F.R. pt. 104 (2010).

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5 29 U.S.C. § 705(20)(F); 42 U.S.C. § 12211.

6 Lauren Hare et al., Androgen Receptor Repeat Length Polymorphism Associated with Male-to-Female Transsexualism,65 Biological Psychiatry 93 (2009); Constance Holden, Gender and the Brain, 322 Science 831 (2008); M. Tayfun Turan et al., Female-to-Male Transsexual with 47,XXX Karyotype, 48 Biological Psychiatry 1116 (2000); Emma Young, Commentary, Male-to-Female Transsexualism Gene Found, New Scientist (Oct. 27, 2008), http:// www.newscientist.com/article/dn15045-maletofemale-transsexualism-gene-found.html; see also Frank P. M. Kruijver et al., Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus, 85 J. Clinical Endocrinology & Metabolism 2034 (2000); Jiang-Ning Zhou et al., A Sex Difference in the Human Brain and Its Relation to Transsexuality, 378 Nature 68 (1995).

7 Note that there is an active movement to remove gender expression and related "disorders" from the DSM-IV-TR (DSM-V is set to be published in 2013) on the basis that it is demeaning and insulting to classify an alternative gender expression, something believed by those in the movement to be innate, as a mental health disorder. See Dan Karasic & Jack Drescher, Introduction to Sexual and Gender Diagnoses of the Diagnostic and Statistical Manual (DSM): A Reevaluation 1 (Dan Karasic & Jack Drescher eds., 2005); GID Reform Advocates, http://gidreform.org/ (last visited Dec. 7, 2010). See generally DSM Revision Activities, Am. Psychiatric Ass'n, http:// www.psych.org/MainMenu/Research/DSMIV/ DSMV/DSMRevisionActivities.aspx (last visited Dec. 7, 2010).

8 See infra Part I.B.1.

9 Government Policy Concerning Transsexual People, U.K. Dep't for Const. Auth., http:// webarchive.nationalarchives.gov.uk/+/http:// www.dca.gov.uk/constitution/transsex/policy.htm (last visited Dec. 7, 2010); La transsexualité ne sera plus classée comme affectation psychiatrique, Le Monde, May 16, 2009, http://www.lemonde.fr/societe/article/2009/05/16/la-transsexualite-ne-sera-plus-classee-comme-affectation-psychiatrique_1193860_ 3224.html.

10 Florida Educational Equity Act (FEEA), Fla. Stat. § 1000.05(2)(c) (2010); Fla. Admin. Code Ann. r. 6A-19.002 (2010). Though neither the FEEA, the State Board of Education Rules, nor the Florida Civil Rights Act of 1992, Fla. Stat. §§ 760.01-760.11, specifically includes sexual orientation or "gender identity disorder," each includes disability and gender, and when coupled with rulings by the Florida Commission on Human Relations (Florida's civil rights enforcement agency) and the Florida Division of Administrative Hearings, it is clear that Stephanie, as a transgender individual, was covered by the policies, if for no other reason, by virtue of her "disability." See Smith v. City of Jacksonville Corr. Inst., 1991 WL 833882 (Fla. Div. Admin. Hrgs. Oct. 15, 1991) (holding that an individual with gender dysphoria falls within the disability protections of the Florida Human Rights Act [predecessor of the Florida Civil Rights Act], as well as the provisions protecting against disability discrimination).

11 Santa Rosa Dist. Sch. Bd., Code of Ethical Standards for Administrators and Instructional Personnel §§ 1.2, 2.1, available at http:// www.santarosa.k12.fl.us/humanresources/SREthicalStd08finalbdappvd.pdf (not specifically including GID or sexual orientation but incorporating the Principles of Professional Conduct for the Education Profession in Florida) (last visited Dec. 7, 2010); Principles of Professional Conduct for the Education Profession in Florida, Fla. Admin. Code Ann. r. 6B-1.006(3)(g): "[An educator] [s]hall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination." (emphasis added). Violation of the Code of Ethics can result in loss of educator credentials. Fla. Admin. Code Ann. r. 6B-1.006(2).

