

# “Boys will be Boys”

Title IX and Gender Stereotyping

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## Session Topics:

- Definitions and Legal Background
- Transgender Students and Bathroom Debates
- Recent Case Law and Hypotheticals

## Title IX

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance

20 U.S.C.A. § 1681

## Price Waterhouse v. Hopkins

US Supreme Court (1989)

- This is a Title VII case, but it laid the foundation for future Title VII and Title IX gender stereotype caselaw and interpretation. (Title VII cases interpreting “sex discrimination” are frequently cited in Title IX cases and discussions.)
- Hopkins was not promoted at PWC because she “needed a course in charm school,” didn’t wear makeup, and was “too aggressive.”
- Of the 622 partners at Price Waterhouse, 7 were women
- A 6-3 U.S. Supreme Court determined that it was discrimination, and that PWC passed over Hopkins due to her not conforming to perceived gender stereotypes

## “Stereotype”

A widely held but fixed and oversimplified image or idea of a particular type of person or thing.

## “Gender/Sex Stereotype”

An overgeneralization of characteristics, differences and attributes of a certain group based on their gender or sex.

## Does “gender stereotype” discrimination cover transgender students?

The Heated Debate Over Bathroom Practices

## Fast Facts

- Since 2014, the issue of transgender students and which bathroom they may use has been a hot legal topic and a political landmine.
- 44 states and the District of Columbia prohibit discrimination based on sex in public accommodations (including educational institutions).
- Texas state law does not protect from discrimination on the basis of sexual orientation or gender identity or expression, though various bills have been introduced to modify the law. Some local ordinances may prohibit this discrimination, but these have been opposed on a state level.
- Many school districts choose to address these issues on a case-by-case basis.

## Title IX Transgender Timeline: OCR's Back and Forth of Bathroom Bills

- **March 2016** - North Carolina's legislature passes House Bill 2, banning trans youth from using the bathroom aligned with their gender identity.
- **May 2016** - The Departments of Justice and Education state that discriminating against transgender students because of their gender identity violates Title IX.
- **May 2016** - Officials from the Justice and Education Departments issue a memo to all school districts concerning discrimination in schools that, unless schools uphold the Obama administration's trans-inclusive interpretation of Title IX, they risk being confronted with a lawsuit or loss of funding.
- **August 2016** - Judge Reed O'Connor in Texas halts enforcement of the Obama administration's directive for allowing transgender students to use the bathroom corresponding with their gender identity.

## Title IX Transgender Timeline: OCR's Back and Forth of Bathroom Bills

- **February 2017** - President Trump revokes the Obama-era interpretation of Title IX that protects transgender students from discrimination based on gender.
- **May 2018** - A federal judge finds in favor of Gavin Grimm, a transgender student in Virginia who sued the school board for prohibiting him from using the boys' restrooms. Gavin asserted that the school board's insistence on his using bathrooms corresponding to his biological sex constituted sex discrimination and a violation of the law.
- **July 2018** - In Florida, a U.S. District Court ruled that, by denying Drew Adams access to the boys' room, a local school board had violated his right to equal protection of the law under the Constitution's Fourteenth Amendment, as well as violating Title IX. The U.S. Court of Appeals upheld a Pennsylvania school district's decision to implement a trans-inclusive restroom policy in the *Doe v. Boyertown* case.

## Recent(ish) Caselaw on Gender Stereotyping

## *Doe v. Brimfield Grade School*

C.D. of Illinois (2008)

- Doe sued on behalf of her son who she claims was subject to physical and verbal harassment by six boys in her son's middle school.
- The boys had a practice that the school had nicknamed "sac stabbing" where the boys hit each other's testicles.
- Plaintiffs assert that the school "essentially told [John] to toughen up and stop acting like a little girl," to "stick up for himself."
- Doe suffered so badly he required surgery on his testicles, and after returning to school post-surgery suffered a split in his incision due to continued "sac stabbing."
- The plaintiff's Title IX claim survived the district's motion to dismiss and strike and was allowed to proceed.

## Doe Deliberations

- Would the outcome of the case change if the school hadn't told Doe to "man up" and take it? If they had just remained silent to the activity without invoking gender norms?
- How would the case change if this were girls hitting one another?

