Transgender Student Rights Under Title IX – The Still Evolving and Shifting Landscape

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Title IX of the Education Amendments of 1972 ("Title IX")[1] provides that no person "shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…."[2] As the plain statutory language makes clear, Title IX "prohibits a [federal] funding recipient from subjecting any person to 'discrimination' 'on the basis of sex.'"[3] The term "discrimination" typically "refers to distinctions or differences in treatment that injure protected individuals."[4] And, "[t]he statute's other prohibitions" further "help give content to the term 'discrimination' in this context."[5] "Students are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits' of any 'education program or activity receiving Federal financial assistance.'"[6] Title IX is enforced in two ways: (1) through private causes of action against the federal funding recipient and (2) by federal agencies that provide funding to the educational programs or activities.[7]

Enacted under the Spending Clause of the United States Constitution,[8] Title IX makes compliance with its anti-discrimination mandate a condition for receiving federal funding in any education program or activity. Title IX applies to federally-funded schools at all levels of education. All public school districts receive some federal financial assistance, as do institutions of higher education through their participation in federal student aid programs.[9] Significantly, when any part of a school district or higher education institution receives federal funds, all of the recipient's operations are covered by Title IX.[10]

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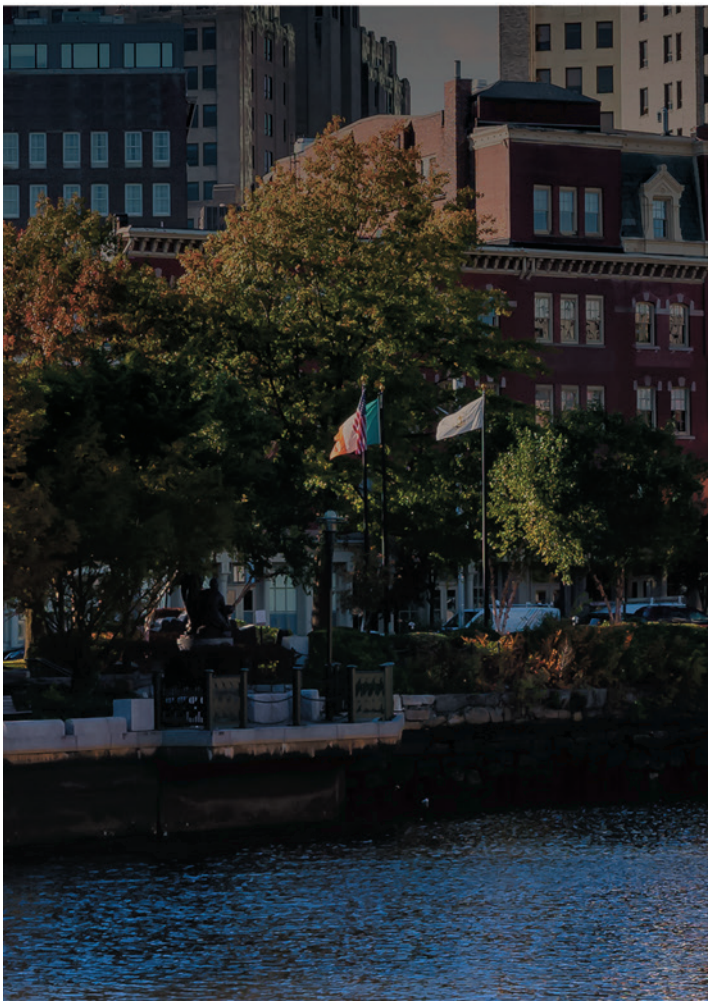
A much-debated and evolving Title IX question has concerned whether discrimination against a transgender student in an education program or activity constitutes discrimination "on the basis of sex" subject to the statute's protections. Such issues have arisen in multiple educational contexts, including debates over school transgender bathroom policies and transgender student athlete participation rights. Interpretations have varied significantly depending on the presidential administration in charge of federal agencies or the judges presiding in a case (at times resulting in 2-1 panel splits at the federal appellate level or prompting full *en banc* review).

