

Legal Sidebar

School Locker Rooms Become the New Battleground in the Gender (Identity) Wars

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In a controversial move, the Department of Education (ED) recently [sided](#) with a transgender female student in Illinois who alleged that her public high school had discriminated against her when it denied her access to the girls' locker rooms. ED's position in this case, along with similar disputes in other contexts—including the recent defeat of an [antidiscrimination ordinance in Houston](#) over concerns about transgender individuals' access to public restrooms—has placed a spotlight on this new frontier in the battle over lesbian, gay, bisexual, and transgender (LGBT) rights.

The Illinois case is particularly notable for several reasons. First, the school district was largely supportive of the transgender student in question, officially referring to her as female and permitting her to use the girls' restrooms and participate on girls' athletic teams. Nevertheless, ED concluded that the school unlawfully discriminated on the basis of sex when it denied the transgender student unrestricted access to the girls' locker rooms. Second, unlike other school districts that have settled with ED prior to a formal agency finding of discrimination, Township High School District 211 initially refused to do so. In response, ED indicated that it planned to pursue enforcement action if a voluntary agreement could not be reached. Faced with the potential legal battle and loss of federal funds, the school district [relented](#) at the last minute, agreeing to allow the student to use the girls' locker rooms.

Understandably, ED's action has raised questions about the agency's legal authority to establish nondiscrimination policies regarding transgender students. Under current law, no federal civil rights statute explicitly prohibits discrimination in schools on the basis of gender identity, although several [federal laws](#) bar discrimination in education on other grounds and multiple states have enacted laws that forbid such discrimination in a variety of contexts. However, there may be instances in which gender identity discrimination could be a form of sex discrimination that violates federal law.

Several [federal laws](#) forbid discrimination on the basis of sex, including [Title VII of the Civil Rights Act of 1964](#), which prohibits, among other things, sex discrimination in employment, and [Title IX of the Education Amendments of 1972](#), which bars sex discrimination in federally funded education programs or activities, a category that includes virtually all public elementary and secondary schools. Initially, the federal courts ruled that these statutory prohibitions on sex discrimination [did not protect individuals who are transgender](#). However, a new trend has slowly emerged in the years since the Supreme Court's landmark ruling in *Price Waterhouse v. Hopkins*.

In *Price Waterhouse*, a case involving a female senior manager who had been denied a partnership in part for being too masculine, the Court ruled that [gender stereotyping is a form of discrimination on the basis of sex](#). Since *Price Waterhouse*, [several courts](#) have applied the *Price Waterhouse* decision to rule in favor of transgender individuals who allege sex discrimination on the basis of gender nonconformity, including at least one federal appellate court that [ruled](#) that the firing of a transgender employee violated the [equal protection clause](#) of the Constitution. (See [here](#) for our post on this case.)

In the wake of this shift in case law, ED has adopted the position that transgender students who are victims of discrimination due to their failure to conform to gender stereotypes are protected under Title IX's prohibition against sex discrimination. Likewise, both ED and the Department of Justice (DOJ) have taken an active role in issuing

[guidance](#) and pursuing [enforcement efforts](#) regarding transgender students. These efforts have resulted in a number of settlements in recent years, including agreements regarding use of shared facilities such as restrooms and locker rooms. For example, in a 2013 case involving Arcadia Unified School District, a transgender male student alleged that the school district had violated Title IX by denying him access to facilities consistent with his male gender. Under an [agreement](#) reached with ED and DOJ, the school district agreed to take a number of steps to establish a nondiscriminatory environment for students who are transgender, including providing the student with access to school facilities consistent with his gender identity.

Despite the anti-discrimination protections that may be available in Title IX cases such as these, it is important to note that not all courts are in agreement that gender identity discrimination can be a form of sex discrimination prohibited by federal law. Indeed, a federal district court recently [dismissed](#) a Title IX claim filed against a Virginia school district that had adopted a policy requiring students to use shared facilities that correspond with their biological sex. In doing so, the court explicitly rejected ED's informal interpretation that Title IX's prohibition against sex discrimination protects transgender students. ED and DOJ have filed a joint [brief](#) on behalf of the student, who is currently appealing the decision to the U.S. Court of Appeals for the Fourth Circuit. Meanwhile, the lack of explicit statutory protection for transgender students appears to have prompted several congressional legislators to propose new bills that would expressly prohibit gender identity discrimination in schools and other settings, including the Student Non-Discrimination Act ([H.R. 846/S. 439](#)) and the Equality Act ([H.R. 3185/S. 1858](#)). In the absence of such legislation, however, it appears that the public controversy and accompanying legal battles in Illinois, Virginia, and elsewhere are only just beginning to heat up.

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