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# Please Check One—Male or Female?: Confronting Gender Identity Discrimination in Collegiate Residential Life

Katherine A. Womack  
*University of Richmond*

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PLEASE CHECK ONE—MALE OR FEMALE?:  
CONFRONTING GENDER IDENTITY DISCRIMINATION  
IN COLLEGIATE RESIDENTIAL LIFE

I. INTRODUCTION

The greatest threat to the identity of transgender youth in transition is the lack of support from peers and superiors.<sup>1</sup> The issues involving gender identity that transgender students face are ripe for discussion on college and university campuses, particularly when schools assign housing according to sex but not gender identity.<sup>2</sup> The binary approach to gender on campus creates difficult questions, challenges, and situations for transgender students who may suffer from discrimination regardless of the approach their schools take to address transgender issues. While some courts have determined that laws that prohibit sex discrimination also prohibit discrimination based on gender identity, other courts have disagreed or have not ruled on the issue.<sup>3</sup> However, the recent passage of the Hate Crimes Prevention Act underscores the urgent need to address such discrimination at the local level, particularly on campus.<sup>4</sup>

While litigation in this field has rarely involved colleges and universities, collegiate environments are often the “forefront for social activism,”<sup>5</sup> so it is likely the issue of transgender housing discrimination will soon explode on campus. It is now critical that colleges, universities, and the counsel who represent them either prepare to address these issues when they arise or explore possibilities to preempt the legal issues that will surely arise at their

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1. See Amanda Kennedy, Note, *Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transition*, 19 HASTINGS WOMEN'S L.J. 281, 287 (2008).

2. See discussion *infra* Part V.

3. See discussion *infra* Part III.

4. See discussion *infra* Part III.C.

5. See, e.g., Francine T. Bazluke & Jeffrey J. Nolan, “*Because of Sex*”: *The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J.C. & U.L. 361, 362 (2006). Housing issues stemming from diverse sexual identities need to be explored and addressed as well, but are outside the scope of this comment.

schools. Part II of this comment discusses the legal definition of transgender. Part III examines the history of the treatment of transgender persons in American courts, as well as their current legal status. Part IV surveys how various residential facilities house transgender youth, as well as how transgender needs affect public restrooms and the legal issues these facilities have faced. Part V reviews the approaches colleges and universities use to address the needs and concerns specific to housing transgender youth. Part VI analyzes the legal issues that may arise from these methods by examining the legal challenges faced by residential facilities. Part VII concludes with the measures college and university administrators and lawmakers should take to tackle the legal issues that concern housing transgender students, as well as the policies needed to protect transgender students.

## II. WHAT IS TRANSGENDER?

While the Supreme Court of the United States has moved toward protection from discrimination based on sexual orientation,<sup>6</sup> it is unclear whether this sort of protection would cover both heterosexual and homosexual transgender members of the Lesbian, Gay, Bisexual, and Transgender (“LGBT”) community. Why not? First, the term transgender does not have a universally accepted definition. In this comment, the term transgender describes people “whose gender identity and/or gender expression differs from the sex they were assigned at birth.”<sup>7</sup> Being transgender relates to gender identity and not sexual identity or preference.<sup>8</sup> Although many transgender individuals identify as gay or lesbian, many other transgender persons are heterosexual.<sup>9</sup> The common acronym LGBT is used too frequently as an “umbrella” term, and so the unique experiences and challenges faced by transgender individuals who are heterosexual may be ignored or forgotten.<sup>10</sup>

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6. See *Romer v. Evans*, 517 U.S. 620, 623–24 (1996) (using the Equal Protection Clause to invalidate Colorado’s Amendment 2, which prohibited government action at any level designed to protect homosexuals against discrimination).

7. GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, MEDIA REFERENCE GUIDE 6 (7th ed. 2007), available at <http://www.glaad.org/Document.Doc?id=25>.

8. See *id.*

9. See *id.*

10. See Gay, Lesbian & Straight Education Network, One Umbrella, Many People: Diversity Within the LGBT Communities (2003), <http://www.glsen.org/binary-data/GLS>

In addition, modern medical theory describes a condition unique to the transgender individual: Gender Identity Disorder (“GID”).<sup>11</sup> This clinical diagnosis has been reclassified as a sexual disorder rather than a psychological one.<sup>12</sup> A diagnosis of GID is “a strong and persistent cross-gender identification” and a “persistent discomfort about one’s sex or a sense of inappropriateness in the gender role of that sex.”<sup>13</sup> The Supreme Court adopted this standard for diagnosis in its definition of a transgender person in *Farmer v. Brennan*.<sup>14</sup> The Court defines a transgender person as “one who has ‘[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,’ and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change.”<sup>15</sup> While treating transgenderism as a medical disorder may increase the likelihood for protection of the group as a whole, some transgender advocates reject this proposal because it labels their lifestyle as diseased.<sup>16</sup> Furthermore, it excludes those who have not sought, or will not seek, medical treatment to become transsexual.<sup>17</sup>

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EN\_ATTACHMENTS/file/246-1.pdf.

11. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532–38 (4th ed. 1994) [hereinafter DSM-IV] (discussing the criteria for diagnosing patients with GID).

12. See *id.* at 532–33 (classifying GID under the “Sexual and Gender Identify Disorders” section). The section of the Diagnostic and Statistical Manual of Mental Disorders (DSM) entitled “Gender Identity Disorders” was replaced with the singular term “Gender Identity Disorder” upon the release of the DSM-IV, and the term “transsexualism” was eliminated. Compare *id.* at 532–38 (not using the term “transsexual”), with AM. PSYCHIATRIC ASS’N DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261–64 (3d ed. 1980) (classifying transsexualism as a “Gender Identity Disorder” within “Psychosexual Disorders”).

13. AM. PSYCHIATRIC ASS’N DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed. text revision 2000).

14. See 511 U.S. 825, 829 (1994).

15. *Id.* at 829 (quoting AM. MED. ASS’N, ENCYCLOPEDIA OF MEDICINE 1006 (1989)).

16. See generally LESLIE FEINBERG, TRANS LIBERATION: BEYOND PINK OR BLUE 1–79 (1998) (discussing a transgender person’s struggle for acceptance by society and his quest to achieve social acceptance for transgender individuals as a whole).

17. For clarification, in this comment the term transgender refers to a person who does not conform to traditional gender stereotypes and characteristics associated with the person’s birth-assigned gender, who may or may not be seeking gender reassignment surgery or diagnosed with gender identity disorder. “Transgender” embraces all forms of challenging gender identity, of which transsexualism is just one aspect. While some of the cases discussed in Part III use the term transsexual, this comment uses the term transgender in the discussion of these cases, for the purpose of simplicity as well as the form elimination of the term in DSM-IV. See generally DSM-IV, *supra* note 11, at 532–38 (refraining from using the term “transsexual”).

## III. LEGAL TREATMENT OF TRANSGENDER PERSONS IN AMERICA

In America, gender has not always been a binary construct. Amerindian cultures both recognized and honored transgender members of their communities.<sup>18</sup> In these early American cultures, some individuals would assume a gender identity opposite that predominantly associated with the genitals with which they were born.<sup>19</sup> However, colonial American culture reacted to this practice with hostility, and some Amerindian communities abandoned traditions that embraced “two-spirit” people.<sup>20</sup>

Such colonial hostility toward transgenderism makes it seem as though modern Western culture in America always abided by a binary gender system. However, classical Western thought was not always so clear-cut with respect to gender. As recently as the late Renaissance period, from the fourteenth century to the sixteenth century, laws determined sex through an evaluation of gender expression and looked at factors like clothing and behavior, not reproductive genitals.<sup>21</sup>

What led to the emphasis on biology rather than identity in gender classification? An early case in American history demonstrates the change in gender philosophy in the New World. In 1629, at the twilight of the Renaissance and the beginning of the Colonial period, the Council and General Court of Colonial Virginia heard the case of Thomas(ine) Hall.<sup>22</sup> Born in England, Hall spent her childhood as Thomasine and wore girls’ clothing.<sup>23</sup> At age twelve, Thomasine went to live with an aunt in London, who dressed her in boys’ clothes and called her Thomas.<sup>24</sup> Dressed as a man, Hall served in the military, but later returned to wearing women’s clothing and performing “women’s work,” such as

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18. LESLIE FEINBERG, *TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL* 21 (1996).

19. *See id.* at 21–29.

20. *Id.* at 21, 25–26. “Two-spirit” refers to the Amerindian concept of complex gender identities. *See id.* at 21, 26–27.

21. Leane Renée, *Impossible Existence: The Clash of Transsexuals, Bipolar Categories, and Law*, 5 AM. U. J. GENDER & L. 343, 352 (1997).

22. Hasan Shafiqullah, Note, *Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN’S L.J. 195, 198 (1997).

23. *Id.*

24. *Id.*

needlework and making bone lace.<sup>25</sup> However, at age twenty, Hall donned men's clothing and sailed to the Virginia Colony, where he switched his gendered apparel regularly.<sup>26</sup> When the confused colonists challenged this gender-bending behavior and went to the authorities to sort out the situation, Hall asserted that s/he was both a man and a woman.<sup>27</sup> The court examined Hall's genitals and determined Hall was intersex, so it required by mandate that Hall wear both men's and women's clothing at all times.<sup>28</sup> One can imagine this solution meant to reflect Hall's intersex genitals.<sup>29</sup> This may be the first American case where gender was determined by genitals and biological sex, rather than gender identity and expression.

### A. *Claims of Transgender Persons in Modern American Courts*

#### 1. Fourteenth Amendment Claims

The Fourteenth Amendment to the United States Constitution states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>30</sup>

While the Fourteenth Amendment protects citizens from discrimination based on biological gender, whether or not this protection applies to discrimination based on gender identity is unclear. In the twentieth century, the Supreme Court found that the Fourteenth Amendment provides for the equal treatment of all citizens, especially those in the minority or belonging to a suspect class.<sup>31</sup> To determine whether unconstitutional discrimination exists with respect to a unique group, the Court has applied varia-

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* (ordering Hall to wear men's clothing and the headcovering and apron of a woman).

