TITLE IX–A NEW FRONTIER FOR THE RIGHTS OF TRANSGENDER YOUTH? THE DEMAND FOR FEDERAL REGULATIONS CLARIFYING THE ACT'S APPLICABILITY

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"I want to look like what I am but don't know what someone like me looks like. I mean, when people look at me I want them to think—there's one of those people . . . that has their own interpretation of happiness. That's what I am."[1]

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[1] Susan Stryker, *Lou Sullivan in His Own Words*, FTM NEWSLETTER 3 (Summer 2007), http://www.ftmvariations.org/IMG/pdf/lousullivan.pdf (quoting an entry from Lou Sullivan's diary, dated June 6, 1966). Sullivan was fifteen years old at the time he wrote the entry. *Id.* Excerpts from his adolescent diary were compiled in memoriam following his death in 1991. *Id.*

INTRODUCTION

In recent years, transgender rights have begun to occupy a centralized position within the broader Lesbian, Gay, Bisexual, Transgender ("LGBT") movement.[2] The scope of medical rights and cultural representation of transgender children has consequently expanded. For example, gender variance in children, while previously classified as a disorder, has been formally depathologized in the Diagnostic and Statistical Manual of Mental Disorders V ("DSM V").[3] As a result, there is a growing medical consensus that transgender children should be allowed to live their lives in the gender with which they identify.[4] This consensus is demonstrated in recent standards of care promulgated by the American Psychological Association and the American Academy of Family Physicians that recommend gender-affirming treatment for transgender children and physician-competency with reference to the provision of care for transgender youth.[5] In the cultural

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[2] Jennifer Bendery, *Joe Biden: Transgender Discrimination Is 'The Civil Rights Issue of Our Time,'* HUFFINGTON POST (Oct. 30, 2012, 11:16 PM), http://www.huffingtonpost.com/2012/10/30/joe-biden-transgender-rights_n_2047275.html.

[3] AM. PSYCHIATRIC ASS'N: DSM-5 DEVELOPMENT, GENDER DYSPHORIA 1 (2013), http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf ("DSM-5 aims to avoid stigma and ensure clinical care for individuals who see and feel themselves to be a different gender than their assigned gender. It replaces the diagnostic name 'gender identity disorder' with 'gender dysphoria,' as well as makes other clarifications in the criteria. *It is important to note that gender nonconformity itself is not a mental disorder.*" (emphasis added)).

[4] Jason Lambrese, *Suppression of Puberty in Transgender Children*, 12 AMA J. ETHICS 645-49 (2010), http://virtualmentor.ama-assn.org/2010/08/jdsc1-1008.html ("The importance of preventing development of secondary sex characteristics during this period cannot be overstated . . . [Children] can experience alienation and harassment at school if they are unable to participate in cross-gender activities or use cross-sex restrooms".); Simona Giordano, *Lives in a Chiaroscura. Should We Suspend the Puberty of Children with Gender Identity Disorder*, 34 J. MED. ETHICS 580, 583 (2008) (arguing for the suppression of puberty in transgender youth if deemed medically appropriate. "If allowing puberty to progress appears likely to harm the child, puberty should be suspended . . . . Indeed it is unethical to let children suffer, when their suffering can be alleviated.").

[5] COLT MEIER & JULIE HARRIS, FACT SHEET: GENDER DIVERSITY AND TRANSGENDER IDENTITY IN CHILDREN (2014), http://www.apadivisions.org/division 44/resources/advocacy/transgender-children.pdf ("Providers should aim to non-judgmentally accept the child's gender presentation and help children build resilience and become more comfortable with themselves, without attempting to change or eliminate cross-gender behavior."); AAFP, LESBIAN, GAY, BISEXUAL, TRANSGENDER HEALTH (AAFP Reprtint No. 289D), http://www.aafp.org/dam/AAFP/documents/medical_education_re

sphere, transgender children are beginning to appear in the media in a light that both highlights the social obstacles they face and validates their identities.[6]

Despite the significant progress that is taking place in both medical and cultural domains, transgender youth continue to experience disproportionate rates of violence and discrimination in the educational context.[7] Because Title IX of the Education Amendments of 1972[8] has not yet been interpreted by federal courts to apply to transgender children, transgender youth are subjected to frequent discrimination when attempting to access sex-segregated educational programs and accommodations.[9] Whereas legal scholars recognize the need for the expanded application of Title IX to transgender students,[10] the academic literature thus far has not addressed the specific demand for federal agency regulations to answer the policy question of whether Title IX's prohibition on "sex" discrimination encompasses gender identity expression, and thereby, transgender people.[11] Nor has the literature extensively addressed the need to define the types of inquiries schools should make when determining whether transgender children should access sex-segregated programs and accommodations.[12]

This Note will center on the issue of the rights of transgender children in the educational context and the issue of Title IX's applicability. It will demonstrate that in order to lay a foundation for federal courts to regularly interpret Title IX as applicable to transgender youth, Title IX's regulating agency the Department of

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sidency/program_directors/Reprint289D_LGBT.pdf (implementing general core competencies family physicians should meet when treating transgender patients including "use of appropriate names, pronouns, sex and sexual identity terms").

