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OUT IN PUBLIC: LEGAL AND POLICY BENEFITS OF OPEN, COOPERATIVE K-12 TRANSGENDER POLICY DEVELOPMENT

*Erin Cranor**

INTRODUCTION

In May 2018, a four-year journey came to an end. Gavin Grimm's lawsuit against the Gloucester County School Board had traveled from district court, by way of the United States Court of Appeals for the Fourth Circuit, to the Supreme Court of the United States, and back again.¹ The journey began in 2014, in the fall of Gavin's sophomore year, when Gavin and his mother told educators at Gavin's high school about his male gender identity, and the school decided to provide Gavin access to boys' restrooms.² The school board later overruled the school's decision with a written policy that said, "the use of [male and female restroom and locker room facilities] shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility."³ Gavin and his mother took the matter to court in July, 2015.⁴

Gavin's case was complicated by a guidance letter issued in May, 2016 by the United States Department of Education Office of Civil Rights and the United States Department of

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1. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 738 (E.D. Va. 2018).

2. *Id.* at 736-37.

3. *Id.* at 737-38.

4. *Id.* at 738.

Justice Civil Rights Division.⁵ The letter, hereinafter, “Title IX Guidance,” stated that the Title IX prohibition against sex discrimination in federally funded education programs “encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.”⁶ The Title IX Guidance was enjoined later that year by a federal judge in Texas as an ungrounded redefinition of the word “sex” in the statute,⁷ then withdrawn by the new administration in February, 2017.⁸ By that time, Gavin’s case had been granted certiorari by the Supreme Court of the United States, but “in light of” the February letter, the Court remanded Gavin’s case that March.⁹ In 2018, a year after Gavin graduated from high school, a federal district court gave a detailed answer to questions about schools’ interest in preventing discrimination against transgender students and ruled that Gavin had pled plausible Title IX and Equal Protection claims of sex discrimination.¹⁰

Parts of that detailed answer are already back in question. While non-transgender¹¹ students lost their petition in

5. Dear Colleague Letter on Transgender Students (withdrawn February 22, 2017), U.S. DEPT. OF JUSTICE CIVIL RIGHTS DIVISION AND U.S. DEPT. OF EDUCATION OFFICE FOR CIVIL RIGHTS (May 13, 2016), archived at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (last accessed 22 May 2019).

5. *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016).

6. Dear Colleague Letter, *supra* note 5.

7. *Texas*, 201 F. Supp. 3d 810.

8. Dear Colleague Letter II, U.S. DEPT. OF JUSTICE CIVIL RIGHTS DIVISION AND U.S. DEPT. OF EDUCATION OFFICE FOR CIVIL RIGHTS (February 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>

9. *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239, 1239 (2017).

10. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 747 (E.D. Va. 2018).

11. According to the GLAAD Media Reference Guide, cisgender, a term that uses cis-, an antonym of the Latin prefix trans-, “is used by some to describe people who are not transgender,” but “[a] more widely understood way to describe people who are not transgender is simply to say non-transgender people.” The GLAAD Media Reference Guide, at <https://www.glaad.org/reference/transgender>, is the preferred reference guide of the National Center for Transgender Equality. See, “Tips for Journalists,” National Center for Transgender Equality. <https://transequality.org/issues/resources/fact-sheet-writing-about-transgender-people-and-issues>. Accessed 18 December 2018. Additionally, The phrase gender non-conforming may be more accurate to many of this paper’s arguments and is often preferred because the term transgender may also connote concepts that are offensive to many gender non-conforming individuals but nonetheless are at times in use, such as: confused, transsexual, transvestite, cross-dresser, drag queen, homosexual, gender identity disorder, and gender dysphoria. However, the term transgender is more widely recognized as the topic of this paper, so both terms are used herein.

the Supreme Court in another K-12 transgender policy case,¹² the Court's October 2019 term will include the question: "Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping . . ." ¹³ In the lower courts, *Boyertown* plaintiffs argued that allowing transgender students to use bathrooms and locker rooms consistent with their gender identity violates petitioners' privacy rights and is based on distorted views of educational equal opportunity and the word, "sex" in Title IX.¹⁴

This story of answers and questions represents some of the uncertainty faced by transgender students, their families, and their school communities.¹⁵ First, the answers were so long in coming that before the matter was settled on remand to the district court, Gavin graduated from high school and had many other experiences in his adolescent and early adult life, including sustained public attention that most young people do not have to deal with. Second, the district court's answers, while definitive for Gavin and the Gloucester County School Board as to the sufficiency of Gavin's Title IX and Equal Protection claims, leave other questions unanswered for thousands of transgender students, families, and school communities.

Uncertainty and nascence are themes of the legal literature about K-12 transgender policy as well.¹⁶ Ryan T. Anderson

12. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018) (denial of Writ of Certiorari on May 28, 2019). See also, *Doe v. Boyertown Area School District*, SCOTUSBLOG.COM (last accessed June 24, 2019), <https://www.scotusblog.com/case-files/cases/doe-v-boyertown-area-school-district/>.

13. *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 884 F.3d 560 (6th Cir. 2018), cert. granted, 139 S. Ct. 1599 (April 22, 2019); see also, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, SCOTUSBLOG.COM (last accessed June 24, 2019), <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/>.

14. *Boyertown*, 897 F.3d 518.

15. See Mudasar Khan et al. eds., *Eighteenth Annual Review of Gender and the Law: Annual Review Article: Challenges Facing LGBTQ Youth*, 18 GEO. J. GENDER & L. 475, 491-97 (2017) (providing a collection of additional recent experiences of transgender students, as well as additional details about legal uncertainties faced by transgender students and their families and school communities).

16. E.g., Bradley Domangue, *Feature: Education Law: Transgender Issues in Public Schools*, 79 TEX. B. J. 626, 627 (2016) ("To say that the current status of law regarding transgender issues is unsettled is an understatement.").

asserts that the 2016 Title IX Guidance and other Executive Branch classifications of “gender identity” as “sex” disrupted a time in which “parents, teachers and local school districts could have conversations about how best to accommodate the dignity, privacy, and safety concerns of students who identify as transgender while also addressing the dignity, privacy, and safety concerns of other students” without much controversy and settle upon “nuanced solutions [that] addressed all involved and reflected their dignity, privacy and safety concerns.”¹⁷ But Gavin’s story does not appear to be an outlier. Harper Jean Tobin and Jennifer Levi had already documented ways in which the solutions Anderson references (separate bathrooms for transgender students rather than inclusion in gender-identity-aligned bathrooms) do not address transgender students’ concerns.¹⁸ Furthermore, Robin Fretwell Wilson had documented rampant controversy both before and after the Title IX Guidance was issued.¹⁹

In another example of the uncertainty faced by transgender students and their families and school communities, Ray D. Hacke details thirteen different types of high school transgender athletics policies among the fifty states.²⁰ In another example, Samuel D. Brunson and David J. Herzig discuss some colleges’ avoidance of transgender issues by not admitting transgender.²¹ Brunson and Herzig also explore potential Executive Branch actions that could bring faster change than legislative or judicial action to the way transgender individuals are treated.²² Amanda Harmon Cooley sets forth evidence that

17. Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 HARV J.L. & PUB. POL’Y 309, 311 (2018).

18. Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC’Y 301, 306 (2013).

19. Robin Fretwell Wilson, *Symposium: Law and Religion in an Increasingly Polarized America: The Nonsense About Bathrooms: How Purported Concerns Over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373, 1383–88 (2017).

20. Ray D. Hacke, *‘Girls will be Boys, and Boys will be Girls’: The Emergence of the Transgender Athlete and a Defensive Game Plan for High Schools that want to Keep their Playing Fields Level – for Athletes of Both Genders*, 18 TEX REV. ENT & SPORTS L. 131, 131–33 (2018).

21. Samuel D. Brunson & David J. Herzig, *A Diachronic Approach to Bob Jones: Religious Tax Exemptions After Obergefell*, 92 IND. L.J. 1175, 1216 (2017).