This article examines judicial and administrative paths traveled over the past several years to bring us to where Title IX law stands today on transgender student rights. First, we analyze whether case law under Title VII of the Civil Rights Act of 1964 ("Title VII")–a statute that protects against discrimination in the workplace and shares similarities with Title IX–helps to answer by analogy the scope of transgender student rights and protections under Title IX.[11] Second, we examine the divergent and shifting federal administrative interpretations of Title IX and transgender student rights under the Obama, Trump, and Biden administrations. Third, we focus on the question as it has been specifically adjudicated in federal appellate decisions addressing transgender student use of bathrooms and locker rooms consistent with their gender identity. Today, Title IX law is still evolving with varying interpretations that may ultimately prompt United States Supreme Court review. Also, as noted below, much of the analysis applies concurrently to issues concerning sexual orientation discrimination.

Title VII and *Bostock* – Do They Provide Guidance to Answer the Title IX Question?

To assess whether discrimination against a student for being transgender is sex discrimination under Title IX, Title VII's language and precedent provide guidance and, as some would suggest, clarity under Title IX. Both statutes focus on the discriminatory treatment of individuals, not groups. Title VII protects "[a]ny individual"[12]; Title IX protects any "person."[13] Both statutes require "but for" causation: Title VII prohibits discrimination "because of" sex;[14] Title IX prohibits discrimination "on the basis of" sex.[15] Although Title VII and Title IX are separate statutes, both



the First Circuit and Rhode Island Federal District Court have held that a court should look to Title VII to interpret Title IX.[16]

In a landmark ruling, on June 15, 2020, the United States Supreme Court issued its decision in **Bostock v. Clayton County**, where the Court addressed three related cases wherein an employee was fired after their employers learned that they were homosexual or transgender.[17] The Court held that Title VII's prohibition against sex discrimination includes prohibiting the discharge of an employee because of their sexual orientation or gender identity.[18] In the majority opinion, Justice Gorsuch stressed that sex played a necessary and evident role in the adverse employment decision, which is expressly what Title VII forbids:

> For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms – and that should be the end of the analysis.[19]

The Court's Title VII reasoning would seem to apply as well to discrimination based upon sex under Title IX. Yet, in the **Bostock** opinion, the Court stated an important caveat regarding the scope of its ruling: "The employers [in the three cases] worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination…. But none of these laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today."[20] Indeed, the Court stated that there could be limitations to the application of its analysis under Title VII itself:

> … [W]e do not purport to address bathrooms, locker rooms, or anything else of the kind. The only questions before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex."… Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.[21]

Additionally, in a lengthy and strongly worded dissent, Justice Alito (joined by Justice Thomas) contended that the statutory analysis should turn on whether, in 1964 when it enacted Title VII, Congress believed that discrimination on the basis of sexual orientation and gender identity fell well within the statute's scope.[22] In Justice Alito's view, the clear answer to that question is "no."[23] Justice Alito's dissent cautioned that "What the court has done today – interpreting discrimination because of 'sex' to encompass discrimination because of sexual orientation and gender identity – is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex."[24] Specifically as to Title IX, Justice Alito warned against the application of the majority's Title VII analysis to posing issues in the educational setting relating to student access to bathrooms based upon gender identity or the rights of a transgender student to participate on a school sports team or in an athletic competition previously reserved for members of one biological sex.[25] In a separate dissent, Justice Kavanagh contended that, under separation of powers principles, Congress and the President bear the responsibility in the legislative process, not the judiciary, to define the application of a federal civil rights statute regarding questions of homo-

sexuality and gender identity.[26]

Putting **Bostock** in perspective as it relates to Title IX, the Court's six-justice majority analysis included the late Justice Ginsberg, who has since been succeeded by Justice Coney Barrett. Given the cautionary limitations expressed in its majority opinion, the dissenting justices' firm positions, and the change in the Court's composition, it remains unanswered whether **Bostock**'s inclusion of sexual orientation and gender identity in the definition of sex for certain Title VII adverse employment actions will establish controlling precedent to establish clear Title IX protections against gender discrimination as to transgender students. As addressed below, both the United States Department of Education, in its administrative enforcement, and federal courts, in private causes of action, have analyzed **Bostock**'s application to Title IX with varying interpretations.

