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LAW SUMMARY

Access to Education: Transgender Students in Missouri's Public Education System

Cailynn Hayter*

I. INTRODUCTION

“While opponents of transgender access experience isolated victories, the overwhelming evidence is unmistakable. Prudent decision makers must swallow any feelings of animus, do what’s best for the student, and save the district the headache of legal hassles.”¹

Although discussion about the rights of transgender students has come to the forefront of our society within the past year, the issue has been debated and researched for decades.² This Note addresses the difficulty in protecting the rights of transgender students while also recognizing the need to provide security and privacy for all students. In balancing these concerns, how should schools proceed on the question that has most vexed public schools as they navigate the rights of transgender students: which restroom should transgender students use?

Following Caitlyn Jenner³ announcing herself to the world as transgender in the spring of 2015,⁴ an increasing number of youth have begun to also openly identify as transgender.⁵ Activists across the United States saw

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1. Edwin C. Darden, *The Law Trends Toward Transgender Students*, 96 ED LAW 76, 77 (2014), <http://pdk.sagepub.com/content/96/2/76.full.pdf+html>.

2. See, e.g., Kristine W. Holt, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of A Transgender Jurisprudence*, 70 TEMP. L. REV. 283 (1997).

3. Circa spring 2015, Bruce Jenner, Olympic champion and reality television star, revealed to the world that he would be transitioning to a woman. Emanuella Grinberg, *Why Caitlyn Jenner's Transgender Experience is Far from the Norm*, CNN (July 15, 2015, 12:29 PM), <http://www.cnn.com/2015/06/03/living/caitlyn-jenner-transgender-reaction-feat/> [hereinafter Grinberg, *Caitlyn Jenner's Transgender Experience*].

4. As a part of the transition, her new name would be Caitlyn Jenner. *Id.*

5. See Emily Shapiro, *Caitlyn Jenner Inspires Transgender Teen Barred From Playing High School Volleyball*, CBS NEWS (July 16, 2015, 4:13 PM), <http://abcnews.go.com/US/caitlyn-jenner-inspired-transgender-teen-barred-high-school/story?id=32492319>.

Jenner's revelation as an opportunity to advocate for the transgender community. However, one commentator asserted Jenner's celebrity status distracts from the "lived experiences of trans [students] who continue to battle discrimination when accessing basic needs such as . . . education."⁶ Studies and reports, showing that transgender students have a harder time being successful in school than non-transgender students, corroborate the notion that transgender students experience discrimination in schools.⁷

Throughout the past several years, the American legal system has dealt with a number of cases regarding the right of transgender students to access the restroom and locker room of the gender with which they identify.⁸ Unfortunately, courts have not been consistent when ruling on the issue of restroom access for transgender students, holding both for and against their right to the facilities of their choice.⁹ This leaves school districts without clear guidelines for protecting non-transgender and transgender students with respect to facility access.

In 2015, Missouri encountered the uncertainty that surrounds restroom access for transgender individuals. The Hillsboro School District made national news when the first openly transgender student at the district was allowed – but later denied – to use the restroom corresponding to her gender identity.¹⁰ In Kansas City, another transgender student also made national headlines after participating as a female cheerleader and being crowned as the first transgender homecoming queen.¹¹ Both of these schools made internal decisions regarding how to handle these situations, highlighting that Missouri school districts currently have no statutory guidance from the legislature regarding what type of policy should be implemented when it comes to transgender students in restrooms.¹² Because no statute addresses the issue, school districts lack guidance when dealing with the practical concerns associated with accommodating students on a daily basis. This exposes each dis-

6. Grinberg, *Caitlyn Jenner's Transgender Experience*, *supra* note 3.

7. *See* discussion *infra* Part IV.B.

8. *Compare* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 722–23 (4th Cir. 2016) (finding that Title IX could require schools to allow transgender students to use the restroom of their gender identity) *mandate recalled, stay granted*, 136 S. Ct. 2442 (2016) (mem.), *with* Johnston v. Univ. of Pittsburgh Sys. of Higher Educ., 97 F. Supp. 3d 657, 661 (W.D. Pa. 2015) (holding that Title IX does not require schools to allow transgender students to use the restroom of their gender identity).

9. *See* cases cited *supra* note 8.

10. Emmanuella Grinberg, *Bathroom Access for Transgender Teen Divides Missouri Town*, CNN (Sept. 5, 2015, 3:37 PM), <http://www.cnn.com/2015/09/03/living/missouri-transgender-teen-feat/> [hereinafter Grinberg, *Bathroom Access*].

11. Derek Helling, *Transgender High School Cheerleader Happy to Be One of the Girls*, SB NATION (Sept. 9, 2015, 12:04 AM), <http://www.outsports.com/2015/9/9/9283443/transgender-high-school-cheerleader-landon-patterson>.

12. *Id.*

strict to potential liability.¹³ Having a statute would allow schools to worry less about liability and more about fulfilling the goals of the education system: to not only help students achieve in the classroom, but also to promote citizenship, diversity, and inclusion.

Although the questions about whether transgender students have a right to use the restrooms of their gender identity in public schools have been centered on moral and religious concerns, this Note does not focus on those aspects. Instead, it focuses on legal precedent and the implications of developing law on the issue in Missouri. The first half of this Note discusses the federal and state legal backgrounds of transgender students' right to use the restroom of their gender identity, while the second half discusses the need for the Missouri General Assembly to adopt a specific statute protecting this right.

II. LEGAL BACKGROUND

Transgender students normally sue under federal law when bringing claims against districts that refuse to allow them to use the restrooms that reflect their gender identity.¹⁴ However, many states have enacted laws that explicitly define the policy to be implemented; in those circumstances, transgender students may choose to bring claims under state law. Presently, California leads the country in its development of policies regarding transgender students, adopting the most explicit policy in favor of restrooms based on gender identity.¹⁵ Missouri, on the other hand, has no law establishing the right of transgender students to access the facilities of the gender with which they identify. Part A of this section begins with an explanation of the federal protections transgender students have attempted to utilize in asserting their rights. Part B explores the patchwork of state protections that have developed around the country in an attempt to provide clarity to school administrators.

A. Federal Protections

Because federal law does not currently prohibit discrimination against students on the basis of gender identity, the transgender community has relied on other laws for protection.¹⁶ Title IX, the Fourteenth Amendment, and the

13. See, e.g., Frances Hubbard, *Federal Judge Issues Opinion in Gloucester Transgender Lawsuit*, DAILY PRESS (Sept. 18, 2015, 11:53 AM), <http://www.dailypress.com/news/gloucester-county/dp-nws-mid-transgender-written-opinion-20150918-story.html>; *Grimm*, 822 F.3d at 714–15; see also *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *3 (Mass. Super. Ct. Oct. 11, 2000); *Zalewska v. Cty. of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003).

14. See cases cited *supra* note 8.

15. See CAL. EDUC. CODE § 221.5(f) (West 2016).

16. *Know Your Rights: Schools*, NAT'L CTR. FOR TRANSGENDER EQUALITY, <http://transequality.org/know-your-rights/schools> (last visited Sept. 14, 2015).

First Amendment have been used to challenge district practices.¹⁷ However, none of these laws have proven to be much help to transgender students seeking access to restrooms and locker rooms of their gender identity.

1. Title IX

Title IX is a federal law prohibiting sex discrimination in schools.¹⁸ The U.S. Department of Education (“Department”) has concluded discrimination or harassment based on an individual’s gender identity is illegal sexual discrimination.¹⁹ However, the Department’s instruction is only non-binding guidance, and many states decline to follow its advice, both generally and in specific application to transgender restroom use. Those who agree with segregating restrooms based on biological gender often argue that restricting the use of school facilities is not considered discriminatory under Title IX.²⁰

A federal district court in Virginia recently refused to recognize Title IX as an avenue to protect transgender students.²¹ Virginia schools, like Missouri schools, lack statutory instruction on the transgender student restroom issue.²² The court held the school board policy, which denies transgender students the right to access and use the restroom of their gender identity, does not violate Title IX.²³ The court concluded that the guidance from the Department was not operative because it contradicted its own policy that requires “schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances.”²⁴

However, on appeal, the U.S. Court of Appeals for the Fourth Circuit held that the Title IX claim could possibly provide relief for transgender stu-

17. *Id.*

18. *See generally* Education Amendments of 1972, 20 U.S.C. § 1681(a) (2012).

19. *See* U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., JOINT “DEAR COLLEAGUE” LETTER ON TRANSGENDER STUDENTS 3 (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (“A school . . . must allow transgender students access to such facilities consistent with their gender identity. A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so.”).