22. *Id.*

school environments remain particularly hostile to transgender students²³ even after years of awareness of detrimental effects on their well-being and educational opportunity, and even after years of availability of model policy and legislation that held promise of more equal educational opportunity for transgender students.²⁴

K-12 transgender policy's situation within what is left of the so-called "cultural war"²⁵ may help explain slow development of definitive case law and other sustained uncertainties across both time and jurisdiction. America's cultural divide may have first been named a war by former presidential candidate Pat Buchanan at a Republican National Convention in 1992 after losing in primary elections.²⁶ Buchanan's speech is useful for understanding some of the difficulty school communities face when they take on transgender policy, because the speech demonstrates animus that can hinder collective efforts toward balanced transgender policy. The speech opened with this analogy: "Like many of you last month, I watched that giant masquerade ball at Madison Square Garden [the Democratic National Convention] – where 20,000 radicals and liberals came dressed up as moderates and centrists in the greatest single exhibition of cross-dressing in American political history."²⁷ Animus against cross dressing is not always the same as

23. Amanda Harmon Cooley, *Against Shaming: Preserving Dignity, Decency, and a Moral-Educative Mission in American Schools*, 91 ST. JOHN'S L. REV. 793, 820 (2017) (referencing *Developments in the Law: Sexual Orientation & Gender Identity*, 127 HARV. L. REV. 1680, 1728 (2014)).

24. See *Developments in the Law: Sexual Orientation & Gender Identity*, 127 HARV. L. REV. 1680, 1692, 1734-36 (2014).

25. Paisley Currah, *Book Review: Transgender Rights Without a Theory of Gender?* Kimberly A Uracko, *Gender Nonconformity & the Law* (Yale University Press 2016), 52 TULSA L. REV. 441, 450-51 (2017) (alludes both to negative effects of the "cultural war" for transgender people and to the "political legibility that identity politics provides").

26. Patrick Joseph Buchanan, *Cultural war Speech: Address to the Republican National Convention*, VOICES OF DEMOCRACY: THE U.S. ORATORY PROJECT (August 17, 1992), <http://voicesofdemocracy.umd.edu/buchanan-culture-war-speech-speech-text/>. See also, Patrick Joseph Buchanan, *1992 Republican National Convention Speech*, PATRICK J. BUCHANAN – OFFICIAL WEBSITE (August 17, 1992), <http://buchanan.org/blog/1992-republican-national-convention-speech-148>.

27. *Id.*

animus against transgender individuals,²⁸ but animus against the “amoral idea” of marriage equality and “a militant leader of the homosexual rights movement” was unmistakable in that speech, which also referred to religious schools and prayer in schools before a central statement of the speech: “[T]his election is about much more than who gets what. It is about who we are. It is about what we believe. It is about what we stand for as Americans. There is a religious war going on in our country for the soul of America. It is a cultural war, as critical to the kind of nation we will one day be as was the Cold War itself.”²⁹ What remains of the divide today is different: a majority of Americans, including majorities of Catholics and mainline Protestants, favor same-sex marriage, with approval growing among other religious groups as well.³⁰ But on some fronts, K-12 education policy seems to be implicated in an all-or-nothing battle of identity politics.³¹

Even against that difficult backdrop, open, cooperative K-12 transgender policy development is worth the effort. Unlike litigation settings, in which discrete parties have been identified as adversaries, and which are very time-constrained, policy development offers communities the opportunity to come together and take time to prioritize interests, find common ground, resolve students’ uncertainty in the equality of their opportunity for education, and cultivate balance and good

28. Cross dressing and being transgender are not the same things. See, “Tips for Journalists,” *supra* note 11. However, even some recent legal literature speaks of being transgender as though it is a masquerade. See, e.g., L. Darnell Weeden, “Transgender Bathroom Rights and President Obama’s Unauthorized Scheme to Transform Title IX,” 44 W. St. U. L. Rev. 1, 1, Fall, 2016 (“AB 1266 allows a self-identified transgendered student to utilize sex-segregated toilets based on the student’s gender identity, regardless of the gender reality recorded on the student’s birth certificate.”); Anderson, *supra* note 16 at 315. (“Gender identity policies quickly become politically correct speech codes. This tendency becomes even more insidious in an educational setting, where gender identity policies quickly acquire an element of indoctrination. That is, they become part of a larger program promoting gender ideology. And they run the risk of prolonging gender dysphoria in students who otherwise would have naturally come to accept and embrace their bodies.”).

29. Buchanan, *supra* note 26.

30. David Masci, Anna Brown, & Jocelyn Kiley, *5 Facts About Same-Sex Marriage*, PEW RESEARCH CENTER FACT TANK (June 26, 2017), <http://www.pewresearch.org/fact-tank/2017/06/26/same-sex-marriage/>.

31. See, e.g., MARY RICE HASSON & THERESA FARNAN, GET OUT NOW: WHY YOU SHOULD PULL YOUR CHILD FROM PUBLIC SCHOOL BEFORE IT’S TOO LATE ix (2018).

faith. Paisley Currah captures one beautiful and possible turn of thought in the opening paragraph of a book review:

In a 1994 essay, Jack Halberstam famously declared that ‘We are all transsexuals. . . and there are no transsexuals.’ . . . ‘[T]rans’ people might make the shakiness of gender particularly visible, but gender uncertainty is visited upon us all. Gender is not so much a status but a lifelong project for everyone – living up to it, convincing others that we are doing it right, rejecting it, changing it, fixing it. We need, Halberstam said, ‘to rewrite the cultural fiction that divides sex from a transex, a gender from a transgender.’ . . . Are we referring to transgender as a particular type of person, collectively only a tiny proportion of the population, desperately in need of rights and respect? Or are we talking about the rights of everyone to live in and express their gender as they see fit? Who are transgender rights for? Who needs transgender rights?³²

This paper seeks to contribute to the conversation about K-12 transgender policy in a hopeful way, by identifying legal and policy benefits that become available to schools and communities that openly and cooperatively work to develop written K-12 transgender policy.

A Florida school district recently responded to the difficulty of transgender policy development by making it a staff project, rather than a public process.³³ This appears to be the method initially employed by the Boyertown Area School District.³⁴ However, the Boyertown school district’s approach has

32. Currah, *supra* note 25, at 441.

33. Bethany Tyne, *Sarasota County Schools Release New Guidelines for Transgender Students*, WUSF NEWS (October 24, 2018), <http://wusfnews.wusf.usf.edu/post/sarasota-county-schools-release-new-guidelines-transgender-students>.

34. *Boyertown Area School District Frequently Asked Questions about Issues Regarding Doe vs. BASD*, BOYERTOWNASD.ORG (March 27, 2017),

become open and written. The district has “no specific policy”³⁵ in the traditional sense, but since early 2017 the school board and superintendent have used the school district website to publish and clarify details: its interest in protecting against discrimination, its balance of competing interests of transgender and non-transgender students, its hope to bring stability and predictability to transgender students’ day-to-day expectations about the ways they will be treated at school, its success in good faith implementation of its transgender approach, and its responses at various stages of the *Joel Doe v. Boyertown* lawsuit.³⁶ Boyertown’s set of practices was upheld in July, 2018 by the United States Court of Appeals for the Third Circuit as “a very thoughtful and carefully tailored policy.”³⁷

Given the difficulty of developing K-12 transgender policy out in the open, what makes it worth doing? The remainder of this paper acknowledges the difficulty of open, cooperative K-12 transgender policy development, then examines four of its legal and policy benefits. Part I examines reasons for the difficulty of transgender policy development. Part II asserts four legal and policy benefits worth pursuing: First, a policy that is clear, and thus legally stable, in its privacy and antidiscrimination priorities; second, common ground and balance of identity interests; third, greater student certainty in their confident pursuit of educational equal opportunity, and fourth, increased community capacity in the principle of good faith that is so necessary and powerful in the pursuit of educational equal opportunity. Part III concludes that open, cooperative K-12 transgender policy development is worth the difficulty.

<https://www.boyertownasd.org/cms/lib/PA01916192/Centricity/Domain/1395/FAQs%20rev%202.10%203.27%20Final%20%20%20BOYERTOWN%20AREA%20SCHOOL%20DISTRICT.pdf>

35. *Id.*

36. *See, e.g.*, at <https://www.boyertownasd.org/Domain/1395>: “Message from the Superintendent,” 22 March 2017; “Message from the Board President,” 24 March 2017; “Frequently Asked Questions About Issues Regarding DOE VS. BASD,” 27 March 2017; “Statement of Boyertown Area School District,” 29 March 2017; “Frequently Asked Questions Document #2 – Regarding Doe VS BASD,” 31 March 2017; “BASD Statement referring to Memorandum Opinion and Order,” 30 August 2017.

37. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 537 (3d Cir. 2018).