12 See, e.g., Human Rights Watch, Hatred in the Hallways: Violence and Discrimination Against Lesbian, Gay, Bisexual, and Transgender Students in U.S. Schools (2001), available at http:// www.hrw.org/sites/default/files/reports/ usalbg01.pdf.

13 See, e.g., Jeni Booker Senter, ACLU Seeks Contempt Charges on School Employee, Santa Rosa Press Gazette, May 12, 2009, http:// www.srpressgazette.com/news/aclu-7084-school-officially.html (example of school district continuing civil rights violations after losing First Amendment case).

14 See ACLU of Mich., Transgender Legal Issues for the Non-Attorney, available at www.arcusfoundation.org/assets/pdf/tgmanual.pdf (last visited Dec. 7, 2010) (providing misinformation that section 504 of the Rehabilitation Act does not apply to transgender individuals, the issue addressed infra); see also Hare et al., supra note 7; Holden, supra note 7; Turan et al., supra note 7; Young, supra note 7; Kruijver et al., supra note 7; Zhou et al., supra note 7.

15 John Gever, APA: Major Changes Loom for Bible of Mental Health, MedPage Today, May 19, 2009, http://www.medpagetoday.com/MeetingCoverage/APA/14270. Note that when the American Psychiatric Association published a draft of the new DSM-V in April 2010 for public comment, no longer available to the public, GID was still included as a mental health disorder.

16 About Us, Gay, Lesbian & Straight Educ. Network, http:// www.glsen.org/cgi-bin/iowa/all/about/index.html (last visited Dec. 7, 2010).

17 See, e.g., Human Rights Watch, supra note 13.

18 See id. at 86 nn.171-73.

19 Darryl B. Hill et al., Gender Identity Disorders in Childhood and Adolescence: A Critical Inquiry, 17 J. Psychol. & Hum. Sexuality 7 (2006) (noting an increasing discord in academic and lay circles regarding the diagnoses of children and adolescents as having GID).

20 Id.

21 Id.

22 See Emily A. Greytak et al., Gay, Lesbian and Straight Education Network, Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools (2009), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1375-1.pdf.

23 Id. at 18.

24 Id.

25 Id. at 18, 22.

26 Id.

27 Id. at xii.

28 U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression, Transgender L. & Pol'y Inst., http:// www.transgenderlaw.org/ndlaws/index.htm#jurisdictions (last updated Feb. 17, 2010) [hereinafter Laws Prohibiting Discrimination]; see also infra Appendices A-F.

29 See, e.g., Enriquez v. W. Jersey Health Sys., 342 N.J. Super. 501 (N.J. Super. Ct. App. Div. 2001); Liev. Sky Publ'g Corp., No. 013117J, 2002 WL 31492397 (Mass. Super. Ct. Oct. 7, 2002); Fishbaugh v. Brevard Cnty. Sheriff's Dep't, Order No. 04-103 (Fla. Comm'n on Human Relations 2004), available at http:// fchr.state.fl.us/fchr/layout/set/print/content/view/full/2263.

30 See infra Appendices A-F.

31 See Greytak et al., supra note 23.

32 For example, in Florida educators may not discriminate on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background. Obviously, to avoid or to protect from discrimination, the student must be identified as belonging to a protected group.

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See Principles of Professional Conduct for the Education Profession in Florida, Fla. Admin. Code Ann. r. 6B-1.006(3)(g) (2010). See also supra note 11.

33 See, e.g., id.; see also Ken Trump, School Safety Politically Hijacked: Civil Rights Masked as Anti-bullying Laws?: Part 1, Sch. Security Blog (Sept. 9, 2010, 7:20 AM), http:// www.schoolsecurityblog.com/2010/09/school-safety-politically-hijacked-civil-rights-masked-as-anti-bullying-laws-part-1/ (debating whether anti-bullying legislation needs labeled protected classes).