20. Alia Wong, *The K-12 Binary*, ATLANTIC (July 9, 2015), <http://www.theatlantic.com/education/archive/2015/07/the-k-12-binary/398060/>.

21. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 753 (E.D. Va. 2015), *rev’d in part, vacated in part*, 822 F.3d 709 (4th Cir. 2016), *mandate recalled, stay granted*, 136 S. Ct. 2442 (2016) (mem.).

22. *Id.*

23. *Id.* at 744–45; *see also* Cleis Abeni, *Federal Judge Denies Trans Student the Right to Male Restroom*, ADVOC. (Sept. 6, 2015, 10:55 AM), <http://www.advocate.com/transgender/2015/09/06/federal-judge-denies-trans-student-right-use-male-restroom>.

24. Hubbard, *supra* note 13; *Grimm*, 132 F. Supp. 3d at 746.

dents wishing to use the restroom of their gender identity.²⁵ The court therefore reversed the district court's dismissal of the Title IX claim, but the success of that claim is yet to be seen on further appeal.²⁶ The Fourth Circuit also reversed the district court's denial of a preliminary injunction allowing the student to use the restroom based on gender identity.²⁷ Plaintiff's case also proceeded under the Fourteenth Amendment.²⁸

In March 2015, the U.S. District Court for the Western District of Pennsylvania held a university did not violate Title IX when the institution prohibited a transgender male from using sex-segregated restrooms and locker rooms designated for men.²⁹ The court found "the University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX."³⁰ While there is still debate about whether Title IX protects transgender students, one thing is clear: Title IX contains no explicit language unambiguously prohibiting gender-segregated restrooms in schools. And even with guidance stating Title IX requires transgender students to be able to use the restroom of their choice and the Fourth Circuit's holding that a transgender student plaintiff could possibly win on such a claim, a Title IX claim on this issue has yet to play out throughout the entire trial process. Therefore, as of now, Title IX does not require schools to adopt policies allowing transgender students to use the restroom of their gender identity.

2. Fourteenth Amendment

The Fourteenth Amendment to the U.S. 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 pro-

25. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016) ("We conclude that the Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case. We reverse the district court's contrary conclusion and its resultant dismissal of G.G.'s Title IX claim."), *mandate recalled, stay granted*, 136 S. Ct. 2442 (2016) (mem.). The U.S. Supreme Court stayed the Fourth Circuit's judgment on August 3, 2016, while it decides if it is going to take the case. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016) (mem.).

26. *Id.*

27. *Id.* at 726.

28. Hubbard, *supra* note 13.

29. Johnston v. Univ. of Pittsburgh Sys. of Higher Educ., 97 F. Supp. 3d 657, 661 (W.D. Pa. 2015).

30. *Id.* at 672–73.

cess of law; nor deny to any person within its jurisdiction the equal protection of the laws.³¹

The Supreme Court has interpreted this language to ensure that all citizens enjoy equal protection under the law.³² Over time, the Supreme Court has applied different criteria for determining whether discrimination toward certain classes of people was or was not constitutional under the equal protection doctrine of the Fourteenth Amendment.³³ Suspect classes generally include those classes that have previously been discriminated against.³⁴ This classification receives the highest level of scrutiny and is normally not upheld as being constitutional. Currently, suspect classes include race, national origin, religion, and alienage. In evaluating the existence of these suspect classifications, the Supreme Court has often focused on “the immutability of discrimination-inducing traits.”³⁵ Some courts have found transgender individuals satisfy this criterion due to having a physical or psychological immutable trait, classified as Gender Dysphoria (“GD”).³⁶

Even considering this immutable trait, many courts still explicitly deny suspect class status to transgender persons. Suspect classes are given strict scrutiny, meaning the state must establish a compelling state interest for enforcing a specific law or denying a specific right.³⁷ Usually, if a group is identified as a suspect class for the purposes of strict scrutiny, courts will almost always invalidate the law that is discriminating against the suspect class on the basis that there is no compelling state interest or because the law

31. U.S. CONST. amend. XIV, § 1.

32. *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996).

33. *See id.*

34. *See* Doug Linder, *Levels of Scrutiny Under the Equal Protection Clause*, EXPLORING CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epscrutiny.htm> (last visited June 26, 2016).

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*, 9 U. PA. J. CONST. L. 895, 901 (2007).

36. *Id.*; *see generally* Frontiero v. Richardson, 411 U.S. 677 (1973); Brown v. Zavaras, 63 F.3d 967, 970 (10th Cir. 1995) (holding that a transgender prisoner had a cause of action when prison officials failed to provide treatment for gender dysphoria); White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988) (holding that transsexualism is a psychological disorder).

37. Linder, *supra* note 34. Courts apply a three-tiered approach to the Equal Protection Clause. *Id.* Rational basis scrutiny is the minimum scrutiny and applies to all classifications not found in strict or middle-tiered scrutiny. *Id.* Under rational basis, the government need only show that the challenged classification is rationally related to a legitimate state interest. *Id.* Under middle-tiered scrutiny, the government must show that the challenged classification serves an important state interest and the classification is substantially related to serving that interest. *Id.* The quasi-suspect classes associated with middle-tiered scrutiny include gender and illegitimacy. *Id.*

is not narrowly tailored. However, given the Supreme Court's reluctance to create new suspect classifications, the Court is unlikely to grant suspect class status to transgender individuals.³⁸ In 2002, the U.S. Court of Appeals for the Second Circuit found that "it is [] not clear that [Plaintiff], as a [transgender individual], is a member of a protected class."³⁹ Other federal circuits have echoed this skepticism toward making transgender individuals members of a protected class.⁴⁰ Until transgender students gain status as a protected class, redress under the Fourteenth Amendment is unlikely.

3. First Amendment

The First Amendment has also been argued as protecting students' freedom of expression. Transgender students contend that the First Amendment freedom of expression encompasses students' right to choose a restroom based on gender identity.⁴¹ Though students have successfully used a two-pronged gender-expression-as-protected-speech⁴² argument to fight school dress codes prohibiting transgender students from dressing as a member of their identified gender,⁴³ courts have yet to aver that transgender-unfriendly restroom policies are similarly proscribed under the First Amendment.

Some scholars argue the use of restrooms based on gender identity is conduct-as-speech, which the First Amendment should protect:⁴⁴ "[A]n individual's conduct in using a restroom designated as either 'male' or 'female' expresses that individual's belief that she belongs in that designated category

38. Elkind, *supra* note 35, at 904.

39. *Mario v. P&C Food Mkts., Inc.*, 313 F.3d 758, 767 (2d Cir. 2002).

40. Additionally, the Tenth Circuit held that transsexuals are not a protected class and therefore receive only rational basis review when they are discriminated against. *Brown*, 63 F.3d at 971. Recently, a judge for the U.S. District Court for the Eastern District of Virginia indicated it would be "highly unlikely" a court would grant injunctive relief to a transgender student under the Equal Protection Clause of the Fourteenth Amendment. Hubbard, *supra* note 13.

41. Although the First Amendment does not specifically provide for "freedom of expression," it has evolved over the years to include a broader scope of protected conduct under the Constitution. *See generally* *Cohen v. California*, 403 U.S. 15 (1971) (holding that wearing offensive clothing in public is speech protected by the First Amendment).

42. *See Spence v. Washington*, 418 U.S. 405, 410–11 (1974) ("An intent to convey a particularized message . . . and . . . the likelihood [i]s great that the message would be understood by those who viewed it."); *see also* *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (articulating a two-prong test in determining whether conduct is speech protected by the First Amendment).

43. *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *3 (Mass. Super. Ct. Oct. 11, 2000); *Zalewska v. Cty. of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003).

44. *See generally* Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89 (2015).

of persons.”⁴⁵ Further, “Because it is socially understood that a person uses the restroom that corresponds with her gender, restroom choice conveys significant information [to others] about an individual’s gender identity.”⁴⁶ According to this argument, using the restroom based on gender identity is expressive conduct conveying a particularized message.⁴⁷

Although the Supreme Court has generally held that a student’s classroom expression is protected under the First Amendment,⁴⁸ no transgender student has successfully argued his or her restroom choice is secured under the First Amendment.⁴⁹ Freedom of expression in schools is “balanced against the added concern of the need to foster an educational atmosphere free from undue disruptions to appropriate discipline.”⁵⁰ Under the standard established in *Tinker v. Des Moines Independent Community School District*, school officials may not silence student expression just because the officials dislike it; instead they must reasonably predict that a student’s behavior will either be (1) a substantial disruption of the school environment, or (2) an invasion of the rights of others.⁵¹ Thus far, all transgender restroom case law indicates that the invasion of the privacy rights of others will outweigh the First Amendment considerations.⁵²

Nevertheless, the question of whether a transgender student using his or her preferred restroom “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of school” is unresolved.⁵³ Until such questions are answered, the First Amendment will not protect transgender students seeking to use the facilities in accord with their gender identity.