[6] James Michael Nichols, *Transgender Youth Tell Their Story in MTV and Logo TV's 'Laverne Cox Presents: The T Word,'* HUFFINGTON POST (Oct. 17, 2014, 3:00 PM), http://www.huffingtonpost.com/2014/10/17/the-t-word-laverne_n_5998692.html.

[7] GLSEN, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 89 (2011) (finding that 80% of transgender children surveyed felt "unsafe" because of their gender identity expression, with 75.4% of transgender students surveyed reporting having experienced "verbal harassment" in an academic setting); NCTE, PEER VIOLENCE AND BULLYING AGAINST TRANSGENDER AND GENDER NONCONFORMING YOUTH: SUBMISSION TO UNITED STATES COMMISSION ON CIVIL RIGHTS 2 (2011) (finding 44% of transgender students surveyed to have been the victim of physical assault); GLSEN, SHARED DIFFERENCES: THE EXPERIENCES OF GAY, LESBIAN, BISEXUAL, AND TRANSGENDER STUDENTS OF COLOR IN OUR NATION'S SCHOOLS 20 (2009) (finding high rates of verbal harassment involving both gendered and racially charged epithets reported by transgender youth of color).

[8] 20 U.S.C. § 1681(a) (2012).

[9] GLSEN, *supra* note 7.

[10] *See, e.g.*, Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC'Y 301 (2013) (arguing that access to sex-segregated programs and accommodations for transgender students should be protected by Title IX by analogy to other federal laws that prohibit discrimination on the basis of sex); Leena D. Phadke, *When Women Aren't Women and Men Aren't Men: The Problem of Transgender Sex Discrimination Under Title IX*, 54 KAN. L. REV. 837 (2006) (arguing that Title IX should extend to transgender students in cases of sexual harassment); Emily Q. Shults, *Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender*, 12 CARDOZO J.L. & GENDER 337 (2005) (advocating for a reading of Title IX that allows for the inclusion of transgender as well as intersex persons).

[11] *Id.*

[12] *Id.*

Education, Office for Civil Rights, ("OCR") should: (1) promulgate a regulation in the Code of Federal Regulations ("CFR") requiring Title IX's prohibition of discrimination on the basis of "sex" to encompass "gender identity," and (2) promulgate a partner regulation in the CFR that defines the types of inquiries schools should make when determining whether a transgender child may receive access to a sex-segregated accommodation or program. The first proposed regulation will be modeled on recent regulations promulgated by the Department of Housing and Urban Development ("HUD"), the agency responsible for overseeing the administration of the Fair Housing Act.[13] The second proposed regulation will be modeled on Massachusetts's gender identity law, which permits schools to rely on a broad spectrum of criteria (i.e. medical and non-medical) when determining student eligibility for sex-segregated programs and accommodations, while simultaneously ensuring that schools retain sufficient oversight to provide for the safety of all students.[14]

Part I of this Note will provide brief treatment to Title IX and its typical application. It will address Title IX's presently limited applicability to transgender youth and the need to facilitate its expansion. Additionally, Part I will draw an analogy to Title VII jurisprudence to demonstrate how prohibitions on sex discrimination have already been extended to protect transgender people in the employment context. Part II will assert that state laws prohibiting discrimination on the basis of gender identity are insufficient to protect transgender youth. Part III will detail the OCR's recent administrative activities with reference to the application of Title IX to transgender youth. This part will also note the limited value of the OCR's present administrative conduct to federal courts when presented with the question of whether Title IX should be interpreted as trans-inclusive under the Chevron doctrine. Part IV will further explore the limited impact of the OCR's present administrative activity on the judiciary under Chevron. The Note will then propose two models on which to base federal regulations in order to trigger a regime of mandatory judicial deference to the OCR's trans-inclusive interpretation in order to facilitate the expansion of transgender rights under Title IX in federal courts.

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[13] Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3631 (2012), as regulated by 24 C.F.R. § 5.105(a)(2) (2011) (requiring that housing determinations for HUD-assisted or insured housing be made without discrimination on the basis of gender identity).