34 Am. Psychiatric Ass'n, supra note 2, at 576.

35 See Karasic & Drescher, supra note 8; GID Reform Advocates, supra note 8. See generally DSM Revision Activities, supra note 8.

36 42 U.S.C. § 12211(b)(1) (2006).

37 Transvestite Definition, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/transvestite (last visited Dec. 7, 2010) (emphasis added). Transvestite is often used as a synonym for "cross-dresser"; see Rupert Raj, Towards a Transpositive Therapeutic Model: Developing Clinical Sensitivity and Cultural Competence in the Effective Support of Transsexual and Transgendered Clients, 6 Int'l J. Transgenderism (2002), http:// www.iiav.nl/ezines/web/IJT/97-03/numbers/symposion/ijtvo06no02_04.htm (explaining the cultural and clinical shift in treating gender identity disorder and the blurring of the definitions describing individuals with gender identity disorder).

38 Transsexual Definition, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/transsexual (last visited Dec. 7, 2010).

39 Transgender Definition, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/transgender (last visited Dec. 7, 2010).

40 Note that transvestism is not the same as gender identity disorder and has a separate diagnostic code in the DSM-IV-TR. The criterion for transvestism includes sexual urges, whereas the diagnosis for GID does not. See Am. Psychiatric Ass'n, supra note 2, at 574-75.

41 World Prof'l Ass'n for Transgender Health, Standards of Care for Gender Identity Disorders (2001), available at http://www.wpath.org/Documents2/socv6.pdf.

42 See Am. Psychiatric Ass'n, supra note 2, at 576-81.

43 Id.; see also Gender Identity Disorder and Transsexualism, Merck Manuals Online Med. Libr., http://www.merck.com/mmpe/sec15/ch203/ch203b.html (last modified Nov. 2007).

44 Paisley Currah, Gender Pluralisms Under the Transgender Umbrella, in Transgender Rights 3 (Paisley Currah et al. eds., 2006); One Umbrella, Many People: Diversity Within the LGBT Communities, Gay, Lesbian & Straight Educ. Network (Jan. 23, 2003), http://www.glsen.org/binary-data/GLSEN_ ATTACHMENTS/file/246-1.pdf.

45 Acronym for LGBTQI: lesbian, gay, bisexual, transgender, queer, questioning, and intersex. The Free Dictionary, http://acronyms.thefreedictionary.com/LGBTQI (last visited Dec. 7, 2010).

46 Gay & Lesbian Alliance Against Defamation, GLAAD Media Reference Guide (8th ed. 2010), http://www.glaad.org/document.doc?id=99.

47 See 135 Cong. Rec. S10765-01 (daily ed. Sept. 7, 1989); see also, e.g., Brian Montopoll, Lawmaker Warns "Don't Ask" Repeal Means Talking to Kids About Homosexuality, CBS News.com (June 8, 2010, 9:07 PM), http://www.cbsnews.com/8301-503544_162-20007160-503544.html (reporting on homophobia exhibited by Rep. Ike Shelton (D-MO) in debate about repeal of "don't ask, don't tell.")

48 29 U.S.C. § 705(20)(F) (2006); 42 U.S.C. § 12211(b)(1).

49 28 C.F.R. pt. 35, app. A (2010); see also David M. Richards, An Overview of § 504, www.partnerstx.org/Resources/Section504/PDF/504_Overview_ Fall_2003.pdf. (citing Memorandum from the Office of Civil Rights on Differences Between ADA Title II and § 504 Regulations (1992) (explaining the differences between the ADA and § 504).

50 28 C.F.R. pt. 35, app. A, § 35.104 (emphasis added).

51 See 42 U.S.C. § 12211; Hill et al., supra note 20.

52 28 C.F.R. § 35.104; 34 C.F.R. § 104.3(j).