4. Federal Law Does Not Protect Transgender Students

Kastl v. Maricopa County Community College District illustrates the lack of federal law protecting transgender students in schools. In *Kastl*, a transgender student attempted to use the women’s restroom but was denied

45. *Id.* at 122.

46. *Id.* at 123.

47. *Id.*

48. *Id.* at 119–20.

49. *Id.* at 119.

50. *Bivens ex rel. Green v. Albuquerque Pub. Schs.*, 899 F. Supp. 556, 559 (D.N.M. 1995) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

51. *See Tinker*, 393 U.S. at 513.

52. *See Weatherby*, *supra* note 44, at 119–20.

53. *See Tinker*, 393 U.S. at 505 (quoting *Burnside v. Byars*, 363 F.2d 477, 769 (5th Cir. 1966)).

access.⁵⁴ Kastl sued the school for violating Title IX, the Fourteenth Amendment, and the First Amendment.⁵⁵

In a short memorandum, the court granted the school's motion for summary judgment on the First Amendment claims of constitutional privacy and freedom of expression because of insufficient evidence, even though public school teachers and administrators are prohibited from censoring a student's speech or expression without a compelling reason under the First Amendment.⁵⁶ The court then held that because the school banned Kastl from using the women's restroom for safety reasons, the school was not in violation of Title IX.⁵⁷ To rebut the "safety reasons" argument, the court insisted Kastl produce evidence the school was "motivated by Kastl's gender" when it banned Kastl from using the women's restroom.⁵⁸ Kastl failed to provide evidence the school denied her access to the restroom based on her gender non-conformity.⁵⁹ The U.S. Court of Appeals for the Ninth Circuit also rejected Kastl's argument under the Fourteenth Amendment but did not offer any reasoning beyond "insufficient evidence."⁶⁰ No court has yet ruled on whether the violation of privacy rights of other students would constitute a legitimate safety reason for banning transgender students from using the restroom of their gender identity.

Because federal law is currently insufficient to resolve the issue of the "great restroom debate," state and local governments are left to guide school districts looking to best address the needs of all students.

B. State Protections

Similar to the federal government, many state and local governments have also declined to enact laws defining the rights of transgender students regarding restroom access. No one state court decision has definitively determined whether these students universally have a legal right to use restrooms based on their gender identity, since decisions on this issue vary from state to state.⁶¹ A Virginia court dismissed a suit against a school that based restroom use on biological gender.⁶² However, decisions in Colorado⁶³ and

54. *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493 (9th Cir. 2009).

55. *Id.*

56. *Id.* at 494.

57. *Id.* at 493–94.

58. *Id.* at 494.

59. *Id.*

60. *Id.*

61. *See, e.g., Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 606 (Me. 2014); *but see Goins v. W. Grp.*, 635 N.W.2d 717, 723 (Minn. 2001).

62. *ACLU Seeks Reversal of Lower Court Decision That Forces Trans Students to Continue Using Separate Facilities*, AM. CIV. LIBERTIES UNION (Oct. 21, 2015), <https://www.aclu.org/news/transgender-student-asks-appeals-court-stop-virginia-schools-discriminatory-restroom-policy>.

Maine⁶⁴ allowed transgender students to access restrooms based on their gender identities.⁶⁵

All states, except Montana, currently have anti-bullying statutes protecting kids in schools.⁶⁶ Of these states, approximately fifteen specifically prohibit gender identity discrimination in public schools, and some even require districts to implement a precise policy against harassment and bullying based on gender identity.⁶⁷ Anti-bullying statutes help accomplish important public policy goals for protecting students. The statutes, however, are an ineffective guide for school districts attempting to resolve the dilemma surrounding transgender students' access to restrooms based on gender identity; they only address bullying concerns and fail to actually define what rights transgender students should enjoy.

Missouri schools are not immune to the transgender restroom issue. Nevertheless, Missouri is one of twenty-eight states that lacks legislation addressing transgender students' restroom use.⁶⁸ A comprehensive example and potential model for legislation can be found in California.⁶⁹

63. In Colorado, a transgender first-grader, Coy Mathis, won a lawsuit against the Fountain-Fort Carson School District after the school district forced Mathis to use the restroom of her biological gender (male). The claim was filed under Colorado's Anti-Discrimination Act, and the court held that transgender students are to be treated just like other students; they should be allowed to use the gender they identify as. This was the first time in the country that a transgender student has won such a lawsuit. Ed Payne, *Transgender first-grader wins the right to use girls' restroom*, CNN (June 24, 2013), <http://www.cnn.com/2013/06/24/us/colorado-transgender-girl-school/>.

64. In Maine, a transgender teenager was awarded \$75,000 after a school district forced the student to use a staff restroom rather than the restroom of the teenager's gender identity. The student won on the basis that the school district had violated the state's Human Rights Act. This was the first time a state's highest court had ruled that a transgender student has a right to use the restroom based on gender identity. David Stout, *Transgender Teen Awarded \$75,000 in School Restroom Lawsuit*, TIME (Dec. 3, 2014), <http://time.com/3615599/transgender-student-restroom-lawsuit-maine/>; see also *Reg'l Sch. Unit 26*, 86 A.3d at 607 ("Decisions about how to address students' legitimate gender identity issues are not to be taken lightly. Where, as here, it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender-identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the MHRA.").

65. Wong, *supra* note 20.

66. Kathleen Conn, *Best Practices in Bullying Prevention: One Size Does Not Fit All*, 22 TEMP. POL. & CIV. RTS. L. REV. 393, 419 (2013).

67. CAL. EDUC. CODE § 233(a)(1) (West 2016); COLO. REV. STAT. ANN. § 22-32-109.1(2)(K) (West 2016); MINN. STAT. ANN. § 121A.031(g) (West 2016); N.Y. EDUC. LAW §§ 11(6), 13(5) (McKinney 2016).

68. *Non-Discrimination Laws: State by State Information—Map*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Aug. 26, 2016).

69. CAL. EDUC. CODE § 221.5(f).

1. California Statute⁷⁰

In 2013, the U.S. Departments of Justice and Education ordered a California school district to give an anonymous transgender student access to men's facilities as part of a resolution agreement between the school and the transgender student.⁷¹ The order occurred after the school instructed a transgender student to use the nurse's restroom rather than restrooms in accordance with the student's gender-identification.⁷² The U.S. Departments of Justice and Education instructed the Arcadia Unified School District that it must allow transgender students to use locker rooms, restrooms, and other facilities in accordance with their gender identity.⁷³ Further, the order mandated schools allow transgender students to play on the sports team of their identified gender.⁷⁴ The school was also required to train school administrators on gender identity-based discrimination and other methods for providing a safe environment for transgender students.⁷⁵

Following that litigation, Governor Jerry Brown signed Assembly Bill 1266 ("AB 1266"), the School Success and Opportunity Act, which has now become known as California's "Transgender Restroom Bill."⁷⁶ The bill requires transgender students have the opportunity to use facilities consistent with gender identity, regardless of the gender listed on the birth certificate.⁷⁷ Assembly Bill 1266 marked the first time a state has mandated by statute that transgender students have access to the facilities of their identified gender.⁷⁸ Before the California Senate voted on the bill, there was robust debate that sought to weigh transgender students' rights to expression against other students' rights to privacy.⁷⁹ Passage of the bill created statewide uniformity, providing precise guidelines for districts regarding treatment of transgender

70. *Id.*

71. Resolution Agreement Between the Arcadia Unified School District, U.S. Dep't of Educ., & U.S. Dep't of Justice, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, 3-5 (July 24, 2013), <https://cbsla.files.wordpress.com/2013/07/2013-07-24-resolution-agreement-signed.pdf> [hereinafter Resolution Agreement].

72. Daniel Reynolds, *Trans Teen Must Have Access to Male Locker Room, Says DOJ*, *ADVOC.* (July 25, 2013), <http://www.advocate.com/politics/transgender/2013/07/25/trans-teen-must-have-access-male-locker-room-says-doj>. The school also required the student to sleep in a separate cabin with no other students during a school field trip. *Id.*

73. Resolution Agreement, *supra* note 71, at 3.

74. *Id.*

75. *Id.* at 5.

76. *Calif. Lawmakers Pass K-12 Transgender-Rights Bill*, *CBS NEWS* (July 3, 2013), <http://www.cbsnews.com/news/calif-lawmakers-pass-k-12-transgender-rights-bill/>.