29. *See id.* (describing Hall's genitals).

30. U.S. CONST. amend. XIV, § 1.

31. *See United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (holding that justifications for discrimination based on gender must be “exceedingly persuasive” in order to be valid under the Equal Protection Clause of the Fourteenth Amendment).

ble criteria. For example, the Court reviews discrimination based on gender with heightened scrutiny.<sup>32</sup> However, the Court has also been reluctant to apply heightened scrutiny to sexual minorities, such as transgender persons with non-conforming gender identities.<sup>33</sup>

Despite this standard, transgender persons may still argue they belong to a suspect class. The Supreme Court has used four criteria to determine suspect class status: historical discrimination, immutability, political powerlessness, and disparate treatment not based on actual ability.<sup>34</sup> First, “[t]he Court in *Frontiero v. Richardson* emphasized that the immutability of a trait is determined largely by whether it is an accident of birth and thus is virtually impossible to change.”<sup>35</sup> It is possible a physiological disorder like GID is an immutable trait, and some federal courts have acknowledged that gender identity is immutable because it is a physiological or psychological condition.<sup>36</sup> Second, the transgender community has also suffered a history of disparate treatment.<sup>37</sup> Transgender people suffer from discrimination “in many areas of life, from employment, housing, health care, and custody

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32. *Id.* at 533 (describing the heightened review standard for gender-based classification).

33. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578–99 (2003) (electing to protect homosexual conduct by incorporating such conduct into the right of privacy under the Fourteenth Amendment’s Due Process Clause). Because the statute struck down in *Lawrence* dealt with homosexual sodomy, not a categorical definition of the rights of homosexual men as a group, the Court declined to analyze the case under the Equal Protection Clause, choosing instead to address whether homosexual intimacy is protected by the Due Process Clause. *See id.* at 574–75 (choosing to focus on overturning *Bowers v. Hardwick* instead).

34. *See Frontiero v. Richardson*, 411 U.S. 677, 684, 686 n.17, 686–87 (1973) (applying these criteria to find that gender is a suspect class).

35. Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, U. PA. J. CONST. L. 895, 902 (2007) (citing *Frontiero*, 411 U.S. at 686).

36. *See, e.g.*, *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995) (holding that a transgender prisoner stated a cause of action for deprivation of medical treatment when prison officials failed to provide treatment for gender dysphoria); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (stating that transsexualism is a psychological disorder that constitutes a “serious medical need”); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (holding that a transsexual inmate stated a valid claim under the Eighth Amendment for the denial of medical treatment for her transsexualism); *id.*

37. *See generally* SHANNON MINTER & CHRISTOPHER DALEY, *TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO’S TRANSGENDER COMMUNITIES* 3 (2003) available at <http://www.transgenderlawcenter.org/trans/pdfs/Trans%20Realities%20Final%20Final.pdf>. Minter and Daley report on a survey in which “the people who completed the survey face an array of legal challenges in expressing their gender identity due to bias and ignorance regarding transgender issues.” *Id.*

rights.”<sup>38</sup> While transgender people may meet the criteria to belong to a suspect class, the Supreme Court is unlikely to bestow suspect class status on the transgendered, since it has expressed a disinclination to create new suspect classes.<sup>39</sup>

## 2. Title VII Claims

Because the Supreme Court is reluctant to assign suspect class status to transgender persons, the fight against gender identity discrimination has played out mainly through civil rights claims. In passing Title VII of the Civil Rights Act of 1964, Congress announced that sex was not relevant to the selection, evaluation, or compensation of employees<sup>40</sup> and at the same time sparked a debate in the courts over the meaning of the term “sex.”<sup>41</sup> For clarity, “sex” usually refers to an individual’s biological identity (chromosomal composition and reproductive organs), while “gender” usually refers to an individual’s social identity (the culturally masculine or feminine characteristics the individual embraces).<sup>42</sup> However, such claims had to overcome a number of challenges to

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38. Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 257 (2005).

39. See, e.g., *Romer v. Evans*, 517 U.S. 620, 640 & n.1 (1996) (Scalia, J., dissenting) (emphasizing that the Court, in holding that an amendment to the Colorado State Constitution that precluded government action designed to protect the status of persons based on their sexual orientation violated the Equal Protection Clause, used the rational basis test and implicitly rejected the argument that the amendment infringed upon fundamental rights of a suspect class); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442–43 (1985) (holding that the mentally retarded are not a quasi-suspect class and thus a zoning ordinance barring an assisted living center for such individuals was not subject to strict scrutiny).

40. 42 U.S.C. § 2000e-2(a) (2006). This section provides:

It shall be an unlawful employment practice for an employer—

(1) 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

*Id.*; see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989).

41. Bazluke & Nolan, *supra* note 5, at 362–63.

42. *Id.* at 362.

succeed, as federal lower courts are reluctant to recognize transgender individuals as a protected class.<sup>43</sup>

First, the court in *Holloway v. Arthur Anderson & Co.* reasoned that Title VII only protects employees from sex discrimination, so it does not protect transgender employees from *gender identity* discrimination.<sup>44</sup> In this case, the plaintiff brought an action against her former employer, alleging that her employer discriminated against her because of her sex, in violation of Title VII of the Civil Rights Act of 1964.<sup>45</sup> In particular, Holloway alleged that her employer fired her for initiating the process of a sex transformation.<sup>46</sup> The court found the employee's discharge did not violate due process and equal protection, since transgender persons are not a suspect class.<sup>47</sup>

Next, the court in *Ulane v. Eastern Airlines, Inc.* found that Title VII's use of the term sex referred to anatomical gender and did not refer to those with GID.<sup>48</sup> In *Ulane*, a transgender woman sued her former employer for violating Title VII by firing her from her job as an airline pilot.<sup>49</sup> Although the district court found in her favor, finding her employer discriminated against her as a transsexual, the appellate court held that Title VII does not protect transgender persons.<sup>50</sup>

It was not long after the *Holloway* and *Ulane* courts drew the line between sex and gender that the Supreme Court complicated matters by blurring the line.<sup>51</sup> Prohibiting discrimination based solely on sex could lead to unnecessarily broad results, if it was interpreted to "preclude discrimination based on human psychological and physiological characteristics, or on sexual orientation. It might also be read to prohibit all workplace sexual behavior or

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43. Elkind, *supra* note 35, at 906.

44. 566 F.2d 659, 664 (9th Cir. 1977) (The plaintiff did not claim discrimination based on sex but rather because she chose to change her sex).

45. *Holloway*, 566 F.2d at 661.

46. *Id.* at 661 & n.1.

47. *Id.* at 663–64 ("[T]he complexities involved merely in defining the term 'transsexual' would prohibit a determination of suspect classification for transsexuals.").

48. 742 F.2d 1081, 1085 (7th Cir. 1984).

49. *Id.* at 1082.

50. *Id.* at 1084–85. Even though Title VII is a remedial statute, the court found nothing in the legislative history of the act to indicate that Congress intended the legislation to apply to "anything other than the traditional concept of sex." *Id.* at 1085.

51. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–41 (1989) (using "sex" and "gender" interchangeably).

words and deeds having sexual content.”<sup>52</sup> However, the Court narrowed this broad spectrum in *Price Waterhouse v. Hopkins* and ultimately found that Title VII covers discrimination based on the notions, or traits and characteristics, stereotypically associated with one gender or another, and “acknowledg[ed] that enforcing a specific sex-gender match may be discrimination.”<sup>53</sup> Although *Price Waterhouse* did not involve the issue of transgenderism, the Court found that where a plaintiff in a Title VII case proves “that the employer actually relied on [his or] her gender in making its decision . . . stereotyped remarks can certainly be *evidence* that gender played a part.”<sup>54</sup> Following this reasoning, courts have found that being transgender “is not fatal to a sex discrimination claim” if the discrimination is due to non-conforming gender identity.<sup>55</sup>

In the landmark case of *Smith v. City of Salem*, the United States Court of Appeals for the Sixth Circuit continued the Title VII analysis, finding sex discrimination present where an employer discriminated against a woman for not conforming to cultural gender norms, like wearing dresses and makeup, since it “would not occur but for the victim’s sex.”<sup>56</sup> Therefore, “employers who discriminate against men because they *do* . . . act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.”<sup>57</sup> For example, the court in *Smith* held that “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination. . . .”<sup>58</sup> Although the district court dismissed the claim in favor of the employer in the Title VII action, the Sixth Circuit held that employment discrimination based upon employee gender non-conformity is an actionable claim.<sup>59</sup> The judge even went so far as to hold that the allegations of discrimination sufficiently consti-

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52. *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 749 (4th Cir. 1996).

53. Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment As Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 203–04 (2005); see *Price Waterhouse*, 490 U.S. at 251 (quoting L.A. Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (“In forbidding employees to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sexual stereotypes.”)).

54. *Price Waterhouse*, 490 U.S. at 250–51.

55. *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).

56. *Id.* at 574.

57. *Id.*

58. *Id.* at 575.