I. THE TROUBLE WITH K-12 TRANSGENDER POLICY DEVELOPMENT

A. Political Volatility

This section demonstrates that political volatility of transgender issues makes developing sound, balanced K-12 transgender policy difficult. Such political volatility caused the Delaware Department of Education to scrap the effort in 2018.³⁸ The course of the state's attempt to develop a transgender policy was marked by critical headlines from opposing perspectives.³⁹ The Delaware Secretary of Education ultimately concluded, "Recent court decisions have raised important legal questions regarding this issue, and the significant public papers make clear we still haven't struck the right balance."⁴⁰ When asked about renewing the effort a few months later, Governor John Carney predicted the issue will have to be resolved by courts rather than in education policy.⁴¹ Harsh criticism from all sides is not uncommon to the K-12 transgender policy development process.⁴²

38. Sarah Mueller, *State Pulls the Plug on Controversial Anti-Discrimination Regulation*, DELAWARE PUBLIC MEDIA (August 2, 2018), <http://www.delawarepublic.org/post/state-pulls-plug-controversial-anti-discrimination-regulation>. For additional examples of data regarding the political volatility of "bathroom bills" specifically, see Wilson, *supra* note 19, at 1383–88.

39. See, e.g., Ariel Sobel, *Delaware Proposes Regulations That Will Out Trans Kids*, THE ADVOCATE (July 6, 2018), <https://www.advocate.com/youth/2018/7/06/delaware-proposes-regulations-will-out-trans-kids>; Jessica Bies, *Regulation would no longer let students 'self-identify' gender without parents' permission*, THE NEWS JOURNAL: DELAWARE ONLINE (June 1, 2018), <https://www.delawareonline.com/story/news/education/2018/06/01/regulation-225-no-longer-lets-students-self-identify-without-parents-ok/662828002/>; Sarah McBride, *HRC Opposes Dangerous Changes to Proposed Regulation Protecting Delaware Students*, HUMAN RIGHTS CAMPAIGN (June 27, 2018) <https://www.hrc.org/blog/hrc-opposes-changes-to-proposed-regulation-protecting-delaware-students>; Chris Reeves, *Insanity: Delaware Pushing to Let Students Change Race, Gender Without Parental Consent*, TOWNHALL (February 21, 2018), <https://townhall.com/tipsheet/chrisreeves/2018/02/21/insanity-delaware-pushing-to-let-students-change-race-gender-without-parents-n2452342>; Nicole Russel, *Now the Transgender Movement is Trampling Parental Rights*, THE WASHINGTON EXAMINER (February 22, 2018), <https://www.washingtonexaminer.com/now-the-transgender-movement-is-trampling-parental-rights>.

40. Mueller, *supra* note 38.

41. Sarah Mueller, *Gov. Carney Sees Lawsuits Not State Policy Settling Transgender Discrimination Issues in Schools*, DELAWARE PUBLIC MEDIA (October 23, 2018), <http://www.delawarepublic.org/post/gov-carney-sees-lawsuits-not-state-policy-settling-transgender-discrimination-issues-schools>.

42. Wilson, *supra* note 19, at 1383.

School communities' efforts to develop K-12 transgender policy can be further complicated by today's social media context. A local school board and community can find itself dealing with national political controversy when it takes on transgender issues. For example, a rural Oklahoma middle school received international attention when it closed for two days in 2018 in response to threats coming from outside the state after a transgender girl used the girls' bathroom.⁴³ The generally unsensational nature of careful, cooperative policy development may be of particular benefit in the context of transgender policy development.

Transgender issues remain nationally visible beyond the social media activity of everyday citizens. For example, among California Attorney General Xavier Becerra's assertions against President Donald Trump is a November, 2018 letter protesting proposed changes to transgender policy at the national level.⁴⁴

When a school board or other policymaking body takes on transgender policy development, criticism can rise to the level of public outcry. A second concern with transgender policy development is the difficult-to-answer question: will this policy be worth the effort or will it just be tossed out the first time it is tested in court?

B. Will it Hold Up in Court?

Litigation tends to cabin the life experience and questions of transgender students, their families and their school communities into one of three categories. Litigated questions about transgender students' educational equal opportunity are usually framed in terms of (1) the Equal Protection Clause of the 14th Amendment, (2) Title IX of the Education Amendments of 1920, which prohibits sex discrimination in access to education programs that receive federal funding,⁴⁵ and/or (3) priva-

43. See, e.g., *Threats to transgender student shut Oklahoma school*, BBC (August 15, 2018), <https://www.bbc.com/news/world-us-canada-45199499>.

44. Xavier Becerra, *Letter Re: Federal Actions Threatening Non-Discrimination Protections*, (November 9, 2018), <https://oag.ca.gov/system/files/attachments/press-docs/11-9-18-letter-white-house-cabinet-re-federal-actions-threatening-non-discrimination-transgender.pdf>.

45. 20 U.S.C. § 1681 et. seq.

cy.⁴⁶ Privacy questions sometimes concern the privacy of a student's transgender status – privacy of that information with regard to other members of the school community, and, most controversially, with regard to the student's parents⁴⁷ – and sometimes concern the bodily privacy of transgender and non-transgender students in school spaces such as bathrooms and locker rooms.⁴⁸

Uncertainties in case law occur in all three categories. Case law is unclear as to whether the withdrawal of the Title IX Guidance renders Title IX discrimination claims by transgender students moot or only changes the basis for such claims.⁴⁹ Withholding or requiring disclosure of a student's transgender status to the student's parents has not been decided by a court yet, but bodily privacy has been litigated enough to generate some lower court splits.⁵⁰ These are just a few examples.⁵¹

Possibilities in the 2019 Supreme Court season may impact some of the existing lower court splits. The Supreme Court will consider whether the word “sex” in Title VII includes gender identity in a dispute over the actionability of transgender

46. Transgender and Gender Nonconforming Students, 4 EDUCATION LAW §10B.06, Matthew Bender & Company, Inc. 2018.

47. *Id.*; see also, Grimm v. Gloucester Cty. Sch. Bd., 302 F. Supp. 3d 730 (E.D. Va. 2018).

48. Transgender and Gender Nonconforming Students, *supra* note 46.

49. Gloucester Cnty Sch. Bd. v G.G., 2017 U.S. LEXIS 1626 (2017) (remanding to Fourth Circuit “in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017”); A.H. v. Minersville Area Sch. Dist., 290 F. Supp. 3d 321, 328 (Mid. Dist. Penn. 2017) (referencing Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034 (7th Cir. 2017) and Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267 (W.D. Pa. 2017) in finding that “the fact that the Department of Justice and the Department of Education withdrew their interpretation of Title IX does not necessarily mean that a school, consistent with Title IX, may prohibit transgender students from accessing the bathrooms that are consistent with their gender identity. Instead, it simply means that the 2016 Guidance cannot form the basis of a Title IX claim.”)

50. E.g., Carcano v. McRory, 203 F. Supp. 3d 615, 641-45 (M.D. N. Car. 2016) (referencing U.S. v. Virginia, 518 U.S. 515 (1996); Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993); and Tuan Anh Nguyen v. Immigration and Naturalization Serv., 443 U.S. 53 (2001) in finding that physiological differences rather than gender identity dictate privacy-related facility decisions); Doe v. Boyertown Area Sch. Dist., 897 F. 3d 518, 525 (3rd Cir. 2018) (“[E]ven if a cisgender plaintiff had been viewed by a transgender student, it would not have violated the cisgender student’s constitutional right to privacy”).

51. For additional examples of nascent trends and lower court splits, see “Transgender and Gender Nonconforming Students,” *supra* note 46; Patrick D. Da, “Schools in the Middle: Resolving Schools’ Conflicting Duties to Transgender Students and Their Parents,” 86 UMKC L. Rev. 405, 416 n. 69. Winter, 2017.

employment discrimination claims.⁵² If the Supreme Court ultimately holds in *EEOC v. R.G. & G.R. Harris Funeral Homes* that the word “sex” in Title VII does or does not implicate gender identity, the May, 2018 District Court ruling against the Gloucester County School Board will arguably be strengthened or undercut, respectively, but only as to the way it relied on Title VII to interpret the word “sex” in Title IX to include gender identity.⁵³ Such a ruling would neither conclusively affirm nor conclusively deny the Fourth Circuit’s permission to the district court to resolve Title IX ambiguities based on Title VII in the first place.⁵⁴

There is no case that would seem to place before the Supreme Court the direct question of whether Title IX protects transgender students via its protection of students based on their sex. Hacke asserts that the Supreme Court settled the matter right after Title IX’s 1972 enactment, when, in *Frontiero v. Richardson*, the Court said that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth[.]”⁵⁵ *Frontiero* has not been overruled; it has in fact been followed on other grounds,⁵⁶ but *G.G.* and similar cases, along with the recent Executive Branch Title IX Guidance history seem to indicate that the part of *Frontiero* that Hacke cites is not universally viewed as precedential. Hacke also asserts that allowing transgender athletes to compete in alignment with their gender identity violates Title IX according to Ninth Circuit holding that “requiring women to prevail against men” unlawfully changes the conditions of participation for women.⁵⁷ More recent case law, however, tends to find Title IX favoring discrimination claims brought by transgender students.⁵⁸ For transgender students and their classmates, therefore, near-future efforts to balance competing claims will likely take place without the guidance of the Supreme Court as to the

52. *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 203 L. Ed. 2d 754 (2019).