The Shifting Federal Administrative Guidance on Title IX and Transgender Students

Since 2016, the United States Department of Education's Office for Civil Rights ("OCR") has issued multiple guidance documents addressing whether Title IX applies to claims of discrimination in education programs or activities based on gender identity or sexual orientation. Under the Obama administration, OCR issued a Dear Colleague Letter dated May 13, 2016 stating that it had "received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students."[27] OCR made clear its position that Title IX's prohibition against gender discrimination "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status…. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity…. A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students."

Early in the Trump Administration, OCR reversed its position. On February 22, 2017, OCR issued a short Dear Colleague Letter stating that it was withdrawing prior Obama administration policy and guidance on transgender student rights under Title IX. OCR noted that the predecessor administration's documents had resulted in effects including requirements of access to sex-segregated facilities based on gender identity. In making this significant reversal, it stated that the now-rescinded "guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process."

Nearly four years later in the waning days of the Trump administration and in light of the Supreme Court's 2020 decision in **Bostock**, OCR's Acting Assistant Secretary issued a memorandum dated January 8, 2021, stressing that **Bostock** does not construe Title IX. Most significantly, adopting a statutory construction consistent with Justice Alito's Title VII's analysis in his **Bostock** dissent, OCR's memorandum purported that "the Department [of Education's] longstanding construction of the

term 'sex' in Title IX to mean biological sex, male or female, is the only construction consistent with the ordinary public meaning of 'sex' at the time of Title IX's enactment [in 1972]."

Upon taking office, the Biden administration quickly took action to negate the Trump administration's Title IX interpretations on transgender student rights, reverting back to positions consistent with the Obama administration's 2016 Dear Colleague Letter. On his first day in office, President Biden issued an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.[28] Citing to **Bostock**, President Biden announced his administration's priorities that "[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation." The Biden administration ordered each federal agency to consider whether to revise, suspend, or rescind agency actions, or promulgate new agency actions, to implement the policy prescribed in the Executive Order.

Acting in accordance with the Executive Order, on March 26, 2021, the United States Department of Justice issued a memorandum indicating that its Civil Rights Division "has determined that the best reading of Title IX's prohibition on discrimination on the basis of sex is that it includes discrimination on the basis of gender identity and sexual orientation." The Department of Justice stated that "the Division ultimately found nothing persuasive in the statutory text, legislative history, or case law to justify a departure from **Bostock**'s textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly."[29]

Within the Department of Education, OCR published its public notice dated June 22, 2021 pronouncing that, relying on **Bostock**, it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department." OCR will address administrative complaints that raise "allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity."[30]

Clearly, the Biden Administration has signaled a clear shift away from the Trump Administration's more narrow reading of Title IX's prohibitions against gender discrimination "on the basis of sex." Recently, the United States Senate confirmed Catherine E. Lhamon as the Department of Education's Assistant Secretary for Civil Rights, a position that she held during the Obama administration, which further indicates the Biden Administration's intention to reinstate and expand upon the Title IX protections that the Trump administration rescinded.

In a significant development, on December 10, 2021, OCR announced that the Department of Education will issue, by no later than April 2022, a notice of proposed rulemaking to promulgate amendments to the Department's Title IX regulations addressing Title IX sexual harassment in educational programs and activities (which took effect on August 14, 2020, after a well-publicized and hotly debated eighteen-month public rulemaking process).[31] OCR will implement amendments consistent with the Biden Administration's Title IX priorities, including those articulated in the President's January 2021 Executive

Order. Consequently, we expect that the Title IX regulatory amendments will include specific language (relying upon **Bostock**) protecting transgender students under Title IX against sexual harassment (as well as protecting against sexual orientation harassment). The Title IX regulatory amendments could take effect by the start of the 2022-23 academic year.