[14] MASS. GEN. LAWS. ch. 4, § 7 (2012). Massachusetts's gender identity law states that an entity, including a school, may require "evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of that person's core identity" in order to determine student eligibility for programs and accommodations. *Id.*

I. THE LANDSCAPE OF TITLE IX AND THE PRESENT DEMAND FOR ITS APPLICATION TO TRANSGENDER STUDENTS

A. A Brief History of Title IX, Its Core Features, and the Importance of a Federal Ruling

Title IX of the Education Amendments of 1972 provides in relevant part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[15] The law was enacted on June 23, 1972 under the Nixon administration at the apex of the women's liberation movement.[16] Historically, cisgender[17] women have been the prototypical beneficiaries of Title IX actions.[18] In this sense, Title IX reflects a triumph of second wave feminism, if its aim is to be understood strictly in terms of social equality for cisgender women.[19] Another dominant feature of Title IX actions has been the enforcement of gender equality in sports, although the statute does not explicitly mention athletics.[20] In spite of the relative frequency of Title IX litigation aimed at equalizing sports to benefit cisgender women, the rationale for

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[15] 20 U.S.C. § 1681(a) (2012).

[16] DEBORAH L. CAREY, GETTING IN THE GAME 2 (2012) ("Title IX is a 'feminist' law in the sense that it is animated by a desire to enable women to live more full and meaningful lives, without the stifling constraints of gender roles and discrimination."); Allen Barra, *Female Athletes, Thank Nixon*, N.Y. TIMES (June 16, 2012), http://www.nytimes.com/2012/06/17/opinion/sunday/female-athletes-thank-nixon.html?r=0 ("The year before Title IX was enacted, there were about 310,000 girls and women in America playing high school and college sports; today, there are more than 3,373,000.").

[17] The term "cisgender" refers to people who identify with the same gender to which they were assigned at birth. *Cisgender*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/cisgender (last visited, Oct. 14, 2015). "Transgender" may be treated as an umbrella term that encompasses those who identify with a gender other than the one assigned to them at birth. *Transgender*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/transgender (last visited, Oct. 14, 2015).

[18] *See, e.g.*, Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60 (1992).

[19] CHARLOTTE KROLOKKE & ANN SORENSEN, GENDER COMMUNICATION THEORIES AND ANALYSES: FROM SILENCE TO PERFORMANCE 11-16 (2005) ("Typical liberal feminist concerns during the second wave . . . were documenting sexism in private as well as public life and delivering a criticism of gendered patterns of socialization." This is to be compared with third-wave feminism, which is defined by adherents' motivation to "develop a feminist theory and politics that honor contradictory experiences and deconstruct categorical thinking . . . the primary principles of transfeminism are defined as the right (a) to define one's own identity and to expect society to respect it and (b) to make decisions regarding one's own body."). It is interesting to note the ways in which the OCR's emerging trans-inclusive interpretation of Title IX parallels a larger cultural recognition of the tenets of third wave feminism.

[20] *See, e.g.*, Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993) (holding that a 10.5% disparity between female athletic participation and female undergraduate enrollment was not substantially proportionate to trigger Title IX protection); Boulahanis v. Bd. of Regents, 198 F. 3d 633 (7th Cir. 1999) (holding that the University's elimination of a portion of men's athletic programs to achieve "substantial proportionality" in relation to female athletic programs did not violate section 1681 because the male athletic programs continued to be proportional to male enrollment).

the Act's passage may be construed far more broadly, as evidenced by remarks from former Senator Birch Bayh, Title IX's chief drafter.[21]

It is therefore crucial to observe the ways in which Title IX may protect students from discriminatory conduct in a variety of academic contexts, and enable remedies if violations are found. For example, the Supreme Court has extended Title IX to sex discrimination in academic admissions, ruling that Title IX creates a private right of action.[22] In *Cannon v. University of Chicago*, the Supreme Court reversed the Seventh Circuit's holding in finding that Title IX confers a private right of action to litigants seeking remedies to sex discrimination.[23] Therefore, by extension, families of transgender students may initiate private litigation against schools in cases of discrimination.

The fact that Title IX creates a private right of action is important because a federal court ruling that vindicates the rights of transgender youth would have a wider reaching impact on subsequent decisions than the OCR's present administrative activity, which although crucial, is non-binding on federal courts. Furthermore, judicial recognition of Title IX's applicability to transgender youth would signify an important judicial commitment to expanding the scope of transgender civil rights in a way that parallels the advancements that are being made in other fields, particularly in medicine.[24] As the body of medical opinion that supports transgender youth expands, it will present an untenable situation if schools do not revise their policies to recognize this advancement and allow transgender students to access sex-segregated programs and accommodations in accordance with gender identity.