53. *Grimm*, 302 F. Supp. 3d at 745.

54. *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir. 2016).

55. Hacke, *supra* note 20, at 136 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

56. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1691 (2017); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

57. Hacke, *supra* note 20, at 147-48 (quoting *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 1108 n. 6 (9th Cir. 2010)).

58. *Transgender and Gender Nonconforming Students*, *supra* note 46.

definition of the word “sex” in Title IX. The continuing context of lower court splits and the revoked Executive Branch guidance letter foretell continuing uncertainty on that point.

A resolution to the definition of the word “sex” in Title IX would leave vast legal uncertainties anyway. To establish a Title IX claim, a plaintiff must claim that (1) the plaintiff was excluded from an education opportunity because of sex, (2) that the school that denied that opportunity was receiving federal assistance when the plaintiff was excluded and (3) that the exclusion caused the plaintiff harm. Furthermore, were a transgender student to seek relief from a hostile environment under Title IX, the claim would have to establish that the school knew of and was deliberately indifferent to sex-based harassment “so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school.”⁵⁹ In context of the many ways school can be less than facilitative of a transgender student’s human potential, a number of points of the Title IX three-part test and the requirements for a Title IX hostile environment claim remain arguable and thus uncertain for students, families, educators, and larger school communities.

K-12 transgender case law is rife with uncertainty regarding both statutes, like Title IX, and Constitutional questions about equal protection. The nascence of transgender case law is a reality that makes it difficult for school communities to come together in confidence that their work will yield sustained improvement in educational equal opportunity.

C. Will Legislation or Regulation Override the School Policy?

Case law is not the only area of the law to cause policy-makers to wonder whether a hard-won K-12 transgender policy will last. Legislative and regulatory activity also threaten the longevity of local policy. Congress has considered, but not acted affirmatively on proposals to make transgender status an explicit protected characteristic under Title VII of the Civil

59. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

Rights Act or Title IX.⁶⁰ Uncertainties in state legislative activity seem to be trending toward a somewhat predictable pattern: (1) so-called “bathroom bills” and other legislation about transgender students may continue to be introduced in a number of state legislatures each session and (2) those bills will tend to die or be defeated.⁶¹ Newer questions, such as the parents’ rights question that killed the Delaware policy development effort in 2018, may continue to rise in the unpredictable milieu of political priorities.⁶² As discussed above, uncertainty lingers about the issuance in May, 2016 and revocation in February, 2017 of the Title IX Guidance by the United States Department of Education and the United States Department of Justice. New ideas are surfacing on the regulatory front, as well.⁶³

There is some irony if such uncertainties stop school boards and school communities from coming together in the open to develop K-12 transgender policy. Surely, gender non-conforming students who wonder each day how they will be treated at school would learn with dismay that volatility and uncertainty facing those who could develop a solution is preventing efforts toward that possible solution. The remainder of this paper seeks to encourage communities to engage in open K-12 transgender policy development, even in the face of the difficulties discussed in this part of the paper, in the hope of realizing legal and policy benefits that make it worth the effort.

II. LEGAL AND POLICY BENEFITS OF OPENLY DEVELOPED K-12 TRANSGENDER POLICY

This section asserts that school communities with openly

60. Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1049 (7th Cir. 2017) (citing Student Non-Discrimination Act of 2015, 2015 S. 439 114th Cong. (2015)).

61. Joellen Kralik, *‘Bathroom Bill’ Legislative Tracking: 2017 State Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.

62. See, Patrick Murphree, *Schools in the Middle: Resolving Schools’ Conflicting Duties to Transgender Students and Their Parents*, 86 UMKC L. REV. 405, 412-417 (2018) (acknowledging the dilemma is unresolved by the courts and asserting that schools’ various compelling interests should override parents’ rights to direct the education of their children).

63. See, Brunson and Herzig, *supra* note 21 at 1216 (proposing Executive Branch remedies to the lack of Civil Rights Act coverage of transgender students, such as an IRS blacklist targeting universities that avoid admitting transgender students).

developed, written, publicly available K-12 transgender policy foster equal education opportunity in four ways. First, open, cooperative effort to clarify and prioritize important antidiscrimination and privacy interests can bring legal stability to a school transgender policy. Second, when members of school communities take time to understand competing interests, they can find common ground and balance identity interests even within the larger context of America's legal and cultural divides. Third, public notice of school transgender policy can reduce or eliminate student uncertainties that can otherwise disrupt their confident pursuit of educational equal opportunity. Fourth, a school community can become more adept at the legal principle of good faith which will be needed to successfully implement balanced school transgender policy. Increased capacity to exercise good faith promises additional success, beyond the transgender policy effort, in our nation's ongoing but still unfulfilled pursuit of equal opportunity for all students.

Educational equal opportunity, even when yet imperfectly achieved, brings to mind the call and aspiration of our country's founding principles – securing and guaranteeing for one another life, liberty, and the pursuit of happiness. However, educational equal opportunity is still imperfectly available to more than one student population in the United States. One of the United States' best-known articulations of educational equal opportunity ironically has not yet been achieved, even for the student population it directly addressed, even though decades have passed since the Supreme Court of the United States ruled it our national imperative.⁶⁴ In *Brown v. Board of Education*, the Court discussed why the Fourteenth Amendment must necessarily guarantee equal education opportunity:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibili-

64. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

ties, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁶⁵

Transgender students' right to educational equal opportunity is thus grounded constitutionally in the Fourteenth Amendment. Arguably, this opportunity is also guaranteed in Title IX of the Education Amendments Act of 1972.⁶⁶ The right to educational equal opportunity limits states' otherwise plenary power over education generally, in context of the Fourteenth Amendment, and in connection with states' receipt of federal education funding with regard to Title IX.⁶⁷ As stated by the Supreme Court in *Brown*, educational equal opportunity is not a fundamental right, but where a state decides to provide education, the Fourteenth Amendment requires that state to make it equally available to all.⁶⁸

The story of the pre-*Brown* beginnings of the quest for educational equal opportunity for black students demonstrates the need for sustained effort in any similar pursuit. Educational equal opportunity will not develop on its own. W.E.B. DuBois and the National Association for the Advancement of Colored People shifted away from accommodationist Booker T. Washington's approach to education beginning in the early 1900s,⁶⁹ around the time of the birth of the eventual architect of our na-

65. *Brown*, 347 U.S. at 492-93.

66. Roy L. Brooks, Gilbert Paul Carrasco, & Michael Selmi, *THE LAW OF DISCRIMINATION: CASES AND PERSPECTIVES*, 27, 32, 65, 204, 219 (Matthew Bender & Company, 2011).

67. *Id.*

68. *Id.* at 31 (citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)).

69. *Id.* at 29.

tion's imperative for educational equal opportunity, Charles Hamilton Houston.⁷⁰ Houston was subjected to scorn and resentment for not honoring Jim Crow tradition as a World War I Army officer,⁷¹ which is reminiscent of some of the difficulties faced by transgender students like Gavin Grimm in schools today who do not honor solutions like using only the single-user bathroom in the school nurse's office. Houston's dedication and success can inspire the pursuit of educational equal opportunity for transgender students today.