59. *Id.* at 572.

tuted a claim of sex discrimination grounded in the Equal Protection Clause.<sup>60</sup> Further, the Sixth Circuit also found in *Barnes v. City of Cincinnati* that a transgender person is a member of a protected class under Title VII.<sup>61</sup>

Unlike the previous standard, which focused on the sex of the victim, the *Price Waterhouse* analysis emphasizes the state of mind of the perpetrator when the discrimination relates to the sex of the victim.<sup>62</sup> Since *Smith*, a transgender plaintiff fired in part because of her non-conforming appearance and behavior and not just her transgender status, has been deemed to have a Title VII claim.<sup>63</sup> Similarly, in *Schwenk v. Hartford* the United States Court of Appeals for the Ninth Circuit examined how the perpetrator's actions stemmed from his belief that the victim failed to act like a man.<sup>64</sup> The court concluded that, under *Price Waterhouse*, sex under Title VII encompasses both sex and gender, and it determined that the terms sex and gender are interchangeable, even where both appear in the language of a statute.<sup>65</sup> Therefore, the court found Title VII forbids discrimination due to a person's failure to act in a way conforming to gender expectations.<sup>66</sup>

Even so, the *Ulane* reasoning remains influential, and *Price Waterhouse* is not yet a generally applied standard.<sup>67</sup> Courts have found that the *Price Waterhouse* prohibition against sex stereotyping should not be applied to transgender persons.<sup>68</sup> In addition, other courts have ruled that Congress intended the term sex in Title VII to refer to biological or anatomical characteristics, and not gender identity.<sup>69</sup> Courts that follow *Ulane* are merely following federal statutory authority, where, for example, Congress specifically excludes transgender persons from antidiscrimination

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60. *Id.* at 576–77.

61. 401 F.3d 729, 737 (6th Cir. 2005).

62. *See* *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

63. *Doe v. United Consumer Fin. Servs.*, No. 1:01CV1112, 2001 WL 34350174, at \*2, \*5 (N.D. Ohio Nov. 9, 2001). The court conceded the complexity of the “seemingly straightforward” question of whether Title VII’s prohibitions apply to transsexuals. *Id.*

64. 204 F.3d at 1202.

65. *Id.*

66. *Id.*

67. *See, e.g., Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000) (following the reasoning that “sex” refers to biological male or biological female anatomy).

68. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218 (10th Cir. 2007).

69. *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (citing *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977)).

protections by way of the definition section of laws such as the Americans with Disabilities Act<sup>70</sup> and the Rehabilitation Act.<sup>71</sup> Because most federal courts are still reluctant to extend protection to transgender persons without specific congressional intent, statutory protection is necessary for the protection of transgender individuals and the promotion of equality.

In sum, the weight of authority points to discrimination under Title VII when it results from sex stereotyping and not an individual's status as transgender. Also, most courts accept that sex stereotyping is a form of sex discrimination forbidden by Title VII. Finally, courts have held that "transgender" is not a subcategory of persons protected under the term sex in Title VII, though transgender persons may be able to make Title VII claims if the discrimination is due to sex stereotypes. However, the Employment Non-Discrimination Act ("ENDA") was introduced in Congress on June 24, 2009.<sup>72</sup> If ENDA succeeds, it will protect employees from gender identity discrimination in the workplace, and Congress will send a clear message of support for the equal rights of transgender persons.

### 3. Title IX Claims

Some courts have used the Title VII analysis to examine claims under Title IX of the Education Amendments of 1972.<sup>73</sup> For example, a court held that harassment based on masculine gender stereotypes constituted a cognizable claim of sex discrimination under Title IX, even though Title IX does not protect against sexual orientation discrimination.<sup>74</sup> In another case, a court found discrimination under Title IX where a student admitted to New York University as a female was in the process of becoming female at the time a professor sexually harassed her.<sup>75</sup>

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70. 42 U.S.C. § 12211(b)(1) (2006).

71. 29 U.S.C. § 705(20)(F)(i) (2006).

72. Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009).

73. Bazluke & Nolan, *supra* note 5, at 390–91.

74. *Montgomery v. Indep. Sch. Dist.* No. 709, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000).

75. *Miles v. N.Y. Univ.*, 979 F. Supp. 248, 248–50 (S.D.N.Y. 1997); *see also* *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 879–80 (N.D. Ohio 2003) (holding a jury could determine that defendant's failure to punish harassment based on perceived sexual orientation was motivated by plaintiff's sex within the scope of Title IX); *Snelling v. Fall Mountain Reg'l Sch. Dist.*, No. Civ. 99-448-JD, 2001 WL 276975, at \*4

### B. *State and Local Antidiscrimination Statutes*

Many states do not legally protect transgender people in their hate crime and antidiscrimination statutes, even where states grant such protections to gays and lesbians.<sup>76</sup> The twelve states and the District of Columbia that do address the issue of gender identity discrimination have used a variety of approaches to find that discrimination against transgender persons constitutes sex discrimination.<sup>77</sup> For example, New York courts have demonstrated a willingness to protect transgender rights once given sufficient statutory authority by the state's 2002 antidiscrimination amendment.<sup>78</sup> In addition, 109 cities and counties now have laws prohibiting discrimination based on gender identity.<sup>79</sup> Most legislative action prohibiting gender identity discrimination occurs at the local municipal level.<sup>80</sup> Many municipalities amended local ordinances to include transgender persons or established new categories of protection.<sup>81</sup> However, at the time of this writing, it appears that California is the only state that explicitly protects transgender *students* from discrimination and harassment.<sup>82</sup>

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(D.N.H. Mar. 21, 2001) (holding allegations that perpetrators' harassment was based on sex-based stereotypes were actionable under Title IX).

76. See generally National Gay & Lesbian Task Force, Hate Crime Laws in the U.S., [http://www.thetaskforce.org/downloads/reports/issue\\_maps/hate\\_crimes\\_7\\_09\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/hate_crimes_7_09_color.pdf) (last visited Apr. 1, 2010). While thirty-one states' hate crime laws include crimes based on sexual orientation, only the laws of twelve states and the District of Columbia protect transgender individuals by including crimes based on gender identity. *Id.* As of the time of this writing, thirteen states and the District of Columbia ban discrimination based on both sexual identity and gender identity. See National Gay & Lesbian Task Force, State Nondiscrimination Laws in the U.S., [http://www.thetaskforce.org/downloads/reports/issue\\_map/s/non\\_discrimination\\_7\\_09\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_map/s/non_discrimination_7_09_color.pdf) (last visited Apr. 1, 2010).

77. See Elkind, *supra* note 35, at 914; Samantha J. Levy, Comment, *Trans-Forming Nations of Equal Protection: The Gender Identity Class*, 12 TEMP. POL. & CIV. RTS. L. REV. 141, 149–50 (2002).

78. McGrath v. Toys "R" Us, Inc., 821 N.E.2d 519, 526–27 (N.Y. 2004) (finding the amendment "eras[ed] any doubt" that the law protected transgender persons).

79. Transgender Law & Policy Institute, U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression, <http://www.transgenderlaw.org/ndlaws/#maps> (last visited Apr. 1, 2010).

80. Bazluke & Nolan, *supra* note 5, at 403.

81. *Id.*; see, e.g., Rentos v. Oce-Office Sys., No. 95 Civ. 7908 LAP, 1996 WL 737215, at \*8–9 (S.D.N.Y. Dec. 24, 1996) (holding that transsexuals are protected from discrimination under city human rights laws); Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 391–93 (N.Y. Sup. Ct. 1995) (considering a transsexual's rights under city administrative code); Hartman v. City of Allentown, 880 A.2d 737, 739–40 (Pa. Commw. Ct. 2005) (challenging an ordinance prohibiting discrimination on basis of gender identity and sexual orientation).

82. See CAL. EDUC. CODE § 66251 (West 2000) ("It is the policy of the State of Califor-

C. *Federal Transgender Rights Under the Hate Crimes Prevention Act*

Despite the limited state statutory protections for transgender persons, the issue of transgender rights has recently made huge strides. On October 28, 2009, President Barack Obama signed a federal hate crimes act into law, known as the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (“HCPA”), the first law to protect transgender persons.<sup>83</sup> This Act expands the 1969 federal hate crime legislation, which only protected those engaging in federally protected activities, like voting or going to school.<sup>84</sup> The HCPA gives the Department of Justice the power to investigate and prosecute bias-motivated violence by granting it jurisdiction over crimes of violence where the victim was selected based on race, color, religion, national origin, gender, sexual orientation, disability, or *gender identity*.<sup>85</sup> It also authorizes the provision of grants for local programs to combat hate crimes committed by juveniles.<sup>86</sup> The National Center for Transgender Equality identified the three greatest roles the HCPA will play for the transgender community: (1) “educat[ing] law enforcement about the frequent hate violence against transgender people and the need to . . . address it;” (2) “provid[ing] federal expertise and resources . . . to overcome a lack of resources or willful inaction” on the state or local level; and (3) “help[ing] educate the public that violence against anyone . . . is unacceptable and illegal.”<sup>87</sup>

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nia to afford all persons, regardless of their sex, ethnic group identification, race, national origin, religion, mental or physical disability, or regardless of any basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code, equal rights and opportunities in the postsecondary institutions of the state.”). At the time of this writing, the Massachusetts Senate has on its docket for 2009–2010 an act concerning gender-based discrimination and hate crimes, though the future of the act is unclear. MASS. STATE SENATE, SENATE DOCKET BILL COMMITTEE REFERENCE 17 (2009), available at <http://www.mass.gov/legis/SenateDocket/BillCommitteeReference.pdf>.

83. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701–4713, 123 Stat. 2835 (2009).

84. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 18 U.S.C. § 245 (2006)); National Center for Transgender Equality, *It’s Official: First Federal Law to Protect Transgender People*, <http://www.archive.constantcontact.com/fs010/1100409733839/archive/1102765237249.html> (last visited Apr. 1, 2010).

85. Hate Crimes Prevention Act, *supra* note 83, § 4704(c) (emphasis added).

86. *Id.* § 4705.