An additional benefit to Title IX adjudication in federal court is the plaintiff's ability to receive damages for statutory violations.[25] In *Franklin v. Gwinnett*, the Supreme Court held that parties may receive compensatory damages under Title IX in cases where they are subjected to impermissible sex discrimination by an institution in receipt of federal funding.[26] Therefore, an additional advantage for transgender children and their families seeking relief under Title IX in federal court

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21 92 CONG. REC. 5807 (1972) ("Central to my amendment are sections . . . which would prohibit discrimination on the basis of sex in federally funded education programs . . . This portion of the amendment covers discrimination in all areas where abuse has been mentioned [including] access to programs within the institution."); Senator Birch Bayh, Address at Sec'y of Educ.'s Comm'n on Opportunity in Athletics, U.S. Dept. of Educ. 24 (Aug. 27, 2002), http://www2.ed.gov/about/bdscomm/list/athletics/transcript-082702.pdf ("What we were really looking for was . . . equal opportunity for young women and for girls in the educational system of the United States of America. Equality of opportunity. Equality. That shouldn't really be a controversial subject in a nation [that] now for 200 years has prided itself on equal justice.").

22 Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).

23 *Id.*

24 Lambrese, *supra* note 4, at 645-49; Giordano, *supra* note 4, at 583. The overreliance on a medical model for the expansion of transgender rights, though an issue that warrants significant attention, will not be addressed for the purpose of this Note.

25 Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 75 (1992).

26 *Id.*

is the opportunity to receive damages as a remedy for discriminatory infringement. The OCR's administrative conduct, while effective in that it so far has enabled the provision of injunctive relief to transgender children, has not resulted in the provision of damages awards to complainants.[27] Because damages provide meaningful relief to parties who have suffered from official misconduct and, at least theoretically, may succeed in deterring the offending school from engaging in future discriminatory behavior, it is important that the families of transgender children be able to seek relief in the form of damages in federal courts.

B. Current Limitations on Title IX's Applicability to Transgender Students in the Absence of Federal Agency Regulations

At least one federal court has recognized that Title IX's prohibition on "sex" discrimination encompasses gender identity, and thereby protects transgender plaintiffs, but the holding was confined to the context of sexual assault in the higher education setting.[28] *Miles v. New York University* involved the issue of Title IX's applicability to a transgender female student claiming sexual harassment at New York University.[29] The plaintiff, a male-to-female transgender student, alleged sexual harassment against a professor in the University's graduate musicology program.[30] The court framed the relevant issue as "whether Title IX protects a biological male who has been subjected to discriminatory conduct while perceived as female."[31] Rejecting the University's argument that Title IX does not prohibit discrimination against transgender people, the court held that the professor's discriminatory harassment against the plaintiff "related to sex and sex alone"[32] and therefore fell within Title IX's protective scope. Interestingly, the court noted that even though the legislators responsible for Title IX's passage "may not have had in mind the specific pattern here involved,"[33] the issue was clearly within the intended province of Title IX.[34]

Miles represents Title IX's potential as a remedy for transgender students who have been subjected to discriminatory conduct on the basis of gender identity. However, because the scope of this decision is confined to transgender students in the fact-specific context of sexual harassment in higher education, the case did not settle the issue of Title IX's applicability to transgender youth in the context of elementary and secondary education, where the harm typically involves discriminatory barriers to accessing sex-segregated programs and accommodations.

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[27] *See, e.g.*, Arcadia Unified Sch. Dist., U.S. Dept. of Educ., OCR Case No. 9-12-1020 (July 24, 2013); Downey Unified Sch. Dist., U.S. Dept. of Educ., OCR Case No. 9-12-1095 (Oct. 8, 2014).

[28] Miles v. New York Univ., 979 F. Supp. 248 (S.D.N.Y. 1997).

[29] *Id.*

[30] *Id.* at 250.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

Furthermore, the Office for Civil Rights, Department of Education's existing Title IX regulation is insufficient in addressing the question of the statute's applicability to transgender students because it does not explicitly extend the statute's prohibition on "sex" discrimination, with reference to programs and accommodations access, to gender identity.[35] The regulation pertaining to sex discrimination only requires that "in providing any aid, benefit, or service to a student, a recipient shall not, *on the basis of sex* . . . [t]reat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service."[36] While the regulation prohibits differential treatment on the basis of "sex" in determining program eligibility or accommodations access, it does not explicitly extend such protections to gender identity, nor does it define the former as encompassing the latter.[37] Therefore, a textual barrier exists as to the regulation's applicability to transgender students because it does not define "sex" as encompassing gender identity.