Maybe not. The Court focused on the district's failure to act because of their perception that he needed to stop complaining or handle it himself.

Might have a harder time stating a Title IX gender stereotype claim without some creative pleading by the attorneys.

## Quigg v. Thomas County School

Eleventh Circuit (2016)/Title VII (but instructive!)

- Quiggs was named Superintendent in 2007.
- Quiggs claimed multiple members of the school board discriminated against her by saying the following:
  - A statement to a school parent that "it is time to put a man in there";
  - A recommendation to Quigg that she hire a tough "hatchet man" to serve as assistant superintendent;
  - A statement to Quigg that she should consider a male assistant superintendent because it is important to achieve gender balance in the school administration; and
  - A comment by shortly after the renewal vote that she voted against Quigg because Quigg "needed a strong male to work under her to handle problems, someone who could get tough."
- The Circuit ruled Quiggs may bring her lawsuit under Title VII.

## Quigg Questions

What if this were a student body president?

Then this may have Title IX implications if the student was denied educational opportunity or showed true signs of distress.

## Sewell v. Monroe City School Board

Fifth Circuit (Sept. 2020)

- Monroe City School Board had a policy that students were not allowed to have "unnaturally dyed" hair.
- Sewell, an African American boy, had dyed his hair "two-toned blonde."
- Sewell was the only student sent to the office for violating the hair policy, despite plenty of other students (mostly females) with outlandish or unnaturally colored hair.
- School officials called Sewell a "thug" and "fool" repeatedly.
- The Court ruled that Sewell could bring his Title IX claim for harassment because the district may have known about the harassment and did nothing to stop it.

## Sewell con't

- **Intersectionality** - the interconnected nature of social categorizations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and interdependent systems of discrimination or disadvantage.
- Rarely are Title IX gender discrimination cases ONLY about gender stereotypes:
  - Religion
  - Race
  - National Origin
- A complaint that starts off about Title IX gender stereotypes for hair color could morph into an equal protection claim, a due process claim, a retaliation claim, or more.

## Sewell Speculations

Would this case have come out differently if:

- Instead of "thug" he were called "gay" or "fairy?"
- The plaintiff was a female student sent to the office for her:
  - Hair Color?
  - Having close-cropped or buzzed hair?

What about:

- If the district had investigated Sewell's claims, and:
  - Started enforcing the policy against female students?
  - Decided to let Sewell's violation "slide" for now?
- It were students making the disparaging statements?

Female students in the same situation would have a harder time arguing a Title IX gender discrimination claim.

Students making fun would make this a bullying case and there wouldn't be the same standing under Title IX.

## Chisholm v. Saint Mary's School Board of Education

Sixth Circuit (Jan. 2020)

- A football coach often called his players "pussy" when they were not playing to his standards.
- Two students sued and claimed this was a violation of Title IX.
- The Court held that although the language was crude, it did not rise to the level of a Title IX violation.
- "Toughness, while sometimes celebrated in men, is certainly not discouraged in women, especially in a professional or team setting."

## Chisholm Conjectures

- What if the Coach called the players:  
"Ladies," "girls," "sissies," or "bitches?"
- What if the activity weren't football? If this were chess club, drama club, or mathletes?

Terminology matters. Although the term "pussy" has protections, "ladies" or "bitches" do not. They aren't analogous for toughness. There'd be a stronger Title IX claim.

Should football or other physically intense sports be given special treatment under the law because they "require toughness?"

## Doe v. University of Denver

Tenth Circuit (March, 2020)

- Doe, a male, was accused of sexual assault on campus by a female student.
- The female student filed a complaint with the University, who conducted a Title IX investigation.
- Ultimately, Doe was expelled from University of Denver.
- Doe sued claiming the University was biased against males and always sided with females who brought claims of Title IX violations.
- The Tenth Circuit dismissed this claim by saying the University was biased towards complainants, but that complainants are not necessarily all female.

## Doe Discussion

- Why does Doe's claim sound so familiar?
- Would the outcome have been the same if Doe were a female accused of sexual assault?
- What if the university had failed to investigate a claim of sexual assault because a male victim "got lucky" or "obviously consented" to the encounter?