77. *Id.*

78. However, Massachusetts's state education department has a similar policy granting the same protections. *Id.*

79. *Id.*

students in restrooms.⁸⁰ On the other hand, other states, such as Missouri, have no such understanding because they have no substantive laws on this issue.

2. Missouri Protections

Although Missouri has yet to adopt a law on the status of transgender students in schools,⁸¹ fourteen cities and counties in Missouri have passed laws protecting transgender individuals from discrimination in public accommodations. But these protections provide little or no guidance for districts regarding restroom accommodations.⁸² For school districts, Missouri only has minimal guidance from organizations like the Missouri State High School Activities Association (“MSHSAA”) and the Missouri School Boards Association (“MSBA”). However, MSHSAA’s decision to remain silent on the issue of transgender access to restrooms and MSBA’s equivocal policy language prove ineffective for truly providing guidance for school districts.

MSHSAA has provided guidance for schools in relation to activities for transgender students. Its policy allows a transgender male who has complet-

80. This bill has been met with some opposition. Christopher Cadelago, *California Transgender Bill Spurs Initiative for ‘Bathroom Privacy’*, SACRAMENTO BEE (Apr. 20, 2015), <http://www.sacbee.com/news/politics-government/capitol-alert/article19064163.html>. Currently, the Personal Privacy Initiative (#15-0019) has been approved for circulation in California as a contender for the November 8, 2016, ballot. *Initiatives and Referenda Failed to Qualify*, CAL. SEC’Y STATE, <http://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/failed-qualify/> (last visited Apr. 15, 2016). The bill would dictate that people in government buildings, including schools, use facilities in accordance with their biological sex. *Id.* The bill, however, has yet to pass. *Id.*

81. Missouri does have a policy prohibiting discrimination based on sexual orientation for executive branch employees. The policy came from an administrative action and does not carry the weight of law. In an American Progress Report on protections for transgender individuals, Missouri was deemed a “weak state” because the policy only applies to public employees, and it omits gender identify in its coverage. Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies: State Nondiscrimination Policies Fill the Void but Federal Protections Are Still Needed*, CTR. FOR AM. PROGRESS ACTION FUND 6 (June 2012), https://www.americanprogress.org/wpcontent/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf.

82. On April 7, 2015, Greene County residents repealed their city’s Ordinance 6141, which included gender identity under the city’s non-discrimination policy. Supporters of the Sexual Orientation and Transgender Anti-Discrimination Ordinance Repeal argued it “violated religious freedom, allowed manipulation and false claims to hurt businesses, and could be abused to protect sexual misconduct.” The repeal won by a narrow margin, with about 51.4% voting to repeal Ordinance 6141. Sarah Parvini, *Springfield, Mo., Voters Repeal LGBT Anti-Discrimination Law*, L.A. TIMES (Apr. 8, 2015, 12:12 PM), <http://www.latimes.com/nation/la-na-missouri-antidiscrimination-law-20150408-story.html>.

ed hormone therapy for a year⁸³ to participate on a men's team and also allows a transgender woman to play on a women's team after the first year of documented testosterone suppression.⁸⁴ The policy provides explicit guidance for students, teachers, and administrators.⁸⁵

Landon Patterson, a transgender senior at Oak Park High School in Kansas City, Missouri, spoke openly about participating in athletics as a transgender athlete.⁸⁶ She has been cheerleading since she was a freshman and playing club volleyball since the seventh grade.⁸⁷ Though Patterson started identifying as a female in middle school, only recently has she begun taking hormones.⁸⁸ Because MSHSAA requires hormone use or suppression for one year, Patterson was ineligible to try out for the high school women's volleyball team.⁸⁹ Though Patterson stated there was no issue in allowing her to wear a female cheerleading uniform, she also stated there were issues "about [her] using the bathroom and locker room."⁹⁰ MSHSAA's policy fosters transgender students' ability to participate in sports, but the policy is silent on questions regarding transgender athletes' uses of facilities, such as the restroom and locker room. In its silence, MSHSAA impliedly leaves the issue to individual school districts.

MSBA's non-binding policy provides more direction for schools on the restroom issue. In 2013, MSBA issued an administrative procedure⁹¹ ("AP") entitled "Prohibition against Discrimination, Harassment, and Retaliation."⁹²

83. The policy requires that "[a] trans male (female to male) who has undergone treatment with testosterone for gender transition may compete on a boys team but is no longer eligible to compete on a girls team without changing the team status to a mixed team." *Board Policy on Transgender Student-Athletes*, 2013-2014 MSHSAA OFFICIAL HANDBOOK 127, http://media.wix.com/ugd/2bc3fc_feb6053e027b4bcd98007e8ff272c29b.pdf. Mixed teams are only allowed to compete in boys' championships. *Id.*

84. For women, the policy states, "A trans female (male to female) student-athlete being treated with testosterone suppression medication for gender transition may continue to compete on a boys team but may not compete on a girls team without changing it to a mixed team status until completing one calendar year of documented testosterone-suppression treatment." *Id.*

85. *Id.*

86. Helling, *supra* note 11.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Administrative procedure is not binding on school districts throughout Missouri; non-compliance does not result in adverse actions. Mo. Sch. Bd. Ass'n, *Policy Overview*, KAN. CITY 33, <https://eboard.eboardsolutions.com/ePolicy/PolicyOverview.aspx?S=228&Sch=228> (last visited June 4, 2016).

92. Mo. Sch. Bd. Ass'n, *Prohibition Against Discrimination, Harassment and Retaliation*, KAN. CITY 33 (Feb. 27, 2013), <https://eboard.eboardsolutions.com/ePolicy/policy.aspx?PC=AC->

Within the AP, students are to be referred to using the pronoun of the students' gender identity.⁹³ A reduction or elimination of gender-segregated activities is also outlined in the AP; in the event an activity is segregated, the student should be placed in the gender group that aligns with his or her gender identity.⁹⁴

With regard to restroom access, MSBA advised that "students . . . shall have access to the restroom that corresponds to the person's gender identity consistently asserted at school whenever possible or practicable."⁹⁵ Additionally, the AP indicated if a student is unable to use the facility of the student's gender identity, a single-stall restroom or the nurse's restroom should be used.⁹⁶ The AP also discussed locker rooms and indicated, "[T]ransgender students shall be assessed on a case-by-case basis with the goals of maximizing the student's social integration and equal opportunity."⁹⁷ If problems occur, the school shall provide the student with a private changing area.⁹⁸

C. Right to Privacy

Many opponents of dividing facilities based on gender identity rely on the constitutional right to privacy. In *Grimm v. Gloucester Community School Board*, the judge concluded that "society demands that male and female restrooms be separate because of privacy concerns."⁹⁹ He reasoned, "Not only is bodily privacy a constitutional right, the need for privacy is even more pronounced in the state educational system."¹⁰⁰ Judge Doumar further stated that the school's interest in prohibiting the transgender student from using the men's restroom "go[es] beyond preventing most exposures of genitalia."¹⁰¹ Moreover, "The mere presence of a member of the opposite sex in the restroom may embarrass many students and be felt a violation of their privacy."¹⁰² The court is not alone in its reasoning.

Though no court has squarely settled the issue of restroom rights for transgender K-12 students, courts have addressed the issue in the employment context. The Tenth Circuit recently established that the use of women's public restrooms by a transgender woman could result in liability for the employ-

AP(1)&Sch=228&S=228&RevNo=1.01&C=A&Z=R [hereinafter MSBA, *Prohibition*].

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. G.G. *ex rel.* *Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 750 (E.D. Va. 2015), *rev'd in part, vacated in part*, 822 F.3d 709 (4th Cir. 2016), *mandate recalled, stay granted*, 136 S. Ct. 2442 (2016) (mem.).

100. *Id.* at 751.

101. *Id.* at 752.

102. *Id.*

er if other employees find their rights to privacy violated.¹⁰³ Additionally, in 2011, the Third Circuit held that bodily exposure meets the lofty constitutional standard and constitutes a violation of one's reasonable expectation of privacy.¹⁰⁴ According to scholars, such motivation – the right to privacy and the avoidance of civil liability – constitutes a legitimate, nondiscriminatory reason for requiring transgender individuals to use facilities based on biological sex.¹⁰⁵ Other courts have echoed these privacy concerns.¹⁰⁶

Missouri has strong protections to ensure the rights to privacy and religious liberty for its citizens.¹⁰⁷ The Missouri Religious Freedom Restoration Act (“MRFRA”) has provided a platform to argue transgender students should not have access to the restroom of their gender identity because it could infringe on other students' religious rights.¹⁰⁸ Some religious students do not want to see the anatomy of the opposite sex for fear it would violate their religious beliefs.¹⁰⁹ The act specifically prohibits substantially burdening a person's exercise of religion.¹¹⁰

In Springfield, Missouri, residents expressed privacy and safety concerns when discussing the possibility of allowing transgender individuals to use restrooms based on gender identity in public places.¹¹¹ One resident remarked, “[W]omen are frightened when they are in areas where they expect privacy and see someone who looks like a man. Mothers expect the same privacy for their young daughters.”¹¹² Opponents of allowing transgender students to use restrooms based on gender identity used both religious free-

103. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007).