Houston designed the strategy of the National Association for the Advancement of Colored People strategy against Jim Crow, then "worked tirelessly" – to an early death – to find ways for the strategy to bear fruit.⁷² Houston wrote before he died, "We may not win today or tomorrow; the mills of the gods grind slowly. But the storm gathers, and all the pride and power [of injustice] will be swept away."⁷³ The strategy came to its most Constitutionally significant fruition after a series of strategic court cases that methodically attacked the "separate" part of the *Plessy* "separate but equal" legal doctrine. Houston, his apprentice Thurgood Marshall, and many others worked deliberately toward Supreme Court recognition in *Brown* that separate never would be "equal."⁷⁴

History lessons for transgender students, their families, and their school communities include the fact that our nation's quest toward educational equal opportunity did not arise or develop on its own. Like other civil rights it has never been achieved to the degree our country yet aspires to.⁷⁵ Nevertheless, our Supreme Court has recognized the imperative for ed-

70. Douglas O. Linder, *Before Brown: Charles H. Houston and the Gaines Case*, TRIAL HEROES, <http://law2.umkc.edu/faculty/projects/ftrials/trialheroes/charleshoustonessayf.html> (last accessed May 22, 2019).

71. *Id.* See also, *The Road to Brown*, CALIFORNIA NEWSREEL, <http://www.newsreel.org/nav/title.asp?tc=CN0076>; *The Road to Brown Transcript*, CALIFORNIA NEWSREEL, <http://newsreel.org/transcripts/roadtob.htm> (last accessed December 18, 2018).

72. *The Road to Brown Transcript*, *supra* note 72.

73. Linder, *supra* note 71. See also, *Transcript*, *supra* note 72.

74. Linder, *supra* note 71.

75. Currah, *supra* note 25, at 444 ("This is not the first time that we have seen discriminatory responses to historic moments of progress for our nation. We saw it in the Jim Crow laws that followed the Emancipation Proclamation. We saw it in fierce and widespread resistance to *Brown v. Board of Education*. This country was founded on a promise of equal rights for all, and we have always managed to move closer to that promise, little by little, one day at a time.") (quoting U.S. Attorney General Loretta Lynch).

educational equal opportunity. Open, cooperative K-12 transgender policy development offers an opportunity to advance toward it. The benefits described in this section equip schools to successfully defend their practices, curb legal liability by helping prevent poor treatment of transgender students in school, and foster greater educational equal opportunity for transgender students and all their peers.

A. Clarity of Interests

As state actors, schools' interests may be scrutinized by courts with regard to claims by both transgender and non-transgender students.⁷⁶ Constitutional claims to equal protection often require courts to determine whether the defendant's actions pass scrutiny of the defendant's important or compelling interests and the relationship or tailoring of those actions to serve the interests.⁷⁷ Open development of written K-12 transgender policy gives school communities a chance to prepare to defend their prioritization of interests by clearly articulating schools' compelling interests in preventing discrimination and protecting privacy.

76. E.g., *Whitaker*, 858 F.3d at 1050; *Boyertown*, 897 F.3d at 527-29, 528 n. 58.

77. The Seventh Circuit stated in a recent K-12 transgender case, "Generally, state action is presumed to be lawful and will be upheld if the classification drawn . . . is rationally related to a legitimate state interest. The rational basis test, however, does not apply when a classification is based upon sex. Rather, a sex-based classification is subject to heightened scrutiny. When a sex-based classification is used, the burden rests with the state to demonstrate that its proffered justification is 'exceedingly persuasive.'" This requires the state to show that the 'classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Whitaker*, 858 F.3d at 1050 (citations omitted). The Fourth Circuit upheld a lower court's selection of intermediate compelling interest analysis of non-transgender students' privacy claims and also, found that the school district's transgender "policy survives the more stringent standard of review," and therefore declined to decide which was the appropriate standard. *Boyertown*, 897 F.3d at 527-29, 528 n. 58. A federal district court cited the Supreme Court as follows in disagreeing with the school district's assertion that gender-identity-aligned bathroom use would violate the school board's "interests in student privacy and safety:" "Under the intermediate scrutiny standard, the School board must show that 'its gender classification is substantially related to a sufficiently important government interest.' Glenn, 663 F.3d at 1316 (quoting *Cleburne*, 473 U.S. at 441). The justification for its policy must be 'exceedingly persuasive.' *United States v. Virginia*, 518 U.S. 515, 532-33 (1996). 'Moreover, the classification must substantially serve an important governmental interest today, for in interpreting the equal protection guarantee [the Supreme Court has] recognized that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged.' *Sessions v. Morales-Santana*, 137 S. Ct. at 1690; *Adams v. Sch. Bd.*, 318 F. Supp. 3d 1293, 1313 (M.D. Fla. 2018).

1. Information Privacy Interests

Transgender students may potentially bring information privacy claims against schools for revealing their transgender status to others at school, perhaps, by inviting the unwanted attention of exclusion from sex-segregated bathrooms.⁷⁸ Transgender students could also bring claims relating to schools' disclosure of their transgender status to their parents, or, conversely, parents could claim violation of their right to their students' education information relating to a school's failure to share with them the transgender status of their children.⁷⁹

Open K-12 transgender policy development gives school communities the opportunity to understand tensions between privacy interests and to articulate their choice of and rationale for protecting one interest above another. Written policy can be designed to hold up in court by articulating how the interest the policy chooses to protect is a compelling or important government interest and, also, by articulating how the actions recommended in the policy are substantially related to that interest or, better, narrowly tailored to serve that interest.⁸⁰

For example, a community may decide that, except in cases in which harm to the student is reasonably anticipated if the student's transgender status is disclosed to the student's parents, that parents will be included in a school's decision-making process about its response to a transgender student's needs. The written policy may include rationale such as the existence of a separate policy for anticipated harm to students by parents,⁸¹ making blanket non-disclosure to parents unnecessary. Such a choice may also be backed up by reference to case

78. See, Whitaker, 858 F.3d at 1045; Harper and Levi, *supra* note 17 at 302.

79. This is a catch-22, because of the federal Family Educational Rights and Privacy Act and some state law requiring schools to allow parents access to their children's education records. See, 20 U.S.C. § 1232g (FERPA); Tex. Atty. Gen. Opinion No. KP-0100, 2016 Tex. AG LEXIS 44 (2016); Murphree, *supra* note 63 at 414-15.

80. See, *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 724 (D. Maryland 2018) (declining to reach the sufficiency of the governmental interest in bodily privacy because there was no showing that the policy was substantially related to the interest).

81. This would be consistent with court cases finding that separate school policies and/or statutes address some concerns, e.g., *Adams*, 316 F. Supp. 3d at 1315 ("Any incidents of misconduct are subject to the school's code of conduct, and, if necessary, Florida criminal law.");

law affirming parents' rights.⁸² The policy might reference evidence that family support is important to students' well-being and educational success in general⁸³ and to successful navigation of issues faced by transgender students in particular.⁸⁴ If a community arrives at a different prioritization of these interests, that choice may similarly be explained in writing in the policy.

2. *Anti-discrimination Interests*

A school community's decision to prioritize its interest in preventing discrimination is not difficult to articulate in written policy. A number of courts have already put this compelling interest into words.⁸⁵ A benefit of open, collective policy development is the opportunity to strategize and plan how to accomplish the good faith opposite of discrimination, which is educational equal opportunity.

82. E.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990). See also, *Wyatt v. Fletcher*, 718 F.3d 496, 505-508 (5th Cir. 2013) (analyzing a privacy claim against school coaches' revelation of a student's sexual orientation to her parent and concluding that "there is no controlling Fifth Circuit authority... showing a clearly established Fourteenth Amendment privacy right that prohibits school officials from communicating to parents information regarding minor students' interests, even when private matters... are involved.").

83. Shelaswau Bushnell Crier, "Beyond Money: Public Urban Board Schools and the State's Obligation to Make and Adequate Education Attainable," 44 J.L. & EDUC. 23, 28-30. Winter, 2015; Lily Eskelsen Garcia and Otha Thornton, "The Enduring Importance of Parental Involvement," NEATODAY. 18 November 2014. <http://neatoday.org/2014/11/18/the-enduring-importance-of-parental-involvement-2/>

84. Caitlin Ryan, "Supportive Families, Healthy Children," 9-12. SAN FRANCISCO STATE UNIVERSITY, 2009; See also, *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("[A]lthough children generally are protected by the same constitutional guarantees against governmental deprivations as adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for '... paternal attention.'" but finding that under certain circumstances a minor may obtain an abortion without parental consent.)