53 28 C.F.R. § 35.104.

54 42 U.S.C. § 12211(b)(1).

55 See Am. Psychiatric Ass'n, supra note 2, at 576-81.

56 Hare et al., supra note 7; Holden, supra note 7; Turan et al., supra note 7; Young, supra note 7; see also Kruijver et al., supra note 7; Zhou et al., supra note 7.

57 Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008) (amends several sections of Titles 29 and 42 of the United States Code); see also Nat'l Human Genome Research Inst., Genetic Information Nondiscrimination Act (GINA) of 2008, Genome.gov, http:// www.genome.gov/24519851 (last updated June 28, 2010).

58 See, e.g., Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165 (1st Cir. 2007) (Title IX action does not preclude § 1983 action); Youngblood ex rel. Youngblood v. Sch. Bd. Of Hillsborough Cnty., Fla., No. 8:02-CV-1089-T-24MAP (M.D. Fla. Sept. 24, 2002) (first amendment dress code case); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000) (Title IX discrimination based on gender non-conformity); Miles v. N.Y. Univ., 979 F. Supp. 248 (S.D.N.Y. 1997); Doe ex rel. Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000) (equal protection case).

59 See Tim Unruh, Hazing & Bullying: Putting a Stop to It, Salina J., Oct. 4, 2009, http://www.saljournal.com/news/story/hazing-story-for-october-4-- 93009 (noting that despite required school policies, bullying still occurs).

60 See Greytak et al., supra note 23.

61 Ben Leichtling, Stop School Bullies: Use Laws, People, Programs, Bullies Be Gone Blog (July 27, 2010), http:// www.bulliesbegoneblog.com/2010/07/27/stop-school-bullies-use-laws-people-programs/ (school bullying expert noting that laws alone will not stop bullying).

62 See Robert Kim with David Sheridan & Sabrina Holcomb, Nat'l Educ. Ass'n, A Report on the State of Gay, Lesbian, Bisexual and Transgender People in Education: Stepping out of the Closet, into the Light (2009), available at http://www.nea.org/assets/docs/glbtstatus09.pdf (this report makes clear that despite existing remedies, discrimination and harassment of LGBT students still occur).

63 See Transgender Youth at Risk, Ill. Gender Advocs., http:// www.genderadvocates.org/Tyra/TYRARisk.html (last visited Dec. 7, 2010) (citing Richard Haynes, Towards Healthier Transgender Youth, Crossroads, 2001, available at http://www.amplifyyourvoice.org/youthresource/healthytransyouth).

64 See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

65 Tinker, 393 U.S. at 506 (citing Meyer v. Nebraska, 262 U.S. 390 (1923), Bartels v. Iowa, 262 U.S. 404 (1923)).

66 Tinker, 393 U.S. at 507; see also Epperson v. Arkansas, 393 U.S. 97 (1968).

67 Tinker, 393 U.S. at 508.

68 Id. at 504.

69 Id.

70 Id. at 508.

71 Id.

72 Id.

73 Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

74 Tinker, 393 U.S. at 509.

75 Id. at 513-15.

76 Id. at 509 n.3.

77 Id.

78 Id.

79 Id. at 509.

80 See, e.g., Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243 (3d Cir. 2002) (upholding a school's anti-harassment policy but invalidating enforcement of policy to prohibit students from wearing T-shirts that did not disrupt the learning environment or interfere with other students' rights); Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157 (D. Mass. 1994) (holding that a school dress code prohibiting clothing that "harasses, threatens, intimidates, or demeans" individuals or groups was unconstitutional viewpoint discrimination because it was aimed at content rather than validity or potential for disruption).

81 See, e.g., Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465 (6th Cir. 2000) (upholding a school district ban on a student's T-shirt depicting vulgar symbols and words contrary to school values); Jeglin v. San Jacinto Unified Sch. Dist., 827 F. Supp. 1459 (C.D. Cal. 1993) (upholding a ban on sports insignia used as gang symbols).