104. *Doe v. Luzerne Cty.*, 660 F.3d 169, 177 (3d Cir. 2011).

105. See *Etsitty*, 502 F.3d at 1224.

106. See *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (finding that differences in anatomy require separate facilities for each gender); *Rosario v. United States*, 538 F. Supp. 2d 480, 497–98 (D.P.R. 2008) (holding a reasonable expectation of privacy exists in a locker room); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981) (“[M]ost people . . . have a special sense of privacy in their own genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.”); *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (“[T]he constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex.”).

107. See Missouri Religious Freedom Restoration Act, MO. ANN. STAT. § 1.302 (West 2016).

108. Stephen Herzog, *Campaigns Heat Up over Gay Rights, 'Bathroom Policy'*, SPRINGFIELD NEWS-LEADER (Mar. 3, 2015, 8:53 AM), <http://www.news-leader.com/story/news/local/ozarks/2015/03/02/sogi-campaigns-heat-group-wants-vote-bathroom-privacy/24288833/>.

109. *Id.*

110. § 1.302.

111. Steve Pokin, *Pokin Around: Gender Identity and the Bathroom Debate*, SPRINGFIELD NEWS-LEADER (Apr. 19, 2015, 1:09 PM), <http://www.news-leader.com/story/news/local/ozarks/2015/03/11/pokin-around-gender-identity-bathroom-debate/24747775/>.

112. *Id.*

dom and privacy arguments to fight against gender identity anti-discrimination laws.¹¹³ Whether or not the MRFRA-based argument would hold up in court remains to be seen.

III. RECENT DEVELOPMENTS

In Missouri, there have been many different movements concerning transgender individuals' ability to access restrooms. Part A of this section examines one school protest surrounding an incident where a transgender student used a restroom based on her gender identity;¹¹⁴ Part B discusses a Missouri school's policy requiring the division of restrooms by gender-identity; and Part C delves into Missouri's new legislation aiming to restrict the access of transgender individuals at large, and in the classroom, from using restrooms based on gender identity. Each of the following recent developments is integral for understanding the current climate for transgender rights in Missouri.

A. Hillsboro High School Restroom Protests

The controversy in Missouri surrounding transgender students in K-12 education gained national attention at the opening of the 2015 school year.¹¹⁵ When classes began, seventeen-year-old transgender female Lila Perry started to use the girls' locker room to change for gym class, even though the school offered a unisex restroom for her to change clothes.¹¹⁶ Though Perry intended to have sex reassignment surgery in the future, she still had the anatomy of a male.¹¹⁷ Although Perry began feeling like a girl at age thirteen, it was not until 2015 that she started to dress as one, coming to school in makeup, skirts, and a long wig.¹¹⁸ After Perry refused to use the unisex restroom to change, a group of parents presented the issue to the Hillsboro School Board on August 27, 2015.¹¹⁹

113. *Id.*

114. Grinberg, *Bathroom Access*, *supra* note 10.

115. *Id.*

116. *Id.*

117. Char Adams, *Transgender Teen on the Protests Against Her Using the Girls' Bathroom: 'This Is More About Hate than It Is Anything Else'*, PEOPLE (Sept. 3, 2015, 1:45 AM), <http://www.people.com/article/lila-perry-transgender-hate-high-school-protest>. Most doctors first start treating children with hormones or hormone suppression before performing surgery. Anermona Hartocollis, *How Young is Too Young to Seek Gender Reassignment?*, N.Y. TIMES, HERALD-TRIBUNE (July 7, 2015), <http://health.heraldtribune.com/2015/07/07/how-young-is-too-young-to-seek-gender-reassignment/>. Because children are still developing, gender-reassignment surgery is often very difficult for them, and doctors want to wait until they have fully developed to perform such evasive surgery. *Id.*

118. Grinberg, *Bathroom Access*, *supra* note 10.

119. Adams, *supra* note 117.

Subsequently, the school board declined to act, resulting in a group of students staging a walkout shortly thereafter.¹²⁰ Girls at the school reportedly felt uncomfortable with the idea they would be changing in the locker room with an individual who still had male anatomy.¹²¹ The next week, Perry and her friends had a rally addressing the issues surrounding the circumstances, and Perry “thanked her classmates for bringing attention to her story and giving her a platform.”¹²²

The events at Hillsboro were met with backlash. Derrick Good, an attorney and father to two daughters in the district, drafted a “student physical privacy policy,” requiring transgender students to “use either facilities based on their biological sex or other gender-neutral facilities.”¹²³ Additionally, following the protests, the Alliance Defending Freedom¹²⁴ drafted a letter to the district, explaining that no law requires public schools to allow transgender students to use the restroom that aligns with their gender identity.¹²⁵ Doing so, the Alliance Defending Freedom letter argued, could violate the privacy rights of other students.¹²⁶ Perry indicated she was aware of other younger transgender students in the district and asked the district to support her fellow transgender peers throughout their K-12 education.¹²⁷ These circumstances demonstrate the need for further direction on this issue to protect both students and districts.

B. School Boards Adopt Anti-Discrimination Policy for Transgender Students

Unlike Hillsboro, the Columbia Public School District proceeded to adopt a policy specifically protecting transgender students in light of the state legislature’s inaction on the issue. In September 2015, the Columbia Public School District, which at the end of the 2015-16 school year educated eight transgender students, unanimously approved the addition of gender identity

120. Grinberg, *Bathroom Access*, *supra* note 10.

121. *Id.*

122. *Id.*

123. Karen Workman, *Missouri Teenagers Protest a Transgender Student’s Use of the Girls’ Bathroom*, N.Y. TIMES (Sept. 1, 2015), <http://www.nytimes.com/2015/09/02/us/teenagers-protest-a-transgender-students-use-of-the-girls-bathroom.html>.

124. The Alliance Defending Freedom is an organization that advocates for individuals to freely live out their faith. *Who We Are*, ALLIANCE DEFENDING FREEDOM, <http://www.adflegal.org/about-us>.

125. Matt Sharp, *Missouri School’s Decision to Open Restrooms to the Opposite Sex Jeopardizes Students’ Privacy*, ALLIANCE DEFENDING FREEDOM (Aug. 25, 2015), <http://www.adfmedia.org/News/PRDetail/9739>; *see also Student Physical Privacy Policy*, ALLIANCE DEFENDING FREEDOM, <http://www.adfmedia.org/files/StudentPhysicalPrivacyPolicy.pdf>.

126. Sharp, *supra* note 125.

127. Workman, *supra* note 123.

and gender expression to the district's anti-discrimination policy, which was first submitted to the board in May 2015.¹²⁸ The policy's mission is to help transgender students feel comfortable and safe at school.¹²⁹ Adding this provision of the anti-discrimination policy allows transgender students to use restrooms based on gender identity.¹³⁰ During a Columbia School Board meeting, seven individuals supported the policy, while four individuals opposed the change.¹³¹ One Columbia resident, in opposition, asserted that one group of students was being placed above the others.¹³² One student commented that even though he still uses a gender-neutral restroom, the policy was a huge step forward for transgender students in the Columbia Public School District.¹³³

Following the adoption of Columbia's policy, the Missouri State Teachers Association determined that school districts should adopt a policy on gender expression and identity.¹³⁴ However, the association did not indicate what that policy should be.¹³⁵ Further, because the association can only issue recommended guidance on the issue, any policy it chooses to adopt would not bind school districts.¹³⁶ This still leaves different school districts across the state with different policies on the issue and does not solve the issue of each school district worrying about liability based on its non-conformance with standards a judge or jury imposes during litigation.