C. Analogy to Title VII: The Movement Towards Trans-Inclusive Interpretations of Prohibitions of "Sex" Discrimination

The argument that Title IX's prohibition on "sex" discrimination should encompass gender identity expression, and thereby protect transgender people, is not unprecedented. A well-defined body of Title VII law has extended the statute's prohibition on "sex" discrimination to transgender people.[38] Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of "sex" in the employment context.[39] The formation of Title VII jurisprudence that allows for a reading of "sex" discrimination as encompassing "sex-stereotyping" and thereby, gender identity expression, is increasingly apparent across federal districts and at the level of agency adjudications.[40] The landmark decision responsible for the sex-stereotyping analysis is *Price Waterhouse v. Hopkins*.[41] *Price Waterhouse* departed from earlier Title VII decisions, which only recognized blanket preferences based on chromosomal sex as impermissible discrimination.[42] *Price Waterhouse* involved a Title VII claim brought by a cisgender woman seeking partnership at the accounting firm.[43] The firm initially recommended the plaintiff for partnership, but

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[35] 34 C.F.R. § 106.31(b)(1) (2010).

[36] *Id.* (emphasis added).

[37] *Id.*

[38] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Glenn v. Brumby, 632 F. Supp. 2d 1308 (N.D. Ga. 2009).

[39] 42 U.S.C. § 2000e-2(a) (2012) ("It shall be unlawful employment practice of an employer—to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

[40] *See, e.g., Price Waterhouse*, 490 U.S. at 228; *Glenn*, 632 F. Supp. 2d at 1308; Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

[41] *Price Waterhouse*, 490 U.S. at 228.

[42] *Id.*

[43] *Id.* at 231-33.

subsequently placed her on hold for further consideration until the next annual meeting.[44] At the following annual meeting, the firm rejected her candidacy for partnership.[45] The primary issue was whether the Admission Committee's concerns about the plaintiff's performance were legitimately nondiscriminatory, or pretext to mask impermissible sex discrimination rooted in sex-stereotyping.[46] In claiming that the firm's conduct was discriminatory, the plaintiff raised three arguments: (1) the criticisms of plaintiff's interpersonal skills were false; (2) even if the firm believed her interpersonal skills were deficient, Price Waterhouse routinely admitted male candidates with weak interpersonal skills if they had strong qualifications in other areas; and most crucially, (3) the criticisms of the plaintiff's interpersonal skills were the product of sex stereotyping by male partners.[47]

The *Price Waterhouse* Court evaluated the plaintiff's arguments before arriving at the conclusion that sex-stereotyping, defined as predicating employment decisions on the extent to which employees fit stereotypes associated with their gender, is prohibited under Title VII.[48] The Court found persuasive the plaintiff's argument that she had been subjected to impermissible sex-stereotyping by male partners who, in evaluating her candidacy, emphasized the need for her to use more feminine language and "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[49]

Federal courts now routinely employ the *Price Waterhouse* sex-stereotyping rationale—that Title VII prohibits employers from engaging in discrimination based on gender stereotypes—when opting to extend Title VII protections to transgender people. For example, *Glenn v. Brumby*[50] involved a discrimination claim brought by a transgender woman. After informing her supervisor at the Georgia General Assembly's Office of Legislative Counsel of her intent to medically transition from male to female, she was fired from her position as Legislative Editor.[51] Because the defendants were state actors, the plaintiff brought claims pursuant to 42 U.S.C. § 1983, alleging that the defendants had violated the Equal Protection Clause for discrimination based on sex.[52] Claiming that she was a member of a suspect class for the purpose of Equal Protection analysis, the plaintiff argued for adherence to the sex-stereotyping analysis used in *Price Waterhouse* to

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44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.* at 235-36.

48 *Id.* at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.").

49 *Id.* at 272.

50 *Glenn*, 632 F. Supp. 2d at 1308.

51 *Id.* at 1311.

52 *Id.*

support a finding of sex discrimination on the basis of her atypical gender presentation.[53] The court accepted her argument, holding that:

> [W]hile "transsexuals" are not members of a protected class based on sex, *those who do not conform to gender stereotypes are members of a protected class based on sex*. This is the same conclusion reached by the Sixth Circuit, which specifically held that some courts improperly "superimpose classifications such as 'transsexual' on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification."[54]

The *Glenn* court's reasoning is crucial for its assertion that transgender people, while not a formally protected class for the purposes of sex discrimination claims, do constitute a protected subclass due to their gender non-conformity. While the evolution of Equal Protection doctrine towards transgender inclusion is distinct from that of Title VII's, it is clear that the notion of "sex" as encompassing gender identity expression is gaining increasing credibility across the federal judiciary.