87. National Center for Transgender Equality, *supra* note 84.

#### IV. TREATMENT OF TRANSGENDER YOUTH IN SEX-SEGREGATED RESIDENTIAL FACILITIES

While many forms of discrimination have declined, more subtle forms of discrimination reveal underlying prejudices.<sup>88</sup> In the gender identity context, most institutions do not have formal policies in place to indicate what criteria determine whether a person can live in the residence of their gender identity rather than their “birth-assigned” gender.<sup>89</sup> Despite the complexities discussed in this comment, these facilities may just assume that sex is a “cleaner category.”<sup>90</sup> Often, untrained intake staffers make the initial determination about what characteristics place a resident in male or female facilities.<sup>91</sup>

While using these categories to separate residents does not appear to have a “sinister purpose” on its surface, the underlying rationale seems to rely on the belief that sex segregation decreases violence.<sup>92</sup> Sex-segregated facilities like shelters and bathrooms are “necessary to daily survival,” and prisons and school dorms are often mandatory, so placement contrary to gender identity can result only in psychological damage, but also in a physically dangerous situation.<sup>93</sup> These gender classification rules have become the “heart of many controversies regarding the rights of transgender people” in many areas, including education.<sup>94</sup> These controversies frequently reveal those underlying prejudices about transgender people, such as the stereotype that they are “impos-

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88. William D. Araiza, *Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What It Means for Congressional Power to Enforce Constitutional Rights*, 62 SMU L. REV. 27, 74–75 (2009).

89. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 775 (2008).

90. Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1350 (2009).

91. Spade, *supra* note 89, at 775.

92. Amara S. Chaudhry, *Lessons from Jim Crow: What Those Seeking Self-Determination for Transgender Individuals Can Learn from America’s History with Racial Classification Categories*, 18 TEMP. POL. & CIV. RTS. L. REV. 505, 507 (2009).

93. *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989) (“[A] child who is in the state’s custody has a . . . right to be free from unreasonable and unnecessary intrusions on . . . [his or her] emotional well-being . . . [since] traumatic experiences can have an indelible effect upon their emotional and psychological well-being.”); Spade, *supra* note 89, at 776.

94. See Dean Spade, *Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in *TRANSGENDER RIGHTS* 219, 229 (Paisley Currah et al. eds., 2006); Spade, *supra* note 89, at 776.

ters” or “sexual predators.”<sup>95</sup> Therefore, the policies for classification arise from fear, not an actual documented decrease in violence where the sexes are segregated.<sup>96</sup> Ultimately, prohibiting gender identity discrimination will prevent facilities from forcing their transgender residents to live in environments hostile to their current gender identity.<sup>97</sup>

In practice, jurisdictions that protect against gender identity discrimination provide resources and regulations to guide these sorts of decisions in facilities housing transgender people.<sup>98</sup> However, even these measures are not enough since advocates report a lack of awareness or failure to comply with guidelines, meaning they “are generally under-enforced.”<sup>99</sup> However, since so few jurisdictions have these sorts of gender identity-inclusive anti-discrimination laws, there is little legal guidance for these issues.<sup>100</sup>

These gender-segregated facilities often place transgender youth “in homes that do not conform to their gender identity because policy dictates that members of different biological sexes cannot dorm together.”<sup>101</sup> Lack of social acceptance for transgenderism among the other youth may create safety concerns due to lack of social acceptance.<sup>102</sup> “There is also the risk of psychological harm due to denial of the youth’s gender identity.”<sup>103</sup>

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95. Spade, *supra* note 89, at 776–77.

96. Chaudhry, *supra* note 92, at 507.

97. See Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth Through Litigation, Advocacy, and Education*, 79 TEMP. L. REV. 415, 423 (2006) (describing the disapproval transgender youth receive from their caretakers); Spade, *supra* note 89, at 776.

98. Spade, *supra* note 89, at 777; see, e.g., N.Y. CITY COMM’N ON HUMAN RIGHTS, GUIDELINES REGARDING GENDER IDENTITY DISCRIMINATION: A FORM OF GENDER DISCRIMINATION PROHIBITED BY THE NEW YORK CITY HUMAN RIGHTS LAW 7 (2006), available at [http://www.nyc.gov/html/cchr/pdf/GenderDis\\_English.pdf](http://www.nyc.gov/html/cchr/pdf/GenderDis_English.pdf); S.F. HUMAN RIGHTS COMM’N, COMPLIANCE GUIDELINES TO PROHIBIT GENDER IDENTITY DISCRIMINATION (Dec. 10, 2003), <http://www.sf-hrc.org/index.aspx?page=29>.

99. Spade, *supra* note 89, at 777.

100. *Id.*

101. Kennedy, *supra* note 1, at 287 (citing *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003)).

102. *Id.*

103. *Id.*

### A. *Foster Care and Youth Shelters*

Since transgender youth are more likely to face situations like family rejection, lack of school access, and difficulties with social services, the need to have access to facilities like foster care and shelters is great.<sup>104</sup> In general, homeless shelters assign residents by biological sex, not gender identity.<sup>105</sup> This “common sense” practice defines gender under the assumption that “gender is assigned at birth and remains the same permanently.”<sup>106</sup> This approach is a common practice, as evidenced by campaigns against shelters demanding written policies allowing gender identity placement.<sup>107</sup> For example, campaigns waged in Boston and New York resulted in laws clearly indicating that forcing a person to use a facility that did not comport with his or her gender identity was unlawful discrimination.<sup>108</sup> Prior to these campaigns, the targeted shelters placed “transgender women in men’s shelters and transgender men in women’s shelters.”<sup>109</sup>

However, there are still few alternative policies to assigning placement based on sex rather than gender identity, and they “tend to be informal and inconsistently applied.”<sup>110</sup> For example, the largest youth shelter in New York City, Covenant House, sometimes “allow[s] transgender girls to live in their girls’ dorms, but [this sort of accommodation] is inconsistent.”<sup>111</sup> Unfortunately, facility staffs sometimes harass transgender youth and fail to protect them from harassment and violence by other youth.<sup>112</sup>

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104. Bryan N. Cochran et al., *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with Their Heterosexual Counterparts*, 92 AM. J. PUB. HEALTH 773, 773–74 (2002); Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 353, 358 (2009).

105. Spade, *supra* note 89, at 778.

106. *Id.*

107. *Id.*; see, e.g., Ellen J. Silberman, *Mayor Set to Approve Transgender Protection*, B. HERALD, Oct. 24, 2002, at 3; N.Y. CITY DEPT OF HOMELESS SERVS., PROCEDURE NO. 06-1-31 (Jan. 31, 2006), available at [http://www.srlp.org/files/DHS\\_trans\\_policy.pdf](http://www.srlp.org/files/DHS_trans_policy.pdf).

108. TURNER, *supra* note 107; NEW YORK CITY DEPT OF HOMELESS SERVICES, *supra* note 107.

109. Spade, *supra* note 89, at 778.

110. *Id.* at 779–80.

111. *Id.* at 780. Spade conducted a series of trainings on transgender antidiscrimination for Covenant House in 2003 and 2004, forming a relationship with the organization and learning about its continual difficulties with staff discrimination against transgender youth and placement of transgender youth. *Id.* at 780 n.248.

112. *Id.* at 780.

Homeless transgender juveniles often face verbal and physical attacks in shelters, especially where beds are assigned according to sex and not gender identity.<sup>113</sup> While some foster care systems created new policies in response to lawsuits alleging discrimination, no system has created a policy that clearly protects transgender youth from placement in facilities contrary to their gender identity.<sup>114</sup> Since birth-assigned gender placement is still the “common sense” method, new policies do not always guide the actual administrative practices.<sup>115</sup> Therefore, for some transgender youth, living on the street may sometimes be a more comfortable option than a shelter if a shelter does not support and protect the gender identity of its residents.<sup>116</sup>

New York has also found that transgender juveniles diagnosed with GID qualify as disabled under New York’s Human Rights Law.<sup>117</sup> Therefore, a court found that under state human rights law, the foster care home that housed the transgender youth plaintiff discriminated against the youth by requiring her to adhere to the dress code, which prohibited her from dressing as a woman, based on her biological gender.<sup>118</sup> The court found the foster care facility needed to reasonably accommodate the disability of the plaintiff and exempt her from the dress code.<sup>119</sup> However, the court also stated that it is “well established that a disabled person is not entitled to a [sic] accommodation that would jeopardize the health and well-being of others.”<sup>120</sup>

Even so, the court distinguished between the adverse treatment of people with disabilities based on a real need for protection, as opposed to overbroad generalizations used to justify discrimination.<sup>121</sup> In this case, the foster care home asserted that its dress policy was necessary to protect the residents and staff, as

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113. ROB WORONOFF ET AL., CHILD WELFARE LEAGUE OF AMERICA, OUT OF THE MARGINS: A REPORT ON REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH IN CARE 37 (2004), available at <http://www.cwla.org/programs/culture/outofthemargins.pdf>.

114. Spade, *supra* note 89, at 780.

115. *Id.* at 778–79.

116. WORONOFF, *supra* note 113, at 37.

117. *Doe v. Bell*, 754 N.Y.S.2d 846, 851 (N.Y. Sup. Ct. 2003).

118. *Id.* at 855–56.

119. *Id.* at 856 (noting that the exemption applies “to the extent it bars her from wearing skirts and dresses”).

120. *Id.* at 854 (citing *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 73–74 (2002)).

121. *Id.* at 854–55.