A Case Study – The Long Judicial Path of the Grimm Case

The long procedural history of **Grimm v. Gloucester County School Board**, provides an interesting and important case study in how the shifting administrative and judicial interpretations of Title IX have impacted transgender student rights. In 2015, Gavin Grimm, a female-to-male transgender student, brought a Title IX action alleging that his high school denied him access to the bathroom that corresponded to his gender identity.[32] The school district's policy restricted bathroom access based on the student's "biological genders," and provided "alternative facilities" for students with "gender identity issues." The parties spent the next two years litigating whether the student's motion for a preliminary injunction should be granted based on the Obama Administration's guidance documents.[33] The Supreme Court agreed to review the question, but the Court later vacated its issuance of a writ of certiorari and remanded the case in March 2017, based upon the Trump Administration's February 2017 withdrawal of the Obama Administration guidance documents at issue in the lower court proceedings.[34] A few months later, the student graduated from high school, but the case proceeded on remand.[35]

In August 2019, a Virginia federal district court ruled in the plaintiff's favor and rejected the school district's argument that "sex" under Title IX is a binary term encompassing the physiological distinctions between males and females. The trial court concluded that the school's bathroom policy discriminated against transgender students on the basis of gender nonconformity.[36] On appeal, in August 2020 (after the Court's ruling in **Bostock**), the United States Court of Appeals for the Fourth Circuit, in a split 2-1 panel ruling affirmed the district court's decision.[37]

The Fourth Circuit's majority opinion concluded that Grimm had suffered a legally cognizable harm, both because the restrooms that he was required to use were inconveniently located within his high school and because "[t]he stigma of being forced to use a separate restroom… invites more scrutiny and attention from other students, very publicly branding all transgender students with a scarlet 'T'"[38] The Fourth Circuit addressed "the heart of the Title IX question in the case: whether the policy unlawfully discriminated against Grimm."[39] Guided by **Bostock**, the Fourth Circuit recognized that the term "discrimination" typically "mean[s] treating [an] individual worse than others who are similarly situated."[40] Grimm was treated worse than other similarly situated students, because, unlike all other students at his high school, he "could not use the restroom corresponding with his gender" and had to use alternative single-stall facilities.[41] The Fourth Circuit explained, that while Title IX's implementing regulations,[42] allow schools to provide "separate toilet… facilities on the basis of sex," they do not authorize schools to do so in a manner that subjects students to separate and unequal treatment.[43]

A strongly worded dissenting opinion characterized the majority's ruling as "an outcome-driven enterprise prompted

by feelings of sympathy and personal views of the best policy" that fell "short of construing the law." The Fourth Circuit later denied the school's petition for rehearing *en banc*,[44] and the school district filed a petition for a writ of certiorari seeking the United States Supreme Court's review.

Because the Supreme Court had previously granted a writ of certiorari in the litigation (but later withdrew it), many pundits and educational law practitioners expected that the Court would grant certiorari again, especially in light of **Bostock** and the resulting questions of whether its analysis equally applied to Title IX. Without comment, on June 28, 2021, the Supreme Court denied the school district's petition.[45] While there could be several reasons for the Court's action (especially given the limited number of cases that it accepts each term and the fact that Grimm had graduated during the litigation), the Court likely concluded that the issue is not yet entirely mature and requires further development among the federal circuits.

What's next?

The Biden administration will enforce Title IX to ensure protections against discrimination based upon gender identity and sexual orientation. Such increased federal administrative oversight could entail more proactive investigations and resulting remedial actions (including resolution agreements with agency oversight requirements) on issues relating to access to school facilities and participation on sports teams. Of course, the Title IX administrative playing field could once again shift back in the other direction again after the 2024 Presidential election, if there is a resulting change in administrations.