The ruling and reasoning behind the outcome in *Doe* were the basis of recent federal changes to the Title IX Investigation and Hearing procedures championed by current Secretary of Education Betsy DeVos.

If the plaintiff could show that their complaint was ignored because the school (through words or deeds) thought a male couldn't be a victim, there could be a viable Title IX gender stereotype claim.

## Boys will be Boys...

- Jon was bullied by fellow male middle school students for not being masculine enough. One time, the middle school boys "stripped [Jon] nude and tied him up" and "placed [Jon] into a trash can" while calling him "fag," "queer," and "homo."
- One of these students "videotaped the attack and uploaded it to YouTube."
- One teacher, after being told by another teacher that she was concerned about the bullying, "essentially replied that 'boys will be boys' and told the teacher to leave it alone."

## Boys will be Boys...

- *Carmichael v. Gialbraith*, 5th Circuit (2014)
- The 5th Circuit declined to address the issue of whether this was considered discrimination on the basis of gender stereotypes and declined to do a *Price Waterhouse*-style analysis of the facts.
- However, the Title IX claim was allowed to proceed on the basis that the same-sex harassment "plausibly fall[s] outside the list of simple 'insults, banter, teasing, shoving, pushing, and gender-specific conduct' which are 'understandable ... in the school setting' and are not actionable under Title IX."

## Not Just You, But All Women...

- Third grade female dealt with a boy named [C.E.] and his friends who decided they didn't like her and started to bully her. They called her "ugly," "short" and told kids on the playground not to play with her. He pushed her off the monkey bars and slammed her head against a pole on the way to PE class.
- In fourth grade, he and his two friends would call her a "fat," "stupid," "ugly," and "bitch" almost daily.
- The bully said it wasn't just this girl that he thought were those things; he thought she, her mom and all women were.

## Not Just You, But All Women...

### *J.B. v. Klein Independent School District, S.D. Texas (Feb. 2020)*

- The Court stated that "[the] only allegation typing C.E.'s [elementary school] bullying to J.B.'s sex is his alleged comment that all women are fat, stupid, bitches. Even if this comment could be characterized as sexual, this single comment falls far short of the type of conduct that meets the legal standard of sex-based severe, pervasive, and objectively offensive conduct necessary to support a Title IX claim."
- But, J.B. also alleged that "she was taunted with vulgar, sexually suggestive comments, **every single day** from sixth grade until she withdrew from school halfway through eighth grade." This was enough to allege a severe and pervasive pattern of sex-based behavior and the Court allowed the Title IX claim on these allegations to proceed.

## *Bostock v. Clayton County*

US Supreme Court (2020) / Title VII Making Waves Again

- Gerald Bostock, a gay man, began working for Clayton County, Georgia, as a child welfare services coordinator in 2003. Over his 10-year tenure he received positive performance reviews.
- When Bostock joined a gay softball league, he was criticized at work and later terminated for behavior "unbecoming of employees."
- In a 6-3 decision, SCOTUS determined discrimination for being LGBTQ is against Title VII.
- "An 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."
- "[A]n employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII."

## OCR and Transgender Athletes

- In Connecticut, the Connecticut Interscholastic Athletic Association (CIAC) had a policy which permitted transgender athletes to compete with their transitioned sex in athletic competitions.
- A cis-female student complained and filed a lawsuit because she competed against two transgender female athletes who beat her in track races.
- This female claimed the transgender athletes had an unfair advantage competing in track because they were born male.
- The timing of races did not show an unfair advantage.
- CIAC reversed their policy due to these complaints in 2019.
- In August, after *Bostock*, the DOE decided to reinterpret this decision to be more in line with *Bostock's* ruling and how this will affect Title IX.

## De'Andre Arnold v. Barbers Hill ISD

Ongoing in Texas Federal Courts

- Arnold, a male high school student, wishes to wear his hair long.
- To comply with the Barbers Hill ISD dress code, he put his hair into a bun that was collectively above his shirt collar.
- In the middle of the school year, BHISD changed the dress code to prohibit hair that, when undone, grows below the shirt collar.
- Arnold sues under Title IX and claims that because girls do not have a hair length under the dress code neither should he.

## Questions?

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