“there [were] many boys who [were] not emotionally mature and who [felt] confused or threatened by the presence of a transgendered boy among them and [were] prone to act out when he [was] nearby.”<sup>122</sup> This argument did not persuade the court.<sup>123</sup> In addition, the court found that even though other facilities for LGBT youth existed, and one of these had ejected the plaintiff due to her misconduct, their presence did not excuse her current facility from reasonably accommodating her.<sup>124</sup> The facility did not meet its “obligation to act in a nondiscriminatory fashion . . . merely by providing a small number of facilities [that treat] children . . . with GID . . . nondiscriminator[ily].”<sup>125</sup>

### B. Prisons and Juvenile Detention Facilities

States that have written policies regarding the placement of transgender prisoners do not mention gender identity as a factor in prisoner placement.<sup>126</sup> Overall, since the majority of transgender people cannot or do not access genital surgery, genital or birth-assigned gender rules result in the majority of transgender people being placed in prisons inappropriate to their current gender.<sup>127</sup> “For these prisoners, the application of birth-gender or genital-based policies creates an urgent issue of personal safety.”<sup>128</sup>

Further, other issues specific to young people arise in juvenile detention centers. In *R.G. v. Koller*, three LGBT juveniles, including one transgender youth, claimed equal protection violations.<sup>129</sup> A juvenile correctional facility, which housed the three individuals in the past using isolation to protect the LGBT youths from

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122. *Id.* at 855.

123. *Id.*

124. *Id.* at 855–56.

125. *Id.* at 856 (emphasis omitted).

126. See, e.g., Ala. Dep’t of Corr., Admin. Regulation No. 637 (2005), available at <http://www.doc.state.al.us/docs/AdminRegs/AR637.pdf>; Colo. Dep’t of Corr., Admin. Regulation No. 700-14 (2005), available at [http://exdoc.state.co.us/userfiles/regulations/pdf/0700\\_14.pdf](http://exdoc.state.co.us/userfiles/regulations/pdf/0700_14.pdf); Idaho Dep’t of Corr., Directive No. 303.02.01.002 (2003), available at <http://www.corrections.state.id.us/policy/int3030201002.pdf>; Idaho Dep’t of Corr., Directive No. 401.06.03.501 (2003), available at <http://www.corrections.state.id.us/policy/int4010603501.pdf>; Ill. Dep’t of Corr., Admin. Directive No. 04.03.104 (2003); Mich. Dep’t of Corr., Policy Directive No. 04.06.184 (1993); Minn. Dep’t of Corr., Policy No. 202.045 (2006), available at <http://www.doc.state.mn.us/DocPolicy2/Document/202.045.htm>.

127. Spade, *supra* note 89, at 782.

128. *Id.* at 782 & n.269.

129. *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1133–34 (D. Haw. 2006).

harassment, claimed their method was “reasonable and non-punitive.”<sup>130</sup> The court examined expert opinions and case law regarding the use of isolation on children, concluding that it was not within the “range of accepted professional practices” and constituted punishment in violation of the plaintiffs’ due process rights.<sup>131</sup> In addition, the court criticized the facility’s failure to implement other protection policies before resorting to isolation.<sup>132</sup> The court also found that it is likely that teenagers would perceive isolation as a punishment for being LGBT, and that this treatment only compounds the psychological harm.<sup>133</sup> Finally, the court concluded that the facility acted with “deliberate indifference” based on the totality of specific factors that the facility failed to maintain.<sup>134</sup> These factors included “(1) policies and training necessary to protect LGBT youth; (2) adequate staffing and supervision; (3) a functioning grievance system; and (4) a classification system to protect vulnerable youth.”<sup>135</sup> While the court did not mean “to suggest that the constitution *requires* particular policies or safeguards,” the supervisory facility’s failure “to adopt *any* professionally acceptable methods of maintaining order and safety . . . constitutes deliberate indifference.”<sup>136</sup>

### C. Bathroom Access

It is dangerous to assume that a sign on a door guarantees safety, regardless of gender identity.<sup>137</sup> If there is a threat to safety, steps should be taken to address the dangerous conditions for everyone, rather than assuming sex segregation creates a safe space.<sup>138</sup> However, courts have found that the policy of allowing a

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130. *Id.* at 1154.

131. *Id.* at 1154–55.

132. *Id.* at 1156 & n.12.

133. *Id.* at 1155.

134. *Id.* at 1157.

135. *Id.*

136. *Id.* (first emphasis added).

137. Video: Wrong Bathroom (Shani Heckman 2006), available at <http://www.youtube.com/watch?v=yFDaYIsOWQk> (“Does a sign on a door guarantee safety? I think there is a danger assuming that it does.”).

138. Catherine Jean Archibald, *De-Clothing Sex-Based Classifications—Same-Sex Marriage Is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1, 39 (2009). “If a bathroom is a dangerous place, then people of the same sex as the potential attacker are also in danger, and the government or institution should take steps to alleviate the dangerous conditions for the potential same-sex as well as opposite-sex victims.” *Id.*

transgender female to use the women's faculty restroom does not create a hostile work environment where several alternate restrooms are available to female staff.<sup>139</sup> Even so, in *Cruzan v. Special School District*, the plaintiff, a female teacher, argued that it was judicial abuse "for a male judge to decide that reasonable women could not find their working environment is abusive or hostile when they must share bathroom facilities with a coworker who self-identifies as female, but who may be biologically male."<sup>140</sup> However, "[n]o case law support[ed that] assertion," and it is a common practice for judges to decide "hostile environment sexual harassment cases involving plaintiffs of the opposite sex."<sup>141</sup>

Despite some courts finding transgender persons using the bathroom of their gender identity appropriate, other courts hold that transgender persons are required to use restrooms according to their biological gender, even where laws prohibit gender identity discrimination.<sup>142</sup> These cases are distinguished from *Cruzan*, where a non-transgender person claimed that using a bathroom with a transgender person created a hostile work environment, since they involve transgender persons who claim that they work in hostile environments because they have to use bathrooms based on their sex, not their gender identity.<sup>143</sup> The claims made in these cases fail for the same reason *Cruzan's* did: the conduct of coworkers "was not of the type of severe or pervasive harassment required to sustain an actionable hostile work environment claim."<sup>144</sup>

## V. HOUSING TRANSGENDER STUDENTS ON CAMPUS

Sex segregation in residential facilities and bathrooms is purported to prevent sexual activity and to preserve comfort, mainly for non-transgender persons.<sup>145</sup> However, sex segregation does not eliminate sexual activity in these places, and certainly not in col-

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139. See *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (per curiam).

140. *Id.* at 984.

141. *Id.*

142. See, e.g., *Goins v. W. Group*, 635 N.W.2d 717, 723 (Minn. 2001); *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 47 (N.Y. Sup. Ct. 2005).

143. See *Goins*, 635 N.W.2d at 723; *Hispanic AIDS Forum*, 792 N.Y.S.2d at 47.

144. *Goins*, 635 N.W.2d at 726.

145. Spade, *supra* note 89, at 808–09; see also *Lamb v. Maschner*, 633 F. Supp. 351, 353 (D. Kan. 1986) (finding sex segregation has a rational purpose).

lege dormitories, but the argument that it does underlies the arguments for safety and comfort.<sup>146</sup> The implication of gender-neutral facilities often raises the issue of comfort,<sup>147</sup> but the idea behind comfort assumes that non-transgender women are safest from violence in environments segregated from men or transgender persons.<sup>148</sup>

But does sex segregation really make people safe? Labels and signs “do not function as locks” and can actually “create a false sense of safe space.”<sup>149</sup> In residential contexts, sex segregation indeed may create a false sense of safety, since sexual violence is still present in sex-segregated facilities.<sup>150</sup> For transgender persons, “sex-segregation itself [may become] a source of vulnerability for harassment and violence.”<sup>151</sup> Furthermore, sex segregation can be an obstacle to transgender people who need access to residential facilities that are sex segregated, like dorms.<sup>152</sup>

Most schools make dorm assignments according to a student’s biological sex, and most dorms are segregated by sex in some way.<sup>153</sup> All students face changes, transitions, and new situations when they begin college, but for transgender students, a housing assignment can create an uncomfortable, unsuitable, or even unsafe situation.<sup>154</sup> Some schools show awareness of these situations by adopting strategies to address the concerns of transgender students,<sup>155</sup> but many institutions do not include gender identity

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146. Spade, *supra* note 89, at 809; *see generally* HEATHER M. KARJANE ET AL., OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 1–7 (2005), *available at* <http://www.ncjrs.gov/pdffiles1/nij/205521.pdf>.

147. Spade, *supra* note 89, at 809–10; *see also* Video, *supra* note 137, at 4:37.

148. Spade, *supra* note 89, at 810. For example, the New York City Department of Homeless Services shelter staff argued against a policy placing transgender women in a women’s shelter because of “concerns about the comfort of non-transgender women in the facilities.” *Id.*

149. *Id.* at 810; *see also* Video, *supra* note 137, at 4:37.

150. Spade, *supra* note 89, at 810; *see also* Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 524 (2009) (describing prison violence).

151. Spade, *supra* note 89, at 812.

152. *Id.* at 812–13.

153. Bazluke & Nolan, *supra* note 5, at 408.

154. *See id.*

155. *Id.* These strategies include “gender-neutral hallways, all-gender or ‘gender blind’ residence halls, and mixed-gender suites.” *Id.*

as a protected status in their antidiscrimination policies,<sup>156</sup> and do not address transgender needs in their housing assignment policies.<sup>157</sup>

Some school campuses enact policies that assign transgender students to housing, which reflects their gender identity.<sup>158</sup> The residential life programs at these schools work with the students on a case-by-case basis to accommodate their needs.<sup>159</sup> Other colleges create gender-neutral housing options that assign students as roommates regardless of gender,<sup>160</sup> and other schools have developed “living-learning programs” or themed dorms that are “trans-supportive.”<sup>161</sup>

When going to the bathroom means declaring a gender identity, gender non-conforming individuals face a difficult situation and may avoid using public restrooms altogether.<sup>162</sup> Since bathrooms on college campuses are public even in residences, more and more schools are addressing the harassment and violence transgender students may face in restrooms by creating gender-neutral bathrooms,<sup>163</sup> and some have gone so far as to adopt poli-

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156. See Jordon E. Alexander, *Implications for Student Affairs of Negative Campus Climates for Transgender Students*, 18 J. STUDENT AFF. 55, 56 (2009).