A trans-inclusive reading of Title VII is now accepted by the federal agency that oversees Title VII enforcement.[55] The Equal Employment Opportunity Commission ("EEOC") has extended Title VII's prohibition on "sex" discrimination to transgender people in its agency adjudications and has sought its application to transgender people through enforcement proceedings.[56] In *Macy v. Holder*, the EEOC issued an agency decision that adhered to a reading of sex discrimination that encompassed gender identity expression under the sex-stereotyping rationale established in *Price Waterhouse*.[57] *Macy* involved a transgender female law enforcement official who, at the time of the discriminatory conduct, worked as a police detective in Phoenix, Arizona.[58] Prior to her transition from male to female, her supervisor at the police department informed her of an opening at the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives Walnut Creek facility where, if hired, she would serve as a ballistics investigator.[59] Mia Macy, the complainant, discussed the position with hiring staff on two occasions over the telephone prior to undergoing physical transition.[60] During these conversations, Ms. Macy was assured that she would have the position as long as her background

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[53] *Id* at 1315.

[54] *Id.* at 1315-16 (citing Smith v. City of Salem, 378 F.3d 566, 577 (6th Cir. 2004) (emphasis added)).

[55] EEOC, FACT SHEET: RECENT EEOC LITIGATION REGARDING TITLE VII & LGBT-RELATED DISCRIMINATION 1 (2015).

[56] Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012); EEOC v. Lakeland Eye Clinic, P.A., Civ. No. 8:14-cv-2421-T35 AEP (M.D. Fla. Sept. 25, 2014); EEOC v. R.G. & G.R. Harris Funeral Homes Inc., Civ. No. 2:14-cv-13710-SFC-DRG (E.D. Mich. Sept. 25, 2014).

[57] *Macy*, 2012 WL 1435995, at *7.

[58] *Id.* at *1.

[59] *Id.*

[60] *Id.*

check was satisfactory.[61] Months later, Ms. Macy revealed her intent to transition from male to female to the party responsible for conducting the background check.[62] Thereafter, she received a letter stating that the position was no longer available "due to federal budget reductions."[63] The Commission adjudicated the dispute in Ms. Macy's favor and cited an emerging judicial doctrine extending Title VII's prohibition on sex discrimination to gender identity expression.[64] In the example of Title VII jurisprudence, the judiciary was the first to accept a functional, trans-inclusive reading of the law predicated on the sex-stereotyping rationale of *Price Waterhouse*. After the federal judiciary provided a framework for a trans-inclusive interpretation of Title VII, the EEOC followed. With respect to Title IX, agency regulations may be used to compel a trans-inclusive reading of the statute in federal courts under the Chevron doctrine, as will be discussed further in Part IV.

It is apparent from the state of contemporary Title VII jurisprudence that a reading of Title IX that encompasses gender identity expression, and thereby transgender people, is far from unprecedented. Contemporary Title VII jurisprudence, which has moved away from a formalistic understanding of discrimination on the basis of "sex" as limited to distinctions based on unmitigated preferences for men or women in hiring or promotion, and towards an understanding that includes sex-stereotyping, lends doctrinal support to the argument for the trans-inclusive expansion of Title IX as applied to transgender students.

II. STATE LAWS PROVIDE INSUFFICIENT PROTECTION FOR TRANSGENDER STUDENTS

While a number of states have laws that contain provisions that prohibit discrimination on the basis of gender identity, the majority of jurisdictions lack such provisions.[65] For example, in 2007, a transgender male student at the public Southern University of Utah was denied access to a male dorm room.[66] The University determined that Osborne would be denied access to male student housing unless he produced documentation from his physician stating that he (1) was on hormone replacement therapy, (2) provided proof from his therapist stating that he had "gender identity disorder," and (3) provided proof of sex-reassignment surgery.[67] In light of these unduly burdensome demands, the student filed a grievance with the necessary administrative officials and was informed that the school was

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[61] *Id.* at *2.

[62] *Id.* at *1.

[63] *Id.*

[64] *Id.* at *4-7 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 228 (1989); Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000)).

[65] ACLU, *Know Your Rights—Transgender People and the Law*, ACLU (Apr. 24, 2013), https://www.aclu.org/know-your-rights/transgender-people-and-law (citing California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington and the District of Columbia as the only states with trans-inclusive anti-discrimination protections).

[66] ALLY WINDSOR HOWELL, TRANSGENDER PERSONS AND THE LAW 82 (2013).

[67] *Id.*

"not discriminating against him," but rather was providing for the safety of other students.[68] Empirically, there is virtually no evidence that transgender students pose a significant safety risk to others in schools.[69] However, because there is an abundance of empirical evidence that transgender students are much more likely to face harassment and violence than their cisgender peers in schools,[70] such a policy can only be characterized as a pretext for discrimination.