C. "Restroom Bills" in Missouri

Missouri legislators recently introduced two pieces of legislation that would restrict public restroom access to biological gender. In 2015, Missouri was one of five states with pending legislation limiting such access.¹³⁷

128. *Columbia Public Schools Adopt Gender Identity Protections*, NEWS TRIBUNE (Sept. 15, 2015), <http://www.newstribune.com/news/2015/sep/15/columbia-public-schools-adopt-gender-identity-prot/>.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* The student also noted that he had used a gender-neutral restroom or no restroom at all, which has led to some health issues. *Id.*

134. Jenna Middaugh, *Teaching Conference Discusses Transgender and Breastfeeding Policies*, KOMU 8 (Nov. 13, 2015, 3:41 PM), <http://www.komu.com/news/teaching-conference-discusses-transgender-and-breastfeeding-policies/>.

135. *Id.*

136. *Id.*

137. *Wave of Anti-LGBT Bills in 2015 State Legislative Sessions*, HUM. RTS. CAMPAIGN 3, http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/2015_StateLegislation-Documents_3_23.pdf (last visited June 26, 2016). The other states include Florida, Kentucky, Texas, and Wisconsin. *Id.* See also Molly Beck, *GOP Lawmakers Seek Gender Restrictions on*

Representative Pogue's House Bill 1338 would require "[a]ll public restrooms, other than single occupancy public restrooms, [to] be designated as gender-divided restrooms. Any single occupancy public restroom may be designated as a unisex restroom."¹³⁸ The bill would restrict transgender individuals from using restrooms based on gender identity, including in schools.¹³⁹ House Bill 1339 would restrict appropriation or expenditure of state revenues for "any project, program, or policy that creates or attempts to create a gender-neutral environment in a previously gender-divided environment" unless mandated by federal or state court.¹⁴⁰ Neither bill gained any traction.¹⁴¹ They were referred to committee but never even heard.¹⁴² The 2016 legislative session is now over. If a bill like either of these ever passes, schools would have explicit direction regarding the ability of transgender students to use the facility they choose – unfortunately this direction tilts in favor of only biological gender restroom use.

IV. DISCUSSION

Schools need legal guidance regarding the access to restrooms and locker rooms for transgender individuals to ensure not only student protection from discrimination and harassment, but also school districts' protection from legal liability. One school superintendent pleaded for guidance: "A law from the state that directs districts about what must be done without discriminating or harassing certain students would be welcomed by our students and staff."¹⁴³ Missouri, a state without a statute on the issue, leaves school districts attempting to interpret the law, which ultimately results in confusion and differing outcomes for school districts across the state. To ensure all students are treated similarly and to ensure schools' protection from legal disputes, a state statute is desperately needed. However, regardless of what the best policy may be, the only policy Missouri will likely adopt is one in

School Bathrooms, Locker Rooms, WIS. ST. J. (Oct. 8, 2015), http://host.madison.com/wsj/news/local/govt-and-politics/gop-lawmakers-seek-gender-restrictions-on-school-bathrooms-locker-rooms/article_8508e56b-544f-542a-ac3c-30ba702a8faa.html.

138. H.B. 1338, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015).

139. Colin Lovett, *Missouri Lawmaker Files Two 'Bathroom' Bills Targeting Transgender Community*, BOOM MAG. (Mar. 16, 2015), <http://www.lgbtqnation.com/2015/03/missouri-lawmaker-files-two-bathroom-bills-targeting-transgender-community/>.

140. H.B. 1339, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015).

141. H.B. 1338, MO. H.R., <http://www.house.mo.gov/billsummary.aspx?bill=HB1338&year=2015&code=R> (last visited Sept. 20, 2015); H.B. 1339, MO. H.R., <http://www.house.mo.gov/billsummary.aspx?bill=HB1339&year=2015&code=R> (last visited June 4, 2016).

142. H.B. 1338, *supra* note 141; H.B. 1339, *supra* note 141.

143. Beck, *supra* note 137.

favor of protecting privacy rights of non-transgender students because of the state's conservative propensities. This Part will discuss (A) the need for developing a law, (B) what the law in Missouri should be, and (C) the probability of such a law being implemented.

A. Statutory Guidance Is Necessary

Currently, the MSHSAA policy and MSBA administrative procedure provide the only statewide guidance to school districts as they determine the accessibility of restrooms according to gender identity.¹⁴⁴ MSHSAA's policy has yet to be challenged¹⁴⁵ and does not identify what locker room or restroom a transgender athlete is to use.¹⁴⁶ MSBA, however, does provide minimal guidance for school districts relating to transgender restroom rights but does so in a non-controversial way.

Under the vague MSBA policy, schools are left with much room for interpretation, as the policy provides that students be allowed to use the restroom based on gender identity "whenever possible or practicable."¹⁴⁷ According to this, schools could argue that "whenever possible or practicable" *never exists* because the other students' privacy rights are being violated whenever transgender students are allowed to use restrooms based on gender identity.¹⁴⁸ This type of guidance is too broad and equivocal for schools to develop a clear understanding. Because MSBA provides only rough guidelines, and MSHHA provides no guidelines for school administrators regarding which restrooms transgender students have access to, they do not impose a specific standard for districts to follow.

Evidently, even the vague guidance is not followed closely, as demonstrated in the Hillsboro case, where the school district lacked an explicit policy regarding the treatment of transgender students.¹⁴⁹ The Hillsboro controversy, contrasted with the Columbia Public School District's policy, reflects the need for a unified state law on the issue of transgender students' restroom rights. These districts are clear examples of how Missouri school districts have conflicting policies (or no policies at all) on the issue of transgender students in schools. Having a policy is important because it helps provide the foundation for a safe and supportive environment in schools by creating ex-

144. *See supra* Part III.

145. Interview with Kerwin Urhahn, Executive Director, Missouri State High School Activities Association, in Columbia, Mo. (Sept. 3, 2015).

146. *Id.*

147. MSBA, *Prohibition*, *supra* note 92.

148. *Id.*

149. Dan Greenwald, *Parents Demand Changes in Policy Regarding Transgender Student in Hillsboro*, KMOV-4 (Sept. 3, 2015, 11:27 PM), <http://www.kmov.com/story/29957448/parents-demand-changes-in-policy-regarding-transgender-student-in-hillsboro>.

pectations for everyone.¹⁵⁰ School policies must comply with state laws, or else face sanctions,¹⁵¹ so it is imperative the legislature enacts laws on the issue so schools may develop consistent policies that ensure a safe and supportive environment for students.

Developing a statute at the state level would also better protect school districts from liability. Instead of students challenging the individual policies of each school district, students would be able to challenge a statute at the state level. This would also lead to uniformity across Missouri on these issues. A uniform standard on transgender restroom policy would ensure students throughout the state are being treated equally. Missouri needs to implement a law that helps guide school districts so that students and schools are protected and can achieve the goal of the public education system: educating students in a safe environment.

B. The Statute to Be Implemented

The best way to require school districts to create policies allowing transgender students to use facilities based on gender identity is to enact a law at the state level.¹⁵² In determining what type of statute should be implemented, one must balance the needs of the transgender students with the privacy interest of the other students and parents. Ultimately, the most effective way to ensure transgender students are treated equally is to enact a statute allowing access to facilities based on gender identity.

In order to appreciate the statute to be instituted, the role of the public education system must be understood. Public education provides two main goals. First, the education system illuminates student achievement through quantifiable achievement standards.¹⁵³ Second, the public education system is designed to help foster students in relation to community involvement, development, and citizenship.¹⁵⁴ In regard to the second goal, schools must focus on “citizenship, social responsibility, and cooperative behavior.”¹⁵⁵

In *McCullum v. Board of Education*, Judge Frankfurter averred that public schools are “[d]esigned to serve as perhaps the most powerful agency for

150. *Element 3: Policies and Procedures*, SAFE SCHS. TOOLKIT, <http://www.education.nt.gov.au/teachers-educators/students-learning/safe-schools-nt/element-3-policies-and-procedures> (last visited June 4, 2016) (website funded by Austl. Gov’t Dep’t of Educ. & Training).

151. *Prevent Bullying, Set Policies & Rules*, <http://www.stopbullying.gov/prevention/at-school/rules/> (last visited June 4, 2016).

152. *Id.*

153. Patrick McGreevy, *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1726 (2014).

154. *Id.*

155. Richard Rothstein & Rebecca Jacobsen, *The Goals of Education*, 88 PHI DELTA KAPPAN 264, 265 (2006).

promoting cohesion among a heterogeneous democratic people.”¹⁵⁶ The two goals of education would be best served by a policy in favor of transgender students; transgender students will be better equipped to integrate themselves into the school community if they are able to fully express themselves. Such a policy would also promote inclusion. Inclusion and acceptance thereby would result in transgender students performing better in schools, raising quantifiable standards. It is evident the two goals of the public education system are interrelated when discussing transgender students; quantifiable achievement of those students is lacking because of exclusion felt in school.