157. *Id.*

158. Brett-Genny Janiczek Beemyn, Transgender Law and Policy Institute, *Ways That U.S. Colleges and Universities Meet the Day-to-Day Needs of Transgender Students*, <http://www.transgenderlaw.org/college/guidelines.htm> (last visited Apr. 1, 2010). Colleges with these policies include, for example, Ithaca College, the Ohio State University, the University of California at Riverside, the University of Minnesota, and the University of Wisconsin. *Id.*

159. Bazluke & Nolan, *supra* note 5, at 408.

160. *Id.*; see, e.g., NAT'L STUDENT GENDERBLIND CAMPAIGN, COLLEGES & UNIVERSITIES THAT OFFER GENDER-NEUTRAL ROOMING 2-8 (2008), available at <http://www.genderblind.org/research.pdf> (describing the gender-neutral rooming options at thirty-six colleges and universities).

161. Beemyn, *supra* note 158. More than a dozen colleges and universities have established LGBT housing, including Beloit College; Carleton College, Syracuse University, Tufts University, the University of California at Berkeley, Davis, Irvine, Riverside, and Santa Barbara, the University of Colorado, Boulder, the University of Iowa, the University of Massachusetts, Amherst, the University of Minnesota, Twin Cities, and the University of Vermont. *Id.*

162. Video, *supra* note 137, at 5:10 (describing how bathroom situations at movie theaters can deter gender non-conformists from drinking Cokes during the movie).

163. See, e.g., N.Y.U. Single Occupancy Restroom List, <http://www.nyu.edu/lgbt/restroom.html> (last visited Apr. 1, 2010); U. Tx. at Austin, Current Gender Neutral Restrooms, <http://www.utexas.edu/diversity/ddce/gsc/gnrr1.php> (last visited Apr. 1, 2010) (providing the location of gender neutral restrooms for students); Brett Beemyn et al., *Transgender Issues on College Campuses*, 2005 NEW DIRECTIONS FOR STUDENT SERVICES 49, 51-52.

cies of renovation and construction that dictate that all buildings have at least one gender-neutral bathroom.<sup>164</sup> Co-ed bathrooms exist across the country in college dorms with no reports of decreased safety or increased violence.<sup>165</sup>

Furthermore, public locker and shower rooms can be just as “uncomfortable, intimidating, and even dangerous” as restrooms for transgender students forced to undress in front of peers.<sup>166</sup> However, schools like Ohio State University offer private “family” changing rooms at their recreation centers, creating an alternative option for transgender students and anyone else wanting a private place to change.<sup>167</sup>

Sex segregation in residential facilities and bathrooms can create a “cultural ‘fault line,’” since “[v]ery few spaces in our society remain divided by sex.”<sup>168</sup> For youth in transition who want to avoid harassment or hassle, this fault line may seem deep.<sup>169</sup> Students on many campuses have embraced gender-neutral facilities since “[l]ots of people don’t fit neatly” into the binary gender system due to fluid identities.<sup>170</sup> However, students are still wary of risks that could lead to violence,<sup>171</sup> so protection is necessary for transgender youth on college campuses.

## VI. LEGAL ISSUES WHEN HOUSING TRANSGENDER STUDENTS ON CAMPUS

Some tentative legal guidance on how to address the concerns of transgender students comes from The National Association of College and University Attorneys (“NACUA”). NACUA attorneys recommend creating designated residence hall floors for transgender students with co-ed bathrooms and dorm rooms, or reserv-

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164. Beemyn, *supra* note 158.

165. Debra Baker, *The Fight Ain't Over*, 85 A.B.A. J. 52, 53 (1999) (reporting that unisex bathrooms are in college dorms around the country); Archibald, *supra* note 138, at 39–40.

166. Beemyn, *supra* note 158.

167. *Id.*; DEPT OF RECREATIONAL SPORTS, THE OHIO STATE UNIVERSITY, RECREATION & PHYSICAL ACTIVITY CENTER FACT SHEET 2, available at <http://recsports.osu.edu/posts/documents/rpac-fact-sheet.pdf>.

168. Patricia Leigh Brown, *A Quest for a Restroom That's Neither Men's Room nor Women's Room*, N.Y. TIMES, Mar. 4, 2005, at A14.

169. *Id.*

170. *Id.*

171. *See id.*

ing single occupancy rooms for transgender students, as many schools have done.<sup>172</sup> However, the cases discussed in Part IV provide examples of the legal issues that potentially arise on university and college campuses when it comes to using these methods in residential housing. Like shelters and foster care homes, higher education administrators may need to reasonably accommodate transgender students suffering from GID. However, creating mandatory separate housing for transgender students could psychologically damage students by making them feel isolated or punished for being transgender, as the court found in *Koller*.<sup>173</sup> If schools do not provide and enforce adequate and professionally acceptable methods of maintaining order and safety, courts may find the lack of policies and training to be deliberate indifference on the part of the school.

It is not as clear what to do about dorm bathrooms, even as many schools embrace gender-neutral bathroom facilities. *Cruzan* showed that gender-neutral bathrooms may not create a hostile environment for non-transgender students,<sup>174</sup> but other courts held that having to use the bathroom of one's biological gender did not create a hostile environment for transgender individuals.<sup>175</sup> Guidance may soon come from the courts. At the time of this writing, a non-transgender student at Green Mountain College in Vermont, Jennifer Weiler, has filed suit against her school over gender-neutral bathrooms on campus and lack of alternatives.<sup>176</sup> It is not likely that *Cruzan* would persuade the court if this suit goes to trial, since it seems all bathrooms available to the student were gender-neutral.<sup>177</sup> As more colleges adopt progressive policies, legal challenges to these policies may also arise in backlash. In addition, there still are other legal concerns and duties for universities housing transgender students.

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172. Francine T. Bazluke & Jeffrey J. Nolan, *Gender Identity and Expression Issues at Colleges and Universities*, NACUA NOTES, June 2, 2005, available at <http://www.transgenderlaw.org/college/NACUA.pdf>; see *supra* Part IV.

173. *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1155 (D. Haw. 2006).

174. *Cruzan v. Special Sch. Dist.*, No. 1, 294 F.3d 981, 984 (8th Cir. 2002).

175. See, e.g., *Goins v. W. Group*, 635 N.W.2d 717, 723 (Minn. 2001) (finding no hostile environment in a workplace discrimination case).

176. Scott Jaschik, *A Bathroom of Her Own*, INSIDE HIGHER ED., Dec. 21, 2009, <http://www.insidehighered.com/news/2009/12/21/bathrooms>.

177. *Id.*

### A. *State and Local Protection*

Some states, like Massachusetts and New Jersey, have adopted abuse prevention statutes, which protect against abuse by family or household members.<sup>178</sup> New Jersey has applied its statute in the dorm context.<sup>179</sup> Nicole M. Decker, in a comment published by the Penn State Law Review, concluded that the Massachusetts law should include college roommates because “[s]ociety needs additional, not fewer, measures to combat domestic violence.”<sup>180</sup> A transgender student abused by roommates in university housing may have a claim under such a statute, if present in that particular jurisdiction.

In addition, as of this writing, 282 colleges and universities have non-discrimination policies that protect gender identity.<sup>181</sup> What does this mean in a residential context, and do these policies create any real changes on campus? In a 2006 survey by GLBT Campus Matters, most colleges and universities indicated “that few changes had occurred as a result of the non-discrimination policy.”<sup>182</sup> Some of these colleges also had policies against people of different genders sharing a room, and these institutions found establishing gender-neutral housing a difficult task.<sup>183</sup> A transgender student may complain to the school under such a discrimination policy if the school does not have gender-neutral housing or if the school assigns the student to housing that does not conform to his or her gender identity. Further, since the Sixth Circuit in *Smith* held that the *Price Waterhouse* rationale applies to transgender persons in areas outside of employment,<sup>184</sup> it is possible that courts will find similar protection under Title IX.

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178. See, e.g., MASS. GEN. LAWS ch. 209A, §§ 1–9 (2003 & Cum. Supp. 2010); N.J. STAT. ANN. §§ 2C:25-17–30 (West 2005 & Supp. 2009).

179. *Hamilton v. Ali*, 795 A.2d 929, 934 (N.J. Super. Ct. 2001).

180. Nicole M. Decker, Comment, *An American Household: Massachusetts’ Abuse Prevention Act and Its Applicability to College Roommates*, 108 PENN. ST. L. REV. 1273, 1294 (2004).

181. Transgender Law & Policy Inst., 282 Colleges and Universities Have Non-Discrimination Policies that Include Gender Identity/Expression, <http://www.transgenderlaw.org/college/> (last visited Apr. 1, 2010).

182. Brett Genny Beemyn & Jessica Pettitt, *How Have Trans-Inclusive Non-Discrimination Policies Changed Institutions?*, CAMPUS MATTERS, June 2006, at 8.

183. *Id.*

184. *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).