85. E.g., *Boyertown*, 897 F.3d at 528 ([T]ransgender students face extraordinary social, psychological, and medical risks and the School District clearly had a compelling state interest in shielding them from discrimination."); *Whitaker*, 858 F.3d at 1050 ("providing a gender-neutral alternative is not sufficient to relieve the School District of liability [under Title IX]"); *Dodds v. United States Dep't of Educ.*, 845 F. 3d 217, 221 (6th Cir. 2016) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination. To protect... constitutional and civil rights [is] a purpose that is always in the public interest."); *G.G.*, 822 F.3d at 729 (4th Cir. 2016) ("Enforcing [a transgender student's] right to be free from discrimination... in an educational institution is plainly in the public interest"); *Carcano v. Cooper*, 2018 U.S. Dist LEXIS 169735, 43 (M.D. No. Car. 2018) ("The majority needs no protection against discrimination.") (quoting *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)).

3. *Interests in Bodily Privacy and Privacy in Important Decisions*

In addition to privacy of information about a student's transgender status, school communities may choose to prioritize the interests of both transgender and non-transgender students in bodily privacy and in two related types of privacy articulated by the Supreme Court as "the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of decisions."⁸⁶ One way to do this is to make confidential channels of communication available to both transgender and non-transgender students who wish to request audience with school officials who have the authority to make decisions related to transgender issues at school.

Another policy option is simply to acknowledge gender identity as "[a] student's understanding, outlook, feelings, and sense of being masculine, feminine, both, or neither, regardless of the student's sex assigned at birth."⁸⁷ In other words, all students, not only transgender students, experience gender identity. This can make significant parts of the policy applicable to all students. For example, "Students have the right to be addressed by the name and pronoun that correspond to their gender identity and expression," and "Schools shall ensure that yearbook photographs allow for all students, including those students with diverse gender identities or expressions, to choose clothing that aligns with their gender identity or expression" and "Schools shall ensure the preferred name of a student be read during ceremonies and other events, including, without limitation, graduation ceremonies."⁸⁸

People understand and share privacy interests, and privacy is a developed legal concept. For example, although the Supreme Court has not given general privacy the status of a fundamental right, the Court has spoken of the right of privacy

86. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

87. "Addressing the Rights and Needs of Students with Diverse Gender Identities or Expressions, Policy 5138," CLARK COUNTY SCHOOL DISTRICT, CLARK COUNTY, NEVADA. August 9, 2018. [https://www.boarddocs.com/nv/ccsdlv/Board.nsf/files/B3G8LA8119FF/\\$file/08.09.18%20Revised%20Ref.%205.04.pdf](https://www.boarddocs.com/nv/ccsdlv/Board.nsf/files/B3G8LA8119FF/$file/08.09.18%20Revised%20Ref.%205.04.pdf).

88. See, *id.*

as connected to our concepts of liberty.⁸⁹ As discussed below, case law is trending toward bodily privacy of non-transgender students as a less persuasive interest than transgender students' inclusion in sex-segregated facilities,⁹⁰ so judicial resolutions of privacy concerns are unlikely to serve as a check on non-transgender students' perception of injustice to their educational opportunity. Using the concept of privacy as common ground for open negotiation of policy details, rather than under the time constraints and adversarial conditions faced in courts, communities can hear and include the voices of both the transgender student and the non-transgender student in a balanced policy.

For example, a non-transgender student may feel compelled by a sense of bodily privacy to use only a single-sex bathroom, and thereby feel singled out and violated as to the privacy of his or her decision about bodily privacy itself, especially if that non-transgender student receives feedback from members of the school community suggesting transphobia or bigotry. Such singling out for hostility may seem to the non-transgender student to be very similar to the singling out that transgender students experience when they are excluded from sex-segregated spaces – and it may feel unjust to the non-transgender student that courts are tending to protect only against the latter form of singling out. It seems unlikely, given current trends in case law, that the non-transgender student in such a circumstance will successfully plead a Title IX hostile environment or an equal protection violation of the right to privacy, but a balanced policy that gives the non-transgender student a voice can address that non-transgender student's concerns and thus allay the sense of injustice. Alleviating perceived injustice can alleviate feelings of hostility among adolescent peers and can go a long way toward accomplishing the school's compelling interest in preventing discrimination and

89. E.g., *Obergefell*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Bellotti*, 443 U.S. at 635; *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Katz v. United States*, 389 U.S. 347 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Poe v. Ullman*, 367 U.S. 497 (1961); *Union Pacific Railway Co. v. Botsford*, 131 U.S. 250, 252 (1891).

90. *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1092-99 (D. Oregon 2018); "Transgender and Gender Nonconforming Students," *supra* note 45.

hostility toward transgender students. While the trend is not for such concerns to be viewed as persuasive by courts,⁹¹ they can be addressed in policy, for example by giving non-transgender students the same access to safe,⁹² confidential channels of communication with school decision makers as the policy gives to transgender students who wish to request changes in school practices with regard to their transgender status.

Another example of legal protection available via an openly developed, written policy is the notice made available to members of the school community by that open process itself. If a non-transgender student persistently feels compelled by his or her own sense of bodily privacy to make choices that reduce the chance of being viewed undressed by, or viewing undressed, a person the non-transgender student perceives to be of the opposite sex, the non-transgender student will likely appreciate notice, via a public policy, of a school's decision to allow gender-identity-aligned access to sex-segregated spaces. The non-transgender student can then plan ahead either to avoid such encounters or take other personal measures to ensure the desired level of privacy. Especially given the fact that governing bodies in every state are subject to sunshine laws,⁹³ it would be difficult for a school to demonstrate in court a compelling interest in keeping the school's decision itself under wraps. Even if extenuating difficulties with open development of policy were to give rise to a compelling interest in closed-door transgender policy development, at least publishing the policy publicly would be better tailored to accomplish the schools' compelling interests without burdening non-transgender students' ability to take measures to retain their own desired levels of bodily privacy.

When school communities come together to develop and codify consensus on important interests and the actions best tailored to achieve those interests, schools are prepared to defend their practices. Open policy development also gives mem-

91. E.g., *Parents for Privacy*, 326 F. Supp. 3d at 1098; *Boyertown*, 897 F.3d at 530.

92. Protected, for example, from being labelled or treated as "a bigot."

93. Steven J. Mulroy, "Sunshine's Shadow: Overbroad Open Meetings Laws as Content-Based Speech Restrictions Distinct from Disclosure Requirements," 51 *WILLAMETTE L. REV.* 135, 136. Winter, 2015.

bers of the school community opportunities to be heard and to hear others' perspectives about important interests and the best ways to protect those interests. Greater shared awareness of tensions that exist between various anti-discrimination and privacy interests can lead to discovery of higher common goals or other common ground that lead the community together toward more effective pursuit of educational equal opportunity. This is a particularly important benefit of working together on identity interests which, in the context of America's cultural divide, may seem more squarely in competition with each other. This benefit is the topic of the next section of this paper.

B. Balanced Identity Interests

Attempts to balance interests on opposite sides of cultural divides are sometimes referred to cynically as "line drawing,"⁹⁴ and in litigation settings, the cynicism is often accurate.⁹⁵ However, free of the time constraints and the irreparably adversarial nature of litigation, communities can endeavor to balance such competing interests with a better hope of pluralistic solutions and even the joyful discovery of previously unimagined common ground. Paisley Currah offers another example, in addition to the one cited above,⁹⁶ when she asks who, in addition to transgender people, may benefit from transgender policy development.⁹⁷ Currah discusses, as an example, the benefit of groups coming to realize the harm experienced by some non-transgender people who are forced to conform to strict gender-specific norms in the workplace.⁹⁸ Pluralistic, openly developed policy solutions are more sus-

94. E.g., *Lee v. Weisman*, 50 U.S. 577, 598 (1992); Jessica A. Clarke, "Against Immutability," 125 *YALE L. J.* 2, 45-47, 2015.

95. E.g., *Doe v. Boyertown*, 897 F.3d at 529-30 ("[W]e do not intend to minimize or ignore testimony suggesting that some of the appellants now avoid using the restrooms and reduce their water intake in order to reduce the number of times they need to use restrooms under the new policy. Nor do we discount the surprise the appellants reported feeling when in an intimate space with a student they understood was of the opposite sex. We cannot, however, equate the situation the appellants now face with the very drastic consequences that the transgender students must endure if the school were to ignore the latter's needs and concerns. Moreover... those cisgender students who feel that they must try to limit trips to the restroom to avoid contact with transgender students can use the single-user bathrooms in the school.").

96. Currah, *supra* note 25.

97. Currah, *supra* note 25, at 445-47.

98. *Id.*

tainable than line drawing or winners-and-losers litigation because they invite mutual buy-in to larger goals and benefits, such as educational equal opportunity for all students.