Currently, transgender students are highly discriminated against in schools, leading to their underperformance in the academic setting. According to a report from the National Center for Transgender Equality and the National Gay and Lesbian Task Force,¹⁵⁷ transgender students are one of the most discriminated-against classes in America. Of the participants in the survey, transgender respondents in grades K-12 experienced 78% of all harassment, 35% of physical assaults, and 12% of sexual violence occurrences.¹⁵⁸ A report by the Gay, Lesbian, and Straight Education Network revealed similar results.¹⁵⁹ Transgender students suffer from a high level of victimization,¹⁶⁰ with a report finding that 87% of transgender students had been verbally harassed based on their gender expression,¹⁶¹ 53% of transgender students had been physically harassed based on their gender expression,¹⁶² and 26% had been physically assaulted based on their gender expression.¹⁶³

Because of the discrimination suffered by transgender students in schools, there have been adverse repercussions surrounding their educational experience. Compared with their non-transgender counterparts, transgender students have more absences, fewer educational aspirations, and poorer academic performance.¹⁶⁴ The Gay, Lesbian, and Straight Education Network report found 56% of transgender students who missed school did so out of fear for their safety while in school.¹⁶⁵ Transgender students likewise had

156. *McCullum v. Bd. of Educ.*, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring).

157. JAMIE M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

158. *Id.* at 3.

159. EMILY A. GREYTAK ET AL., *GAY, LESBIAN AND STRAIGHT EDUC. NETWORK, HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS* (2009), <http://www.glsen.org/sites/default/files/Harsh%20Realities.pdf>.

160. *Id.* at xi.

161. *Id.* at 18. Verbal harassment includes being named called or threatened. *Id.*

162. *Id.* Physical harassment is characterized as being pushed or shoved. *Id.*

163. *Id.* at 19. Physical assault includes being punched, kicked, or injured with a weapon. *Id.* at 18.

164. *Id.* at 44.

165. *Id.* at xii.

significantly lower grade point averages than those who experienced lower levels of harassment.¹⁶⁶ An environment of inclusion would benefit transgender students in lowering discrimination felt in schools, leading to increased outcomes and quantifiable achievement.¹⁶⁷

Many scholars consider restrooms the key to unlocking gender identity inclusion in schools.¹⁶⁸ Living and going to school as their gender identity is essential for the psychological well-being and academic success of transgender students.¹⁶⁹ Fear of being denied access to the facility of the gender-identified student is so stressful that they avoid using the restroom altogether, causing physical and emotional pain that hinders their ability to perform well in school.¹⁷⁰ Further, forcing students to use restrooms based on biological gender or separate restrooms sends a clear message to other students: the transgender student is “different” or “other” than they.¹⁷¹ Classifying these students as “others” creates a stigma and communicates to the students’ peers that transgender students are not normal.¹⁷² This perpetuates the already-present schoolyard biases and promotes bullying behavior.¹⁷³ Allowing transgender students access to facilities based on gender identity acknowledges they belong to the category of their choosing, male or female.¹⁷⁴

166. *Id.* The study found that harassment based on gender expression led to an average GPA of 2.2, while other students who had a lower harassment level had an average GPA of 3.0. *Id.*

167. *See id.* at 33.

168. *See* Brief for Me. Chapter of the Am. Acad. of Pediatrics et al. as Amici Curiae Supporting Appellants at 19–23, *Doe v. Clenchy*, 86 A.3d 600 (Me. 2013) (No. PEN-12-582), 2013 WL 8349676, at *19–23 [hereinafter *Clenchy Amicus*].

169. Laura Edwards-Leeper & Norman P. Spack, *Psychological Evaluation and Medical Treatment of Transgender Youth in an Interdisciplinary ‘Gender Management Service’ (GeMS) in a Major Pediatric Center*, 59 J. HOMOSEXUALITY 331, 330 (2012).

170. *See, e.g., Clenchy Amicus, supra* note 168, at 19–20 (“Singling out a transgender girl and requiring her to use a separate bathroom – not because of any misconduct or misbehavior, but solely because she has a medical condition that carries a social stigma – disrupts her ability to develop normal peer relationships, marginalizes and isolates her, and exposes her to rejection and discrimination. These are serious harms that prevent a child from feeling safe and from having equal opportunities to learn and to participate at school. They are also likely to have a lasting negative impact on an individual’s long term health and well being and the quality of her adult life.”).

171. *Id.* at 21–22.

172. *Id.*

173. Elkind, *supra* note 35, at 897–98.

174. Weatherby, *supra* note 44, at 121.

However, the transgender restroom rights' debate is not one-sided. The court system has a strong interest in protecting the privacy of all students.¹⁷⁵ Under federal and Missouri law, the rights to privacy and personal autonomy are reviewed on a case-by-case basis,¹⁷⁶ and the scope of the right is ever-changing depending on current public opinion.¹⁷⁷

In relation to transgender restroom rights in Missouri, the right to privacy has been invoked frequently. The right to privacy was the key aspect of the new policy submitted to the board at Hillsboro High School, and Missourians have long held strong convictions regarding the protection of that privacy.¹⁷⁸ Some opponents argue that allowing transgender students to use the restroom of their gender identity violates the privacy of other students, since students are perceived to be most vulnerable throughout K-12 education.¹⁷⁹ The privacy argument stems from concerns that transgender-friendly restroom policies will lead to increased sexual assaults or situations where cisgender students take advantage of the policies to access the other gender's restroom.¹⁸⁰

Yet fears of sexual assault or cisgender students going into the wrong restroom as a result of allowing transgender students to use facilities based on gender identity have yet to be borne out in public schools.¹⁸¹ *Media Matters*

175. See generally Carl E. Schneider, *State Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS. 79 (1988).

176. *O'Connor v. Ortega*, 480 U.S. 709, 710 (1987).

177. Schneider, *supra* note 175, at 107.

178. Kate Scanlon, *Does This School's Transgender Bathroom Policy Violate Student Privacy?*, DAILY SIGNAL (Aug. 27, 2015), <http://dailysignal.com/2015/08/27/does-this-schools-transgender-bathroom-policy-violate-student-privacy/>.

179. These concerns were raised in California, as well; in opposition to California's bill allowing transgender students access to restrooms based on gender identity, Assemblyman Tim Donnelly stated the bill was a "grotesque[]" violation of other students' privacy. Chris Megerian, *Conservatives Target Law on Transgender Students*, L.A. TIMES (Aug. 16, 2013, 4:40 PM) <http://www.latimes.com/local/political/la-me-pc-california-transgender-students-20130816-story.html>. Furthermore, he asserted that should the bill pass, "[t]he right to privacy enjoyed by every student will be replaced by the right to be ogled." Assemblyman Tim Donnelly, *California Schemin': Transgender Restroom Law Humiliates the 98%*, WORLDNETDAILY (Aug. 15, 2013, 8:08 PM), <http://www.wnd.com/2013/08/transgender-restroom-law-humiliates-the-98/>.

180. See, e.g., *Doe v. Clenchy*, No. CV-09-201, slip op. at 4–6 (Me. Super. Ct. Nov. 20, 2012) (describing a cisgender male student who followed a transgender female student into the girls' bathroom).

181. There have been incidences in Canada surrounding misuse of gender identity bathroom policies. Dan Joseph, *University Closes Transgender Bathrooms After Peeping Incident*, MRC TV (Oct. 9, 2015, 12:01 PM), <http://www.mrcvtv.org/blog/university-dumps-transgender-bathrooms-after-peeping-incidents#.okj1mx3:T2Nb>. The University of Toronto shut down their gender neutral

recently studied the largest school districts in twelve states currently allowing students the use of restrooms in accordance with gender identity.¹⁸² Looking at every district in the study, there were zero reports of inappropriate behavior.¹⁸³ The Columbia Public School District has yet to report any problems associated with sexual assault or inappropriate behavior since implementing its new policy.¹⁸⁴ Additionally, to argue that an increased risk of sexual assault would occur with transgender students using facilities based on gender identity undermines society's understanding of equality.¹⁸⁵ Such an argument would also insinuate homosexuals should not be permitted to use restrooms based on biological gender for fear sexual assault would occur.

A final concern is that school-aged children, in light of their naiveté, may be unable to genuinely understand heterogeneous gender-identifications. The argument is that allowing transgender students to use restrooms associated with gender identity equates to "school-age children using their fluctuating feelings to dominate and even extinguish the voices of others through lawsuits and school policies."¹⁸⁶ Theoretically, if transgender students are allowed to use the facilities of their claimed gender identity and later decide to revert back to their biological gender after having been in the restroom with other cisgender students, this will result in an infringement of other students'

bathrooms after two male students were caught filming women while they showered. *Id.*

182. Rachel Percelay, *17 School Districts Debunk Right-Wing Lies About Protections for Transgender Students*, MEDIA MATTERS FOR AM., (June 3, 2015), <http://mediamatters.org/research/2015/06/03/17-school-districts-debunk-right-wing-lies-abou/203867>.