However, some may fight against antidiscrimination policies at colleges and universities or similar protective measures. For example, on March 4, 2010, Virginia Attorney General Kenneth T. Cuccinelli, II, sent a privileged letter to all of the presidents, rectors, and visitors of Virginia's public colleges and universities declaring that they had no legal authority to adopt antidiscrimination policies that include not only gender identity, but sexual orientation and gender expression as well.<sup>185</sup> Cuccinelli advised that the Commonwealth prohibits such language and classifications from inclusion as protected classes without "specific authorization from the General Assembly."<sup>186</sup> According to Cuccinelli, this means state agencies like public schools cannot "reach beyond the boundaries established by the General Assembly."<sup>187</sup> In addition, Cuccinelli criticized localities for including sexual orientation and similar categories in their antidiscrimination policies—policies inconsistent with Virginia Attorney General opinions from the early 1980s.<sup>188</sup>

Cuccinelli concludes that schools including gender identity in their antidiscrimination policies have done so without the proper authority and have created "confusion about the law and, at worst, a litany of instances in which the school's operation would need to change" to conform.<sup>189</sup> Instead, Cuccinelli believes the schools need to make changes to conform with "the law and public policy of Virginia,"<sup>190</sup> or at least with Cuccinelli's interpretation of public policy. The actions of the Attorney General "dismayed" students and faculty members and revealed the tension between liberal academics and conservative state leaders in Virginia.<sup>191</sup> So far, academic leaders from schools like the University of Virginia and the College of William and Mary have commented on the issue, not only stressing that they will review their own policies, but also underscoring the importance of their nondiscriminatory

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185. Rosalind S. Helderman, *Attorney General Asks Colleges to End Policies That Shield Gays*, WASH. POST, Mar. 6, 2010, at A1; Letter from Kenneth T. Cuccinelli, II, Attorney Gen., Commonwealth of Va., to Presidents, Rectors, and Visitors of Va.'s Pub. Colls. and Univs. 1 (Mar. 4, 2010), available at <http://www.washingtonpost.com/wp-srv/metro/Cuccinelli.pdf>.

186. Letter from Kenneth T. Cuccinelli, *supra* note 185, at 1.

187. *Id.* at 2.

188. *Id.* at 3–4.

189. *Id.* at 4.

190. *Id.*

191. Helderman, *supra* note 185.

values.<sup>192</sup> While it is not clear what will happen if universities do not heed Cuccinelli's advice, "[t]hey call it advice for a reason" according to a former deputy attorney general.<sup>193</sup>

Therefore, Cuccinelli will probably need to take court action to enforce his own opinion, even though college boards and visitors swear to follow the law.<sup>194</sup> Cuccinelli seems to believe that protections based on sexual orientation or gender identity are unnecessary, just as the Governor believes that "no Virginia college or university . . . will engage in discrimination of any kind."<sup>195</sup> However, Democrat Mark Warner, former governor and now U.S. Senator for the Commonwealth, believes that this sort of advice will "damage the Commonwealth's reputation for academic excellence and diversity."<sup>196</sup> Perhaps McDonnell at first denied the need for protection from sexual orientation discrimination and similar acts of intolerance to further his own agenda,<sup>197</sup> since con-

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192. Press Release, Taylor Reveley, President, Coll. William & Mary, No Discrimination at W&M (Mar. 9, 2010), <http://www.wm.edu/news/pressreleases/2010/no-discrimination-at-wm.php> ("[W]e need to review carefully the AG's view as a matter of law and policy . . . . For now, let's be clear that William & Mary neither discriminates against people nor tolerates discrimination on our campus."); Statement by President Casteen: Governor McDonnell's Executive Directive Clarifies Nondiscrimination Policy (Mar. 10, 2010), <http://www.virginia.edu/uvatoday/newsRelease.php?id=11230> ("But as rightly alarmed as many of us and I myself were by last week's Attorney General letter, . . . [l]et us hope that the subsequent discussion will rise to the level of the [eloquence and clarity] struck in [Governor McDonnell's] directive."). While neither school includes gender identity, they do include sexual orientation in their anti- or non-discrimination policies. University of Virginia, Policy: Preventing and Addressing Discrimination and Harassment, <https://policy.itc.virginia.edu/policy/policydisplay?id=HRM-009> (last visited Apr. 1, 2010); William and Mary Law School, Non-Discrimination Policy, <http://law.wm.edu/careerservices/policies/index.php> (last visited Apr. 1, 2010).

193. Helderman, *supra* note 185 (quoting former Deputy Attorney General Claire Guthrie Gastañaga).

194. *Id.*

195. *Id.* However, Virginia Senator Mark Warner is confused as to why Virginia's Attorney General would "authorize our public colleges and universities to discriminate." Press Release, Sen. Mark Warner, Statement on Va. Attorney General's Opinion on Non-discrimination Issue (Mar. 5, 2010).

196. Helderman, *supra* note 185. Some speculate that Virginia schools will need to amend their admissions materials "to put a big ole' asterisk next to diversity to remind prospective students that only straight students are welcome in Virginia." Crazydrumguy, Cuccinelli Orders Va. Colleges to Strip Sexual Orientation and Gender Identity from Anti-Discrimination Policies, <http://crazydrumguy.com/2010/03/cuccinelli-orders-va-colleges-to-strip-sexual-orientation-and-gender-identity-from-anti-discrimination-policies/> (Mar. 5, 2010, 21:24 EST).

197. Va. Exec. Order No. 6 (Feb. 5, 2010), *available at* [http://www.governor.virginia.gov/Issues/ExecutiveOrders/pdf/EO\\_6.pdf](http://www.governor.virginia.gov/Issues/ExecutiveOrders/pdf/EO_6.pdf) (rescinding the prior ban on state employment discrimination which included a ban on sexual preference discrimination); Jim Nolan, *Senate Backs Protection for Sexual Orientation; It Passes a Bill to Add It to the Anti-Bias Policies in State Hiring; Defeat in House Likely*, RICH. TIMES DISPATCH (Va.), Feb. 9, 2010, at

trary to Cuccinelli's argument that the Virginia General Assembly has never supported protecting sexual orientation, the Virginia Senate has supported adding sexual orientation to anti-discrimination policies.<sup>198</sup>

While an unlikely explanation, perhaps Virginia's leaders see progress on campus as an indicator that discrimination based on sexual orientation and gender identity is a non-issue on campus. Social acceptance of transgender students is growing on college campuses, as evidenced by the election of the first transgender homecoming queen at the College of William and Mary.<sup>199</sup> The reaction of other students has been positive.<sup>200</sup> One student described Vasold's election as "cool," since "it shows how our culture is evolving, hopefully."<sup>201</sup> Also encouraging is the administration's low-key support, which Vasold sees as a promotion of student "differences and similarities" that increase cultural understanding.<sup>202</sup> The campus attitude at William and Mary shows that the social movement to support and accept transgender persons is growing on college campuses and foretells imminent social change.<sup>203</sup> As one William and Mary student put it, "It's a general change across the country . . . . We're tired of the old way."<sup>204</sup> Even so, Vasold's parents still have concerns for her safety on campus.<sup>205</sup> Rather than cite the social change students strive for on campus as evidence that certain classes do not belong in anti-discrimination policies, colleges and universities should support and protect their students and not de facto tolerate discrimination by refraining from including sexual orientation or gender identity in their antidiscrimination policies. While public schools in any state must conform at a local level with the state's law and public policy, to remain relevant and prestigious, institutions, col-

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A10 (noting that a vote in the General Assembly was due to McDonnell's decision "not to issue an executive order that includes sexual orientation in the state's anti-discriminatory policy").

198. Nolan, *supra* note 197.

199. Felicia Tsung, *Transgender Homecoming Queen a First for College*, FLAT HAT (Williamsburg, Va.), Oct. 23, 2009, available at <http://www.flathatnews.com/content/71865>.

200. Michael Paul Williams, *Homecoming Queen at W&M: Diversity Reigns*, RICH. TIMES-DISPATCH (Va.), Oct. 29, 2009, at B1.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

leges, and universities should place a higher premium on the public policy directions at a national level, particularly the inclusion of gender identity as a protected class in the HCPA.<sup>206</sup>

Possibly in response to the reaction to Cuccinelli's letter,<sup>207</sup> Governor McDonnell ultimately did decide to issue an executive directive stating "discrimination against enumerated classes of persons set forth in the Virginia Human Rights Act or discrimination against any class of persons without a rational basis is prohibited."<sup>208</sup> However, this gesture is just a directive, not an executive order, so it does not carry the weight of law.<sup>209</sup> McDonnell could have included gender identity, sexual orientation, and gender expression in Executive Order Six,<sup>210</sup> or broadened his directive to include student protections. In an interview with *The Washington Post*, he explained that "[t]he attorney general's job is to declare the law. It's my job to set the policy and help the General Assembly set the policy."<sup>211</sup> Since the Governor and Attorney General are aware of the political push and desire for gender identity protection on college campuses,<sup>212</sup> they should work in their roles toward that policy.

### B. Supervisory Liability for Schools

In 1996 a student brought an action against school officials alleging equal protection and due process violations due to the failure of school officials to protect the student from gender-based harassment and harm by other students.<sup>213</sup> On appeal, the United States Court of Appeals for the Seventh Circuit found that the

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206. See *supra* Part III.

207. Jenna Johnson et al., *Students Irate at Cuccinelli Over Gay-Rights Policies*, WASH. POST, Mar. 9, 2010, at B1.

208. Va. Exec. Directive No. 1 (2010), available at <http://www.dhrm.virginia.gov/documents/ExecutiveDirectiveOne.pdf> (last visited Apr. 1, 2010); see also VA. CODE ANN. § 2.2-3901 (Repl. Vol. 2008).

209. Posting of Rosalind Helderman, McDonnell's Nondiscrimination Directive Carries Force of Office, Not Law, to Virginia Politics, [http://voices.washingtonpost.com/virginiapolitics/2010/03/mcdonnells\\_nondiscrimination\\_d.html](http://voices.washingtonpost.com/virginiapolitics/2010/03/mcdonnells_nondiscrimination_d.html) (Mar. 11, 2010, 7:52 EST).

210. Va. Exec. Order No. 6 (Feb. 5, 2010), available at [http://www.governor.virginia.gov/Issues/ExecutiveOrders/pdf/EO\\_6.pdf](http://www.governor.virginia.gov/Issues/ExecutiveOrders/pdf/EO_6.pdf).