82 See, e.g., Olesen v. Bd. of Educ. of Sch. Dist. No. 228, 676 F. Supp. 820 (N.D. Ill. 1987) (upholding a ban on boys' wearing of earrings where the district had a gang problem and some earrings were used as gang symbols); Hines v. Caston Sch. Corp., 651 N.E.2d 330 (Ind. Ct. App. 1995) (upholding a ban on boys' wearing of earrings where, under local community standards of dress, earrings were considered female attire and the earring rule discouraged rebelliousness); Jones v. W.T. Henning Elem. Sch., 721 So. 2d 530 (La. Ct. App. 1998) (upholding a ban on boys' wearing of earrings based on the distraction it would cause as contrary to community values).

83 Doe ex rel. Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000) (holding that statutory and constitutional protections of free expression against sex and disability discrimination prohibited a Brockton, Mass. public school from preventing an 8th grade transgender student "from wearing any clothing or accessories that any other male or female student could wear to school without being disciplined." The judge rejected the school's justification that Ms. Doe's wearing "female" clothing was disruptive and made other students uncomfortable, holding that this excuse was not sufficient to overcome Ms. Doe's freedom to dress consistently with her gender identity), rev'g Doe v. Brockton Sch. Comm., No. 2000-J-648, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) denying int. app. for relief from prelim. inj.

84 Spence v. Washington, 418 U.S. 405, 409-10 (1974) (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)); see also Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004) (explaining "in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message").

85 See Olesen, 676 F. Supp. 820; see also Youngblood ex rel. Youngblood v. Sch. Bd. of Hillsborough Cnty., Fla., No. 8:02-CV-1089-T-24MAP, at *6 (M.D. Fla. Sept. 24, 2002) (holding that a female student's desire to wear male clothing during a senior portrait was not expressive conduct).

86 See generally 34 C.F.R. pt. 106 (2010); Elia Powers, Weighing the Reach of a Title IX Ruling, Inside Higher Educ. (Sept. 10, 2007), http:// www.insidehighered.com/news/2007/09/10/colorado (discussing cases as examples that Title IX allowed a cause of action, but the damage had already occurred, despite school knowledge of the problems).

87 Title IX Legal Manual, U.S. Dep't of Justice (Jan. 11, 2001), http://www.justice.gov/crt/cor/coord/ixlegal.php#II (noting the legislative history and purpose of Title IX, which was about equality in education for women).

88 See 20 U.S.C. § 1681 (2006). Note that Title IX does not mention gender, transgender, or gender identity. Explicitly, it only prohibits discrimination based on sex, but see Miles v. N.Y. Univ., 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (holding, in one of the first instances, that Title IX prohibits sexual harassment of a transsexual woman).

89 20 U.S.C. § 1681(a).

90 Hayut v. State Univ. of N.Y., 352 F.3d 733, 750 (2d Cir. 2003) (internal citation omitted); see also Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992) (holding that a teacher's sexual harassment of a student constitutes "discrimination" on the basis of sex); Lovell v. Comsewogue Sch. Dist., 214 F. Supp. 2d 319, 323 (E.D.N.Y. 2002) (noting that an equal protection § 1983 claim may also be available).

91 See Jeffrey Young, Campuses Said to be Hostile Environments for Gay, Lesbian, Bisexual and Transgender Students, Chron. of Higher Educ. (May 8, 2003), http://chronicle.com/article/Campuses-Said-to-Be-Hostile/110296/; Norma V. Cantu, Sexual Harassment Guidance, U.S. Dep't of Educ. (Mar. 13, 1997), http://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html (discussing types of sexual harassment claims as quid pro quo or hostile environment).