Osborn was unable to seek judicial relief for the discrimination he suffered because Utah is in the majority of states that do not protect transgender students from discrimination.[71] Osborne's situation further reinforces the need for the OCR to promulgate a federal regulation that defines the inquiries schools can make when determining whether to permit a transgender student to access to a sex-segregated program or accommodation. While Osborne's situation arose in the context of higher education, the accommodations discrimination to which he was subjected parallels that experienced by transgender students in the context of elementary and secondary education.[72]

Even in the minority of states that have laws protecting gender identity, such protections are not uniformly applied or consistently interpreted by state courts. For example, in *Doe v. Clenchy*, the family of Nicole Maines, a transgender child seeking access to sex-segregated accommodations and educational programming, brought a civil rights lawsuit against her school under the state's anti-discrimination law.[73] In *Clenchy*, a transgender elementary school student sought access to the girl's restroom at Asa Adams Elementary School in Orono, Maine.[74] Before the beginning of the school year, the girl's parents met with members of the school's administration to inform them that school staff should use female pronouns when addressing their transgender daughter and to request that she be allowed to use female bathroom facilities throughout the school day.[75] Initially, school administrators vowed to allow accommodations access, but later that year revoked gender-appropriate bathroom access for the transgender student.[76] News reports indicated that the transgender girl was subjected to harassment and taunting

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[68] *Id.*

[69] *Id.*

[70] Joeseph G. Kosciw, Emily A. Greytak & Elizabeth M. Diaz, *Who, What, Where, When, and Why: Demographic and Ecological Factors Contributing to Hostile School Climate for Lesbian, Gay, Bisexual, and Transgender Youth*, 38 J. YOUTH & ADOLESCENCE 976, 978 (2009) (citing the particular challenges facing transgender youth in rural and lower-income communities); JAIME M. GRANT, LISA A. MOTTET & JUSTIN TANIS, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 39 (2011) (finding 35% of transgender students in higher education surveyed to report harassment or bullying by students and staff).

[71] ACLU, *supra* note 65.

[72] *See, e.g.*, Doe v. Clenchy, No. CV-09-201, 2011 Me. Super. LEXIS 70 (Me. Super. Ct. Apr. 1, 2011).

[73] *Id.*

[74] *Id.* at *2.

[75] *Id.*

[76] *Id.* at *3.

from other students and the administration.[77] On April 10, 2010, after being consistently denied access to the girl's restroom, Nicole Maines, the transgender plaintiff, filed a complaint with the Maine Human Rights Commission, alleging that the district superintendent had violated section 4552 of the Maine Human Rights Act ("MHRA"), which declares the policy of the State to "prevent discrimination in employment, housing or access to public accommodations on account of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin . . . and to prevent discrimination in education on account of sex, sexual orientation or physical or mental disability."[78] The term "sexual orientation" is defined in the MHRA as "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression."[79]

Despite the inclusion of "gender identity" in the MHRA's statutory definition of "sexual orientation," the Maine Superior Court rejected the plaintiff's claim that the school violated the MHRA in failing to provide access to the women's restroom.[80] Instead, the court examined section 4595(1)(A)-(E) of the MHRA, requiring nondiscriminatory accommodation, and reasoned that it was limited to cases of physical disability, of which gender dysphoria is not classified.[81] Furthermore, the Maine Superior Court reasoned that section 4595(1)(A)-(E) of the MHRA had not been interpreted by any federal or state court to extend to gender identity.[82] Notably, the court supported its finding of the inapplicability of section 4595(1)(A)-(E) of the MHRA to gender identity due to the absence of any guiding regulation requiring that "sex" be interpreted to encompass "gender identity" in the accommodations provision.[83] The lower court's refusal to use the definitions explicitly provided in the MHRA further reinforces the need for a federal law that provides uniform protection through offering a stable definition of "sex" discrimination as encompassing discrimination on the basis of "gender identity."

On appeal, the Maine Supreme Judicial Court reversed the Maine Superior Court's holding, ruling that the MHRA prohibited discrimination in the context of access to public accommodations on the basis of gender identity.[84] Employing a reading of the MHRA that allowed for a consideration of its "practical operation and potential consequences,"[85] the court found that "denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the

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[77] Judy Harrison, *Maine Supreme Court Rules in Favor of Transgender Girl in Orono School Bathroom Case*, BANGOR DAILY NEWS (Jan. 30, 2014, 12:07 PM), http://bangordailynews.com/2014/01/30/news/bangor/maine-supreme-court-rules-in-favor-of-transgender-girl-in-orono-school-bathroom-case/.

[78] *Clenchy*, 2011 Me. Super. Ct. LEXIS 70, at *7 (citing 5 M.R.S. § 4552 (2010)).

[79] ME. REV. STAT. ANN. tit. 5, § 4553 (9-C) (2014).

[80] *Clenchy*, 2011 Me. Super. Ct. LEXIS 70, at *13.

[81] *Id.* at *11 (citing 5 M.R.S. § 4595(1)(A)-(E) (2010)).