Judicially, high-profile cases continue to progress on dockets nationally addressing Title IX's protections against discrimination "on the basis of sex" and transgender student rights, including issues relating to bathroom policies, locker room access, and sports participation. One important case to watch is **Adams v. School Board of St. John's County, Florida**, addressing a Florida school board's bathroom policy.[46] The Eleventh Circuit recently granted the school board's petition for a rehearing *en banc*, after the appellate court had twice ruled against the board's policy. Eighteen states have filed an *amicus* brief arguing that Title IX unambiguously allows educational institutions to maintain restrooms that are separated based on biological sex and that construing Title IX to prohibit distinctions based on biological sex would constitute a judicial trespassing on legislative functions. Twenty-two other states (including Rhode Island through its Office of Attorney General) and the District of Columbia have filed an *amicus* brief taking a counter position, arguing that Title IX requires recipients of federal funds to refrain from discrimination based on sex and that the school board's bathroom policy constitutes unlawful gender discrimination against transgender students.[47] As *amici*, major businesses, civil rights organizations, legal advocacy groups, and religious groups have also weighed in on the appeal. The Eleventh Circuit's *en banc* ruling (expected sometime in 2022) could prompt the Supreme Court to reconsider its recent refusal to address the still-evolving, and highly significant issues interpreting the scope of Title IX's prohibition against discrimination "on the basis of sex."

ENDNOTES

1 *20 U.S.C. §§ 1681-1688.*
2 *20 U.S.C. § 1681(a) (emphasis added).*
3 ***Jackson v. Birmingham Bd. of Educ.**, 544 U.S. 167, 173 (2005) (quoting*

20 U.S.C. § 1681(a)).
4 ***Burlingham N. & Sante Fe Ry. Co. v. White***, *548 U.S. 53, 59 (2006)*.
5 ***Davis ex. rel. LaShonda D. v. Monroe Cty. Bd. of Educ.***, *526 U.S. 629, 650 (1999)*.
6 ***Id.*** *(quoting 20 U.S.C. § 1681(a))*.
7 *Title IX is not the exclusive remedy for victims of sex discrimination in schools. In matters pertaining to public colleges, universities, or school districts, 42 U.S.C. § 1983 provides an avenue for relief against state actors who deprive individuals of a constitutional right. The Supreme Court has held that Title IX does not displace the availability of § 1983 claims based on the Equal Protection Clause for plaintiffs alleging gender discrimination in schools.* ***Fitzgerald v. Barnstable Sch. Comm.***, *555 U.S. 246, 248 (2009). The subject of liability under § 1983 is beyond the scope of this article.*
8 *U.S. Const. art. 1, § 8, cl. 2.*
9 *20 U.S.C. § 1681(a). Title IX contains several exceptions, such as exceptions for educational institutions controlled by a religious organization and those whose primary purpose is training for military service or the merchant marine.* ***Id.*** *1681(a)(1)-(9).*
10 *20 U.S.C. § 1687.*
11 *Title VII declares that it is "unlawful… for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment* ***because of*** *such individual's race, color, religion,* ***sex,*** *or national origin." 42 U.S.C. 2000e-2(a)(1) (emphasis added). Employees of educational institutions are protected from sex discriminations under Title VII, and courts have generally held that employees may bring concurrent causes of action under Title VII and Title IX.*
12 *42 U.S.C. § 2000e-2(a)(1).*
13 *20 U.S.C. § 1681(a).*
14 *42 U.S.C. 2000e-2(a)(1).*
15 *20 U.S.C. § 1681(a).*
16 ***Wills v. Brown Univ.***, *184 F.3d 20, 25 n.3 (1st Cir. 1999) (recognizing that some aspects of Title VII and Title IX are* ***in pari materia****);* ***Doe v. Brown Univ.***, *327 F. Supp. 3d 397, 408 (D.R.I. 2018) (citations omitted).*
17 *140 S. Ct. 1731 (2020).*
18 ***Id.*** *at 1737.*
19 ***Id.*** *at 1743.*
20 ***Id.*** *at 1753.*
21 ***Id.***
22 ***Id.*** *at 1756-57.*
23 ***Id.***
24 ***Id*** *at 1778.*
25 ***Id.*** *at 1779-80.*
26 ***Id.*** *at 1822-23, 1823 n.1.*
27 *A "Dear Colleague Letter" is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). OCR issues "Dear Colleague Letters" and other policy guidance to provide educational institutions and school districts with information to assist them in meeting their obligations under federal laws enforced by the Department of Education (such as Title IX) and to provide the public with information about their rights. OCR purports that its guidance and policy documents are not designed to add requirements to applicable law, but provide information and examples to inform federal educational funding recipients about how OCR evaluates compliance with legal obligations. Copies of the guidance documents (both current and rescinded) referenced in this article are available for public viewing on OCR's website: https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html.*
28 *The White House, Executive Order on Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation (Jan. 20, 2021). https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/.*
29 *Memorandum from Principal Deputy Assistant Attorney General for Civil Rights, Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of* ***Bostock v. Clayton County*** *to Title IX of the Education Amendments of 1972 (March 26, 2021). https://www/justice.gov/crt/page/file/1383026/download.*
30 *Federal Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of* ***Bostock v. Clayton County*** *(June 22, 2021). https://www.federalregister.gov/documents/2021/06/22/2021-13058/enforcement-of-title-ix-of-the-education-amendments-of-1972-with-respect-to-discrimination-based-on.*
31 *Statement by U.S. Department of Education Assistant Secretary for Civil Rights Catherine E. Lhamon on Title IX Update in Fall 2021 United Agenda*