211. Posting of Anita Kumar, McDonnell: No Special Counsel to Enforce Directive Banning Discrimination Against Gays, to Virginia Politics, [http://voices.washingtonpost.com/virginiapolitics/2010/03/post\\_648.html](http://voices.washingtonpost.com/virginiapolitics/2010/03/post_648.html) (Mar. 17, 2010, 14:08 EST).

212. Rosalind S. Helderman, *Cuccinelli Not Giving in on Colleges' Gay Bias Policies*, WASH. POST, Mar. 13, 2010, at B5.

213. *Nabozny v. Podlesny*, 92 F.3d 446, 449 (7th Cir. 1996).

student could maintain equal protection claims of discrimination based on both gender and sexual orientation.<sup>214</sup> However, the plaintiff in *Nabozny v. Podlesny* also argued that the “defendants violated his right to due process by acting with deliberate indifference in maintaining a policy or practice of failing to punish his assailants, thereby encouraging a harmful environment.”<sup>215</sup> Both the district court and the Seventh Circuit rejected this argument because school employees did not perpetrate the harm suffered, and the school officials had no duty to act and prevent the harm.<sup>216</sup>

Even so, “[s]upervisory liability exists even *without* overt personal participation in the offensive act,” so officials who just stand behind a deficient policy are still liable.<sup>217</sup> Furthermore, courts may impose supervisory liability if supervisors breach duties imposed by local laws.<sup>218</sup> A student may make a claim under the HCPA or under an antidiscrimination policy that includes discrimination based on gender identity. Therefore, courts may be willing to hold school officials liable when school policies or practices place students in dangerous environments, even when officials do not perpetrate the specific harm.

### C. Recommendations

Colleges and universities must be flexible, and allow transgender students to choose the housing option with which they are most comfortable, regardless of sex and gender identity. The current trend seems to be a rejection of separate housing arrangements for LGBT students.<sup>219</sup> Some schools have cancelled plans for themed housing for transgender or LGBT students.<sup>220</sup> Texas Christian University cancelled its plan for an LGBT “living learn-

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214. *Id.* at 460.

215. *Id.* at 449, 460 (citing *J.O. v. Alton Cmty. Unit Sch. Dist. 11*, 909 F.2d 267, 273 (7th Cir. 1990)).

216. *Id.* at 453, 460–61.

217. *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987) (emphasis added) (quoting *Grandstaff v. City of Borger*, 767 F.2d 161, 169–70 (5th Cir. 1985)).

218. *O’Quinn v. Manuel*, 773 F.2d 605, 608 (5th Cir. 1985).

219. *See supra* Part V.

220. Posting of Alison Go, TCU Cancels Plans for Gay-Themed Housing, to Paper Trail, <http://www.usnews.com/blogs/paper-trail/2009/04/15/tcu-cancels-plans-for-gay-themed-housing.html> (Apr. 15, 2009, 17:56 EST).

ing community” because of concerns of separatism.<sup>221</sup> Yale University tabled its plans for gender-neutral housing despite overwhelming student support because it wanted to form a task force to study similar programs at peer schools such as Harvard, Stanford, Brown, and the University of Pennsylvania.<sup>222</sup> Drew University rejected gender-neutral housing proposals because “the idea had become too controversial.”<sup>223</sup> While the administration initially supported the proposal, it “decided to err on the side of caution” and just address the needs of each transgender student individually.<sup>224</sup> This is an improvement from the previous arrangement, which allowed students to request “medical singles,” which were isolating and carried a stigma.<sup>225</sup>

Therefore, schools should focus their energy away from creating LGBT or transgender-themed housing, and instead find comfortable solutions for everyone by working on a case-by-case basis. For example, schools like the University of Chicago allow upperclassmen to pursue living arrangements with whomever they choose.<sup>226</sup> This program allows students to “seek out the living arrangements that make them feel the most comfortable.”<sup>227</sup> So far, there have been no complaints, issues, or concerns with the program.<sup>228</sup> This option appeals to a broad range of students beyond the LGBT community, since there are added benefits to gender-neutral housing, such as the ability to live with a relative of the opposite sex or someone you already trust.<sup>229</sup> At the University of Connecticut, an experiment with gender-neutral housing allowed siblings and friends who simply wanted to live with someone they knew to have that freedom.<sup>230</sup> Before implementation of the new

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221. *Id.*

222. Posting of Alison Go, Yale Delays Gender-Neutral Housing, to Paper Trail, <http://www.usnews.com/blogs/paper-trail/2009/03/04/yale-delays-gender-neutral-housing.html> (Mar. 4, 2009, 17:56 EST).

223. Leslie Kwoh, *Drew University Rejects a Proposal for a “Gender-Neutral” Dorm*, STAR-LEDGER (Newark, N.J.), Dec. 7, 2008, at 40.

224. *Id.*

225. *Id.*

226. Dave Newbart, *Men, Women, Share U. of C. Rooms; Male, Female Undergraduates Can Now Share Dorm, No Questions*, CHI. SUN-TIMES, July 6, 2009, at 4. Unfortunately, first year students are still assigned same-sex housing. *Id.*

227. *Id.*

228. *Id.*

229. See Nikki Bussey, *Colleges Test Water with Gender-Neutral Dorms*, COM. APPEAL (Memphis, Tenn.), June 29, 2008, at M1.

230. Grace E. Merritt, *Genders Mix in UConn Housing, Pilot Program to Expand in Fall*, HARTFORD COURANT (Conn.), May 26, 2008, at B1.

plan, there was only one gender-neutral suite, and the students who lived there felt isolated.<sup>231</sup> Accordingly, schools should also provide resources and training for residential advisors and educational opportunities for non-transgender students to foster a more accepting environment.

However, privacy in the application process may become a concern. While most college admissions and housing applications are separate, transgender students may identify strongly with one gender, and feel most comfortable selecting that gender to live with without disclosing their transgender status. For example, Dartmouth declares on its housing application that it “seeks to provide a living environment welcoming to all gender identities; one not limited by the traditional gender binary.”<sup>232</sup> Students have the choice to disclose their gender identity and the third-person pronoun that makes them feel the most comfortable.<sup>233</sup> Even so, for students who just want to be male or female, and not labeled as transgender, this option might still not be enough to address the issue. In gender-neutral or case-by-case housing, students may feel more comfortable disclosing their needs and preference for living arrangements.

In addition, schools will also need to anticipate the concerns of all students and parents, and find solutions that do not result in gender identity discrimination.<sup>234</sup> For example, schools offering gender-neutral housing should still offer students who prefer same-sex roommates that option. While the solution is not simple, most students enjoy the ability to live with whomever they want, and appear to be adjusting to living with transgender students.<sup>235</sup>

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231. *Id.* The new plan will add five more gender-neutral sites. *Id.*

232. Peter Schworm, *Just Roommates: Colleges' Final Frontier: Mixed-Gender Housing*, BOSTON GLOBE, Apr. 2, 2008, at A1.

233. *Id.*

234. One situation that merits examination but is outside the scope of this comment is the presence of transgender students at women's colleges. This situation raises the question of whether those colleges can serve students who no longer see themselves as women. See Alissa Quart, *When Girls Will Be Boys*, N.Y. TIMES, Mar. 16, 2008 (Magazine), at 32. Students at women's colleges “chose[ ] to attend a women's college in order to live and be educated in the company of other women.” *Id.* at 35. Some alumni see the admission of transmale students as a way of “passively going coed” and transmale students were “men seeking to take advantage of Mount Holyoke's liberal and accepting atmosphere.” *Id.* at 36. One graduate of Mount Holyoke, Suzanne Corriell, sees the difficulty of the situation, since “when a student no longer identifies as a woman, the privilege to attend these schools is lost.” *Id.*

235. See Sara Olkon, *Next: Coed Dorm Rooms; In 2009, U. of C. Will Allow Students to Have Roommate of Opposite to Sex—No Permission Needed*, CHI. TRIB., Dec. 20, 2008, at

Learning to live with peoples' differences is merely a part of the broader socialization process experienced in college, and most students will admit problems can come with any roommate, regardless of gender identity.<sup>236</sup>

## VII. CONCLUSION

Gender identity issues will arise at the collegiate level, particularly in residence halls, given recent cases dealing with situations in the workplace and similar residential settings.<sup>237</sup> While the trend to protect gender identity under Title VII is not overwhelming, the recent passage of the HCPA, and the recent inclusion of gender identity in the proposed ENDA show that the trend is not something that will soon go away. To send a message on this issue to the nation's schools and face the new reality of gender in America, the Department of Education should amend its Title IX regulations to allow transgender students to live in single-sex housing that conforms to their gender identity.

The ultimate measure Congress could take to protect transgender youth in college and university housing is to pass a bill that explicitly protects students from discrimination and harassment based on their gender identity. While the HCPA specifically addresses hate crimes, until Congress makes it clear to the courts that people with non-conforming gender identities are a protected class in all antidiscrimination laws, transgender persons will be denied equal rights.

*Katherine A. Womack* \*

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C1.

236. See Justin Ellis, *Gender Lines Blurring in College Dorms, The University of Southern Maine Is One of a Growing Number of Universities Offering Co-Ed Rooms on Campus*, PORTLAND PRESS HERALD (Me.), Feb. 11, 2007, at B1. One student explains that the gender-neutral policy at his school is really an advantage, but "[i]t's college, there's not much privacy no matter who you're living with." *Id.*

237. See *supra* Part IV.

\* I dedicate this comment to my grandfather, Frank Cacciapaglia, Jr., whose law review note, *The Proposed Drug Industry Antitrust Act—Patents, Pricing, and the Public*, 30 GEO. WASH. L. REV. 875 (1962), inspired my own legal writing. I thank my family and friends for their love and encouragement, and the staff and editors of the *University of Richmond Law Review* for their hard work and insights. I especially thank Stephen Taylor, Mary Hallerman, Faith Alejandro, and Angela Carrico for their generous support in the publication process.