92 Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

93 Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633, 645 (1999) (emphasis added); see also Doe ex rel. A.N. v. E. Haven Bd. of Educ., 430 F. Supp. 2d 54, 63 (D. Conn. 2006) ("[D]efendant must respond to acts of known peer harassment in a manner that is not clearly unreasonable."); Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x 492, 493 (9th Cir. 2009) ("[I]t is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women."); Howell v. Austin Indep. Sch. Dist., 323 F. App'x 294, 295 (5th Cir. 2009) (holding that the student did not establish that the school district had actual knowledge of the student's sexual abuse by contractor or that the district was deliberately indifferent to discrimination, as required to establish a claim for monetary damages under Title IX).

94 Doe, 430 F. Supp. 2d at 59.

95 Davis, 526 U.S. at 633-34.

96 Id. at 644-35.

97 Id.

98 See id. at 634.

99 Id.

100 Human Rights Watch, supra note 12.

101 Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 129 S. Ct. 788 (2009) (holding that Title IX was not meant to be an exclusive mechanism of action for gender discrimination, allowing equal protection claim); see also Flores v. Morgan

Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003) (holding that gay, lesbian, and bisexual students have clearly established a right to be free from discrimination and allowing a § 1983 claim).

102 Only educational institutions may be sued under Title IX, while violations of constitutional rights, such as equal protection may expose individual school employees to liability pursuant to § 1983. See Cantu, supra note 92; see also Fitzgerald, 555 U.S. 246 (Title IX action does not preclude § 1983 action individuals).

103 Fitzgerald, 555 U.S. 246.

104 See 42 U.S.C. § 1983 (2006); Schroeder v. Hamilton Sch. Dist., 282 F.3d 946 (7th Cir. 2002); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996); Seiwert v. Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942, 951 (S.D. Ind. 2007).

105 Schroeder, 282 F.3d at 951.

106 Fitzgerald, 555 U.S. 246 (slip op. at 10).

107 See Glenn v. Brumby, 632 F. Supp. 2d 1308 (N.D. Ga. 2009) (applying intermediate scrutiny in a transgender employment termination case and noting that the action would not have survived rational basis analysis).

108 To this author's knowledge, there has not been a census of the number of transgender students. However, given that the estimated transgender population is only .25-1% of the general population, the number of school-aged transgender students must be incredibly small. See Transgender Population and Number of Transgender Employees, Human Rights Campaign, http:// www.hrc.org/issues/9598.htm (last visited Dec. 7, 2010). In the school climate survey by GLSEN, only 295 of the 6209 LGBT students identified as transgender, but it should be noted that the survey participants targeted already identified as having an alternative sexual identity. Greytak et al., supra note 23, at x.

109 See Human Rights Campaign, supra note 109.

110 20 U.S.C. § 1400, et seq (2006). IDEA is similar to section 504 in that it requires an individualized plan to accommodate the disabled student and offers procedural safeguards. Id. § 1400(d)(1)(A). However, IDEA is limited to students with learning disabilities. Though a student with GID may be disabled, he or she is not necessarily learning disabled. But see Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004) (finding a denial of free appropriate public education where IDEA eligible student suffered peer harassment based on homophobic and gender stereotypes).

111 42 U.S.C. § 12211; 20 U.S.C. §§ 1003(3), 1228c(d)(1) (accords definitions of disability between ADA and education code).

112 See Hare et al., supra note 7; Holden, supra note 7; Turan et al., supra note 7; Young, supra note 7; see also Kruijver et al., supra note 7; Zhou et al., supra note 7.

113 Compare 34 C.F.R. pt. 104 et seq. (2010) and 28 C.F.R. pt. 35; see also A Comparison of ADA, IDEA, and Section 504, Disability Rts. Educ. & Def. Fund, http://www.dredf.org/advocacy/comparison.html (last visited Dec. 7, 2010).

114 The Matthew Shepard Federal Hate Crimes Act protects transgender individuals from hate crimes, and one could feasibly see its application in an instance of physical abuse at a school. Again, that is a reactive solution, and whether harassment would rise to the level of a crime is unclear. Pub. L. No. 111-84, §§ 4701-13, 123 Stat. 2190, 2935-44 (2009); see also infra Appendices E, F.