and Regulatory Plan.

32 *The **Grimm** litigation also involved claims of Equal Protection violations. For purposes of this article, our analysis focuses on the Title IX claims only.*

33 *Initially, the United States District Court for the Eastern District of Virginia dismissed the student's Title IX claim and denied his request for a preliminary injunction. 132 F. Supp. 3d 736 (E.D. Va. 2015). The Fourth Circuit reversed relying significantly upon the impacts of the Obama Administration's then-applicable Title IX guidance documents. 822 F.3d 709 (4th Cir. 2016).*

34 *137 S. Ct. 1239 (2017) (mem.).*

35 *The fact that Grimm removed his request for injunctive relief and compensatory damages on remand from his complaint against the school board, which challenged that board's policy of requiring students to use bathrooms based on biological sex, did not moot his claims, where he still sought nominal damages and declaratory relief as to the bathroom policy and his claims could be redressed through a favorable judicial decision.*

36 *400 F. Supp. 3d 444 (E.D. Va. 2019).*

37 *972 F.3d 586 (4th Cir. 2020).*

38 ***Id.** at 617-18 (quotation omitted).*

39 ***Id.** at 618.*

40 ***Id.***

41 ***Id.***

42 *The Department of Education's Title IX implementing regulation, 34 C.F.R. § 106.33, allows for "separate toilet, locker room, and shower facilities on the basis of sex," so long as they are "comparable" to each other. In **Grimm**, the school district argued that this regulation should be interpreted in a binary manner based upon the person's biological sex.*

43 *972 F.3d at 618.*

44 *976 F.3d 399 (4th Cir. 2020).*

45 *141 S. Ct. 2878 (2021).*

46 *Appeal No. 18-13592 (11th Cir.).*

47 *In the **amicus** brief joined by Rhode Island, the **amici** state that Rhode Island has enacted civil rights statutory protections for transgender individuals. R.I. Gen. Laws § 11-24-2 (public accommodations); §§ 28-5-6(11), 28-5-7 (employment); §§ 34-37-3(9), 34-37-4 (housing). The **amici** contend that the experiences of states, such as Rhode Island, with policies and practices that ensure equal access to public facilities for transgender people – including access to common restrooms consistent with their gender identity – promote safe and inclusive school environments.* ◊

January Compare & Contrast Free, Non-Credit Program: Electronic Signatures

The next session in the, **FREE**, **non-credit**, technology program series, ***Compare & Contrast***, is scheduled on **Monday, January 24th at 12:30 pm** and will focus on electronic signatures. In this session, Jared Correia of Red Cave Law Firm Consulting and Attorney Mike Goldberg, co-chair of the Bar's Technology in the Practice Committee, will review three top electronic signature providers, and take questions on the subject.

This quick (30 minute) and free presentation will get you the information you need to make an informed choice. Please **click here to register** for the program via Zoom.

This series will review different law-related products and services and each webinar will be focused on a particular topic. In just 30 minutes, Jared will discuss what makes the most sense for members depending on practice size and budget. All sessions will be recorded and available to view free of charge on the Bar's **Law Practice Management** page on **ribar.com**.