K-12 transgender policy that articulates a community's choice of balance between competing interests also prepares schools to successfully defend their approaches to transgender and non-transgender students' difficult – and therefore potentially litigated – questions. For example, the Boyertown Area School District used its website to make public its effort to balance the needs and interests of transgender students with those of their peers.⁹⁹ As mentioned above, Boyertown's set of practices was upheld in July, 2018 by the United States Court of Appeals for the Third Circuit as "a very thoughtful and carefully tailored policy."¹⁰⁰

Although religion and religious freedom are very rarely implicated in court cases about K-12 transgender policy,¹⁰¹ religious identity does come up in public discussion of proposed K-12 transgender policy.¹⁰² Possible future conflicts in still-nascent K-12 transgender case law could include potential future difficulties for students who hold their personal religious beliefs as central to their own gender identity. A recent Supreme Court case that centered on religious freedom offers insight toward larger goals and common ground that can be realized when school communities come together to develop K-12 transgender policy. When opponents of K-12 transgender policy claim the religious liberty to teach their children according

99. FAQ, *supra* note 34.

100. *Boyertown*, 897 F.3d at 537.

101. Two recent cases do implicate religious freedom, generally in context of parents' right to control the upbringing of their children: *Parents for Privacy*, 326 F. Supp. 3d at 1109, and *Students & Parents for Privacy v. United States Dep't of Educ.*, 2016 U.S. Dist LEXIS 150011, 14-15 (N. D. Ill. 2016). Additionally, in one case a federal district court judge mentions religion in his opinion. *Adams*, 318 F. Supp. 3d at 1297 ("The Court recognizes that some will disagree with this decision, for religious and other reasons.")

102. See, e.g., Arika Herron, "Teacher says school's transgender name policy goes against his religious beliefs," *DES MOINES REGISTER*, 5 June 2018. <https://www.desmoinesregister.com/story/news/nation-now/2018/06/05/transgender-student-policy-prompts-religious-dispute-teacher-school/672285002/>; Jonathan Allen, "A potential drastic change in transgender policy moves into the midterms," *NBC NEWS*, 22 Oct 2018. <https://www.nbcnews.com/politics/politics-news/potential-dramatic-change-transgender-policy-moves-midterms-n922951>; Peter Sprigg, "Sexual Orientation and Gender Identity (SOGI) Laws: A Threat to Free Markets and Freedom of Conscience and Religion," *Family Research Council*, Oct 2014. <https://downloads.frc.org/EF/EF14K13.pdf>

to their religion on grounds that transgender people do not exist,¹⁰³ they are on no steadier legal ground than was an Executive Branch commission that labeled religion mere pretext for invidious discrimination against LGBTQ+ people.¹⁰⁴

Proceedings and briefs in *Masterpiece Cakeshop* demonstrate that such polarized positions are politically and perhaps legally harmful to those taking them. Efforts to balance competing claims in a pluralistic way yield more defensible transgender policy that can hold up in court and over time, thus protecting schools from legal losses and furthering school communities' hope to engage successfully and without unwarranted disruption in the quest for educational equal opportunity.

In *Masterpiece Cakeshop*, the Supreme Court directly rejects any possible constitutionality of religious claims based on inferiority or invalidity of a transgender person's identity as such.¹⁰⁵ The Court also condemned allegations that religious faith is pretext for invidious discrimination, ultimately overturning the Colorado Civil Rights Commission's order after emphasizing that a commissioner made such an allegation.¹⁰⁶

The Court went on to set forth a guide for approaching cultural war issues in a way that aligns with the Constitution. This guidance can also help members of school communities to pause and find common ground upon which to regroup whenever the K-12 transgender policy development process veers toward presupposing illegitimacy of the concerns of any members of the school community, or hostility toward those concerns.

[T]he Court [has] made clear that the government, if it is to respect the Constitution's guaran-

103. See, e.g., Hasson and Farnan, *supra* note 30 AT 133-35.

104. The report by the U.S. Commission for Civil Rights, which was issued in 2016, has been removed from government websites, but is still referred to by secondary sources. See, e.g., Interfaith Group Asks US Government to Reject Report that Stigmatizes Religious Americans, NEWSROOM, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 12 October 2016, <https://www.mormonnewsroom.org/article/interfaith-coalition-president-congress-biased-religious-liberty-report> See also, Emma Green, Even the Government's Smartest Lawyers Can't Figure Out Religious Liberty, THE ATLANTIC, 14 September 2016.

105. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (citations omitted).

106. *Id.* at 1729-30 (citations omitted).

tee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. . . . The Constitution “commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.”¹⁰⁷

In June 2018, religious freedom leaders and gay rights leaders met and articulated additional possible common ground between individuals with deeply held religious identity and deeply held transgender identity. Religious freedom leader L. Whitney Clayton said,

‘Religion is obviously a fraud,’ [the] thinking seems to go, ‘and while sometimes it is harmless enough, the sooner it is abandoned in favor of reason and reality the sooner we can be secure against its dangerous consequences.’ Some are increasingly willing to use social and legal forces to pressure people to change their religious beliefs, convinced they will be better off for having discarded those beliefs as quaint anachronisms. But this view is profoundly naïve. It fails to account for the fact that for tens of millions of Americans faith and religious conviction are the most powerful and defining sources of personal and family identity in their lives. . . . If you have concluded that certain favored classes deserve special legal protections and accommodations but that people of faith do not because they have *chosen* their beliefs and can just as easily ‘*unchoose*’ them, I would ask you to reconsider. . . . I

107. Id. at 1731 (citations omitted)

believe religious identity . . . should be afforded at least as much protection and accommodation as other forms of identity. . . . I believe that religious and secular Americans of good will . . . have big enough hearts, broad enough minds, and strong enough wills to forge the hard compromises that will allow all of us, whatever our identities, to live together in dignity, respect and peace. It is to that task that we must commit ourselves for the good of all.¹⁰⁸

Gay rights leaders and scholars including Tyler Deaton, Thomas Berg, and William Eskridge, Jr. endorsed the concept of deeply held or “deeply principled” identity as common ground rather than as a cultural divide.¹⁰⁹

The guidance of the Supreme Court in *Masterpiece Cakeshop* and the insights of scholars and leaders of both religious freedom and LGBTQ+ rights allow school communities to discard both the idea that religious faith can justify an inferior view of transgender students and the idea that religious faith is but a pretext for invidious discrimination. Ideally, as school communities come together to develop K-12 transgender policy, they may come to mutually experience the concept of gender identity, including gender identity that is centered in religious belief, as common ground. Even absent meaningful discovery of such common ground, a school community that clearly articulates its choice of balance between competing interests prepares itself to successfully defend its approach in court.

Such preparedness is useful not only to the school but to the transgender student as well. Success in defending a K-12 transgender policy means stability of that policy, which means greater certainty for the transgender student who wonders what school is going to be like from day to day in the near and

108. L. Whitney Clayton, “In the Marrow of Their Bones,” International Center for Law and Religion Studies 2018 Religious Freedom Annual Review. 20 June 2018. <https://www.iclrs.org/content/blurp/files/Elder%20Clayton%20RFAR%20Keynote%202018.pdf>. Accessed 22 May 2019

109. Betsy Vandenberghe, “Religious-Freedom and LGBT Advocates Offer Rare Lessons in Pluralism,” NATIONAL REVIEW. 2 July 2018. <https://www.nationalreview.com/2018/07/religious-freedom-and-lgbt-advocates-call-truce-utah-conference/>.

far future. The next section discusses additional ways in which openly developed, publicly available K-12 transgender policy contributes to greater certainty in students' daily hope for educational equal opportunity.

C. More Certainty in Transgender Students' Hope for Educational Equal Opportunity

Uncertainties in policy development at the school, school community, and school board levels generally are due to uncertainties discussed earlier in this paper. These include the political volatility already mentioned, ongoing uncertainty about the impact of national politics and state legislation on local policies, and questions about developing case law, such as the question of whether a given policy, once a community expends the considerable effort required to develop it, will hold up in court. Poetically, open development of K-12 transgender policy can contribute to its longevity in the face of these uncertainties. As discussed in both of the previous sections, openly developed, written policy is more likely to last than unwritten rules.