183. In California, six school districts that had implemented the policy reported no instances of inappropriate behavior by allowing transgender students to use the restroom of their gender identity. Two Colorado school districts also reported no instances of inappropriate bathroom behavior. *Id.* Colorado has had its policy allowing transgender students to choose the restroom they use since 2008. *Id.* The largest districts in the states of Illinois, Connecticut, Iowa, Maine, Massachusetts, Minnesota, New Jersey, Oregon, Washington, and Vermont all reported to have no instances of inappropriate behavior, bullying, or harassment resulting from allowing transgender students to use the facilities of their gender identity. *Id.*

184. See Associated Press, *Columbia Public Schools Adopt Gender-Identity Protections*, CBS ST. LOUIS, (Sept. 15, 2015, 4:08 PM), <http://stlouis.cbslocal.com/2015/09/15/columbia-public-schools-adopt-gender-identity-protections/>.

185. Many argue that there are cases where a cisgender disguises him or herself as the opposite sex to commit a violent crime or to spy on the individual. While these circumstances may exist, criminal laws are in place to redress those situations. See generally I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1 (2008).

186. Nicole Russell, *Don't Put My Five-Year-Old Girl in a Bathroom with a Transgender Boy*, FEDERALIST (July 24, 2015), <http://thefederalist.com/2015/07/24/transgender-bathroom-my-daughter/>.

privacy rights.¹⁸⁷ This concern, however, has yet to be corroborated. But in order to ensure individuals do not take advantage of such a policy, Missouri's statute should be limited in application to transgender students who are *consistently* and *exclusively* identifying as the opposite sex.¹⁸⁸

Overall, restroom access based on gender identity should be implemented with tightly worded language to ensure students do not abuse restroom access freedom. Such a policy would better enable transgender students to reap the benefits of education and cause them to be less stigmatized and endangered. Additionally, having a policy created by the legislature would shift the responsibility of balancing these students' rights from the individual school districts to the Missouri General Assembly. Nonetheless, even if norms are moving toward acceptance and nondiscrimination for transgender students' access to facilities, getting the Missouri General Assembly to enact such policies might be difficult.

C. Missouri's Conservative Politics Make It Unlikely the Legislature Will Adopt a Policy in Favor of Transgender Students

Even though the best policy in pursuit of the goals of education – inclusion and acceptance – is allowing transgender students access to facilities based upon their gender identity, Missouri's conservative legislature is unlikely to yield such a policy in the upcoming years.¹⁸⁹ The disposition of Missouri, especially in relation to the LGBTQ¹⁹⁰ community, is best reflected in the events surrounding the Missouri Nondiscrimination Act (“MONA”).¹⁹¹ MONA was an attempt to include sexual orientation and gender identity in

187. Reverting back to a student's biological gender after he or she identifies as transgender has been a valid concern in regards to California's statute. Under the statute, students are able to switch back and forth between the use of the boys' and girls' bathrooms based on how they feel on any given day. Mario Vasquez, *Youth Leader Clarifies AB 1266 for Readers*, ANTELOPE VALLEY TIMES (Sept. 27, 2013), <http://theavtimes.com/2013/09/27/youth-leader-clarifies-ab-1266-for-readers/>. The vague language of AB 1266 is broad enough to encompass students who look and dress as one sex but internally may identify as another. CAL. EDUC. CODE § 221.5(f) (West 2016) (“A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender-identity, irrespective of the gender listed on the pupil's records.”).

188. This Note does not delve into the meaning behind consistently and exclusively.

189. Political pundits describe Missouri as increasingly conservative. Mike Ferguson, *Are Gay Rights Gaining Ground in Missouri*, MO. VIEWPOINTS WITH MIKE FERGUSON, <http://missouriviewpoints.com/are-gay-rights-gaining-ground-in-missouri/> (last visited June 26, 2016).

190. LGBTQ stands for lesbian, gay, bisexual, transgender, and questioning. *See, e.g., LGBT Terms and Definitions*, U. MICH. STUDENT LIFE, <https://internationalspectrum.umich.edu/life/definitions> (last visited June 5, 2016).

191. H.B. 615, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013).

the protected categories associated with employment, housing, and public accommodations.¹⁹² The bill was first submitted in 2013 and has yet to be passed.¹⁹³ Without this bill, public and private companies in Missouri have the legal right to discriminate against transgender individuals based solely on their gender-identification.¹⁹⁴

Popular support for Missouri's "restroom bills" introduced into the House prohibiting transgender individuals from using restrooms in association with gender-identification¹⁹⁵ further reveals the conservative propensities of Missouri's citizenry. This social conservatism was further reflected in Springfield, Missouri, when the city repealed the gender identity anti-discrimination law.¹⁹⁶ The arguments used in favor of MONA, the restroom bills, and for repealing the gender identity anti-discrimination law have all been echoed in the school setting.¹⁹⁷

When MONA was first introduced, bill antagonist and then-Speaker of the House, Tim Jones, stated he was "not in favor of creating more protected classes and encouraging more litigation on our Missouri employers and job creators."¹⁹⁸ The Missouri Chamber of Commerce likewise opposed the bill for the same reasons.¹⁹⁹ Considering these events, it is unlikely the Missouri General Assembly will pass a bill regarding equal access to restrooms based on gender identity for transgender students in the near future. Whether it is because of students' privacy rights or fear of backlash from constituents, Missouri's General Assembly would likely be reluctant to pass such a bill, even if introduced.

Though inclusion success stories like Landon Patterson, the 17-year-old transgender student from Kansas City, have emerged in the recent years, the Missouri General Assembly is still unlikely to create a law allowing transgender students the right to access facilities based on gender identity due to the conservative nature of legislators' constituents. Even if the legislature is unwilling to pass a law that favors such access, a law in either direction needs to be implemented so districts can effectuate uniform policies focusing on educating students and not worrying about legal liability. Furthermore, a state statute denying access based on gender identity could more easily be

192. Ferguson, *supra* note 189.

193. *Id.*

194. *Id.*

195. H.B. 1338, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015); H.B. 1339, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015).

196. Pokin, *supra* note 111.

197. Grinberg, *Bathroom Access*, *supra* note 10.

198. Robyn Montague, *State Non-Discrimination Efforts In Missouri*, HUFFINGTON POST: QUEER VOICES (Apr. 2, 2013, 4:54 PM), http://www.huffingtonpost.com/robyn-carolyn-montague/state-nondiscrimination-e_b_2995802.html.

199. *Keaveny is Optimistic that the Missouri Nondiscrimination Act Will Pass*, MO. TIMES (Jan. 13, 2015), <http://themissouritimes.com/15867/keaveny-optimistic-missouri-nondiscrimination-act-will-pass/>.

challenged than the hodgepodge of district policies because of the uniformity created throughout districts by such a law. Thus, many would disapprove of the Missouri General Assembly for failing to adopt the best policy and neglecting to help the underequipped and isolated school districts.

V. CONCLUSION

The education system is an arena where viewpoints are fostered, critical thinking is encouraged, and ideas become realities. Individuals from all walks of life are brought together in an environment where the expectation is to grow, develop, and learn. Since students spend seven to eight hours a day, five days a week, nine months out of a year in these institutions, it is imperative that legislatures, courts, and school districts come together to create the environment needed to encourage this growth. School systems are, in essence, the training ground for the generations to come. As such, school districts must cultivate environments that support diversity and encourage acceptance. Currently, transgender students are underperforming in schools, which appears to be directly related to the isolation, anxiety, and exclusion these students suffer from not being able to use the restroom of their gender identity. Allowing transgender students access to these facilities would promote an environment of inclusion and citizenship. The legal and logistical concerns school districts are facing would be best resolved by a law from the Missouri General Assembly allowing transgender students access to restrooms of their gender-identification.

For now, Missouri remains a state where the law is insufficient to guide school districts, leaving those districts incapable of protecting all youth and including both transgender and non-transgender students, during the most formative period of their lives. The lack of a definitive law protecting transgender students subjects schools to liability and renders schools unable to predict or prepare for future litigation. Although Missouri's conservative legislature is unlikely to pass such a law in the near future, that does not negate the fact students who consistently and exclusively identify as transgender should be able to use the restroom of their choice. This lack of help from the legislature ultimately causes stress for school districts. Of even greater importance, it does not protect our state's most valuable asset – its students.