115 34 C.F.R. § 104.3(j).

116 Id. §§ 104.3(j), 104.33.

117 Id. §§ 104.36, 104.7, 104.8.

118 Id. § 104.3(j)(2)(i).

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119 Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, U.S. Dep't of Educ., http://www2.ed.gov/about/offices/list/ocr/504faq.html #protected (last visited Dec. 7, 2010) [hereinafter Protecting Students with Disabilities].

120 Protecting Students with Disabilities, supra note 120.

121 Id.

122 Id.

123 Id.

124 Id.

125 Id.

126 See infra Appendices A, B.

127 See infra Appendix C.

128 See infra Appendix D.

129 See, e.g., Rupp v. Bryant, 417 So. 2d 658, 666-67 (Fla. 1982); Brahateck v. Millard Sch. Dist., Sch. Dist. No. 17, 273 N.W.2d 680, 688 (Neb. 1979); McLeod v. Grant Cnty. Sch. Dist. No. 128, 255 P.2d 360, 362-63 (Wash. 1953).

130 See, e.g., Smith v. City of Jacksonville Corr. Inst., 1991 WL 833882 (Fla. Div. Admin. Hrgs. Oct. 15, 1991).

131 See infra Appendices E, F.

132 See infra Appendices E, F.

133 See 34 C.F.R. pt. 104 (2010).

134 Why Reform Transgender Psychiatric Classification?, GID Reform Advocs., http://www.gidreform.org/ (last visited Dec. 7, 2010); DSM 5th Edition, Status and Issues, GID Reform Advocs., http:// www.gidreform.org/dsm5.html (last visited Dec. 7, 2010).

135 See Hare et al., supra note 7; Holden, supra note 7; Turan et al., supra note 7; Young, supra note 7; see also Kruijver et al., supra note 7; Zhou et al., supra note 7.

136 John Sommers-Flanagan & Rita Sommers-Flanagan, The Buzz on Bullying, Am. Sch. Couns. Ass'n, http:// www.schoolcounselor.org/content.asp? contentid=282 (last visited Dec. 7, 2010) (noting that traditional punishment merely reinforces the cycle of bullying, as the bully perceives himself as a victim and responds by continued bullying).

137 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Human Rights Campaign (June 28, 2010), http:// www.hrc.org/laws_and_ elections/5660.htm.

138 School Budget Cuts Threaten Gains, Wash. Times, Mar. 11, 2009, http://www.washingtontimes.com/news/2009/ mar/11/schools-cut-budgets-where-it-hurts-children-most/ (noting that budget cuts take "focus away from educational improvements and raising achievement and put the focus on simply battening down the hatches and trying to make it through").

139 20 U.S.C. §§ 1401(8), 1412(5)(B) (2006); 29 U.S.C. § 794; 34 C.F.R. §§ 104.3, 300.17, 300.101, 300.114 (2010); Office of Civil Rights, U.S. Dep't of Educ., Free Appropriate Public Education for Students with Disabilities: Requirements Under Section 504 of the Rehabilitation Act of 1973 (2010), available at http:// www2.ed.gov/about/offices/list/ocr/ docs/edlite-FAPE504.html.

140 34 C.F.R. §§ 104.35, 300.303, 300.324.

141 34 C.F.R. §§ 104.36, 300.121, 300.140, 300.151-53, 300.500-37.

142 See Greytak et al., supra note 23.

143 Jan Hoffman, Can a Boy Wear a Skirt to School?, N.Y. Times, at ST1, available at http://www.nytimes.com/2009/11/08/fashion/08cross.html.

144 See Greytak et al., supra note 23.

145 See 29 U.S.C. § 705(20)(F) (2006); 42 U.S.C. § 12211.

146 Laws Prohibiting Discrimination, supra note 29.

25 WIJLGS 353

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