Additionally, open development of written policy creates imperatives and opportunities for individuals to communicate about and articulate policy nuance in ways not available in litigation. Changing definitions and emerging differences between judiciary and public use of transgender terms and phrases, demonstrate some of the difficulty courts face if they are left to answer the questions that face transgender students and their families and school communities. For example, while a Florida district court opinion acknowledged alternative definitions of the phrase "gender fluid" in a footnote, the body of the opinion cabined the phrase as referring to students "whose gender changes between male and female."¹¹⁰ Not only does the phrase have alternate uses, including as a synonym for "non-binary" or "genderqueer" due to discomfort with those terms,¹¹¹ the phrase itself seems to have influenced policy de-

110. Adams, 318 F. Supp. 3d at 1303, 1303 n. 23.

111. See, "LGBTQ+ Definitions," Trans Student Educational Resources. <http://www.transstudent.org/definitions/>. Accessed 17 December 2018. This site is updated often "to keep up with the rapid proliferation of queer and trans language."

velopment in that case.¹¹²

Proximate efforts to work with and on behalf of transgender students and their fellow students may offer a much more nuanced understanding of individual preferences and personal struggles to communicate out and describe the experience of being transgender. Even the word “transition,” which is acquiring some specific legal meaning,¹¹³ may be a less finite and more nuanced word, in the actual experience of a transitioning person, than any legal term can encompass.¹¹⁴

The limits of the emerging vocabulary of the transgender experience may seem even more frustrating or awkward to non-transgender people as they become more familiar through proximity with transgender students’ life experience. Communities have advantages over courts for dealing with these frustrations: communities can take time that courts cannot, and communities can in many instances, come together in ways less adversarial than the litigation setting. Written policy that reflects the resolution of struggles to come to mutual understanding can go a long way toward transgender students’ certainty that their community is committed to and capable of providing them with educational equal opportunity.

Greater certainty for transgender students, their families, and their school communities is the result of such coming together, taking time, and acquiring mutual understanding, even if by struggle. Care can be taken to articulate that mutual understanding in written policy so that fewer questions remain unanswered as a transgender student contemplates what school will be like each day. While the answers to Gavin

112. Adams, 318 F. Supp. 3d at 1303.

113. *Boyertown*, 897 F.3d at 522; *See also*, Adams, 318 F. Supp. 3d at 1299, 1319 n. 45.

114. *See, e.g.*, Chloe Schwenke, “The Unexpected Champions of Human Dignity,” TEDxUMD, 29 April 2016. <https://www.youtube.com/watch?v=21ZFXc8Necw> (“[T]he phenomenon of non-conforming gender identity is remarkably complex and we’re only now beginning to interrogate this with an open mind. Our only chance to claim... inner peace and wholeness may be to transition. Hopefully I can count on you not to reject my claim of being human, but my assertion is far more audacious in that I’m claiming to be a woman – how can that be, a woman who was never a girl – well, fortunately I don’t need your permission to be myself but I do need your willingness to make space in our society – in every society – for people like me whose gender identity is and always has been female and who’s living her life in a womanly direction. That’s my way of saying that the transgender transition never really ends, but if we’re treated with decency, respect and dignity we can make our lives meaningful and happy.”)

Grimm's questions about the sufficiency of his Title IX and Fourth Amendment claims are important to many transgender students, the questions answered by an openly developed policy about how they will be treated that day at school may go much farther toward actual day-to-day confidence in educational equal opportunity.

D. Better Understanding and Use of Good Faith Toward Educational Equal Opportunity

Good faith "is one of the oldest ideas in the law."¹¹⁵ In education in particular, equal opportunity requires good faith on the part of those interacting with the students who seek that opportunity. An affirmative definition of good faith captures much of what school communities need, both in their conduct on the path to good policy development, and as a goal for what the ultimate policy must promote:

Good Faith *bona fide*: The honest and fair pursuit of one's stated and reasonable purposes. Good faith is sincerity, a measure to assess one's own conduct and the conduct of others. Good faith is subjective, measuring what one knows, rather than entirely determining what one should reasonably believe under the circumstances. . . . [W]illful ignorance, or deliberate naivete, or intentionally ambiguous motives cannot be held or asserted in good faith.¹¹⁶

This section reviews language used by the Supreme Court during this country's initial struggle toward good faith in its effort to provide educational equal opportunity to black students. These moments illustrate the importance of good faith to success in our yet-unfulfilled pursuit of educational equal opportunity for black students, and for all students. These moments also demonstrate the value of school communities'

115. Stephen Michael Sheppard, "Good Faith (Bona Fide)," *BOUVIER LAW DICTIONARY*, 2012.

116. *Id.*

opportunity to come together to work with and toward good faith in K-12 transgender policy development. The opportunity to respond to the challenges of transgender issues in our nation's schools is an opportunity to practice and become more adept in good faith. As we improve in our capacity for good faith through the experience of open K-12 transgender policy development, we improve in our capacity to employ good faith in our continued pursuit of educational equal opportunity for all students.

Just three years after the disastrous *Plessy v. Ferguson* transportation case ruled “separate but equal” to satisfy the post-Civil-war Constitutional amendments,¹¹⁷ a group of parents claimed that a school board's decision to close a black high school while still collecting education taxes from black families violated equal protection.¹¹⁸ At that point in our nation's history, the Court required only a near opposite of good faith – simply not desiring to discriminate in a way that can be evidenced. Justice Harlan wrote, “We are not permitted by the evidence in the record to regard that decision as having been made with any desire or purpose on the part of the Board to discriminate against any of the colored school children of the county on account of their race.”¹¹⁹

Another way states avoided legal penalty while at the same time denying educational equal opportunity was to engage in the technicality – another opposite of good faith – of only “supporting” public education rather than providing it, so that by not technically providing education, the state had no obligation to provide education equally.¹²⁰

Good faith is a legal concept necessarily applied in order to make progress toward educational equal opportunity. This was evident in the first major Supreme Court victory¹²¹ in the quest for educational equal opportunity for blacks. The state defended its denial of admission of petitioner Lloyd Gaines, a black student, to the School of Law of the State University of

117. *Plessy v. Ferguson*, 163 U.S. 537 (1896)

118. *Cummings v. Richmond County Board of Education*, 175 US. 528 (1899)

119. *Id.*

120. *Brooks et al.*, supra note 66 at 38 (referencing *Griffin v. Prince Edward County School Board*, 377 U.S. 218 (1964)).

121. *Id.* at 47 (“Gaines . . . was “the NAACP's first major federal victory in an education case”)

Missouri, with its intent to provide a black law school at Lincoln University. The Court responded that “it cannot be said that a mere declaration of purpose, still unfulfilled, is enough.”¹²²

Another Supreme Court case¹²³ helps illustrate the necessity of good faith to educational equal opportunity. To allow time for the state of Texas to comply with the “separate but equal” requirement to provide a school for an applicant who was denied admission to the University of Texas Law School because he was black, a state trial court continued the case, then accepted the state’s separate school.¹²⁴ The student, however, did not accept the school as equal, and his case was heard by the Supreme Court.¹²⁵ The Court recognized the inequality and expressed the necessity of good faith efforts toward educational equal opportunity rather than a reliance on technicalities to meet the requirements of the law:

It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. . . . “Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.” *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). It is fundamental that these cases concern rights which are personal and present. . . .¹²⁶

The history of a lack of good faith in the “separate but equal” era of education in the United States resulted in a problem identified in *Brown* in 1954 and that is similar to a problem that impacts transgender K-12 students today in school communities not practiced in good faith. In the words of the Court:

122. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 346 (1938)

123. *Brooks et al.*, supra note 66 at 64.

124. *Brooks et al.*, supra note 66 at 60.

125. *Id.*

126. *Sweatt v. Painter*, 339 U.S. 629, 633-36 (1950).

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . . To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.¹²⁷

An absence of good faith and its effects is apparent in the “separate but equal” part of this nation’s history of education and helps show why school communities, in their own efforts to proceed in and develop good faith, may need the kind of persistence demonstrated by the story of Charles Hamilton Houston. Good faith is both a requirement upon and an aim of a community that comes together to pursue educational equal opportunity. Through persistent effort and perhaps even difficult struggle a school community can become more adept at the legal principle of good faith that will be needed to successfully implement balanced school transgender policy. An increased capacity to exercise good faith promises additional success, beyond the transgender policy effort, in our nation’s ongoing but still unfulfilled pursuit of equal opportunity for all students.

CONCLUSION

School communities can successfully chart their own path to educational equal opportunity for transgender students and their fellow students. The need for K-12 transgender policy is an opportunity to come together and take time to understand and prioritize interests, find common ground, resolve

127. *Brown v. Board of Educ.*, *supra* note 64 at 493.

students' uncertainty in the equality of their opportunity for education, and develop balance and good faith.