[82] *Id.* at *12.

[83] *Id.* at *13.

[84] Doe v. Reg'l Sch. Unit 26, 86 A.3d 600 (Me. 2014).

[85] *Id.* at 604.

MHRA."[86] While the outcome in *Clenchy* was ultimately favorable, the Maine Supreme Judicial Court's reasoning hinged on the MHRA's statutory definition of "sexual orientation" as encompassing "gender identity," an interpretation at odds with that offered by the lower court.[87]

The MHRA deviates from the norm in two ways. First, most state-level anti-discrimination laws do not protect gender identity discrimination in public schools.[88] Second, most state laws that prohibit discrimination on the basis of sexual orientation do not extend protection to gender identity expression and consequently do not encompass transgender students.[89] In fact, most state laws that prohibit discrimination on the basis of sexual orientation do not offer protection to those who face discrimination on account of gender identity expression.[90] Furthermore, the rationale provided by the Maine Superior Court for deeming the MHRA inapplicable to transgender individuals indicates the inconsistent interpretations we may expect when transgender plaintiffs rely on murky, ill-defined state law to remedy discrimination.[91] *Doe v. Clenchy*, while ultimately favorable in outcome for the plaintiff, when examined more closely, actually reinforces the demand for uniformity that would be provided by the consistent application of Title IX to transgender students.[92] Without a federal remedy that clearly defines "gender identity" as encompassed within the term "sex" for the purposes of protection from discrimination, transgender students and their families will be subjected to the unpredictable tides of state court interpretations of state statutory provisions.

III. THE LIMITED SCOPE OF THE OCR'S PRESENT ADMINISTRATIVE CONDUCT EXTENDING TITLE IX PROTECTIONS TO TRANSGENDER YOUTH

Recently, the OCR has demonstrated that Title IX protections extend to transgender students. In the course of its administrative conduct, it has offered a Statement of Interest in a pending federal Title IX action on behalf of a transgender child, authorized two resolution agreements between transgender children and school districts, and issued guidance documents that offer a trans-inclusive interpretation of the statute.[93] While the OCR's position on Title IX's applicability is clear, the protections are limited because, at present, they are unlikely to be eligible for Chevron deference, as will be further discussed in Part IV.[94]

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[86] *Id.* at 607.

[87] *Id.*

[88] ACLU, *supra* note 65.

[89] *Id.*

[90] *Id.*

[91] Doe v. Clenchy, No. CV-09-201, 2011 Me. Super. LEXIS 70 (Me. Super. Ct. Apr. 1, 2011).

[92] *Id.*

[93] See the following examples of the OCR's administrative activities supporting a trans-inclusive interpretation of Title IX.

[94] *Infra* Part IV.

A. The Statement of Interest: Tooley v. Van Buren Public Schools

The issue of Title IX's applicability to transgender children in the context of public schools has not been finally adjudicated by a federal court, although the first action of this kind is presently pending in the Eastern District of Michigan.[95] The plaintiff in *Tooley v. Van Buren Public Schools* is a fourteen-year-old transgender boy alleging discrimination and harassment in violation of Title IX against the Wyandotte Public School District.[96] In support of the plaintiff's claim against the district for violations of Title IX and the Equal Protection Clause, the OCR has explicitly stated its commitment to a trans-inclusive interpretation of the statute,[97] and supported its position by analogy to an increasingly prevalent trans-inclusive interpretation of Title VII's prohibition on sex discrimination.[98] The OCR's submission of the Statement of Interest to the court demonstrates its intention to "provide the correct legal standards governing sex discrimination under Title IX" in an effort to urge the court to "reject Wyandotte's Motion to Dismiss."[99]

B. The Resolution Agreements

1. Arcadia Resolution Agreement

Two recent resolution agreements between the OCR and two California school districts reveal the OCR's emerging commitment to extending Title IX protection to transgender children. The first of the agreements that adheres to a trans-inclusive reading of Title IX is the Resolution Agreement ("Arcadia Agreement") reached between the OCR and the Arcadia Unified School District ("Arcadia District").[100] The Arcadia Unified School District case involved a Title IX claim brought by the family of a female-to-male transgender elementary school student.[101] The student, assigned female at birth, had manifested a male gender iden-

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[95] Tooley v. Van Buren Pub. Schs., No. 2:14-cv-13466 (E.D. Mich. Sept. 5, 2014). At the time of this Note's submission, the disposition of this case is still pending in the Eastern District of Michigan.

[96] Statement of Interest of the United States at 1, Tooley v. Van Buren Pub. Schs., Case No. 2:14-cv-13466-AC-DRG (E.D. Mich. Feb. 24, 2015). The OCR has submitted the foregoing to the court declaring its commitment to a reading of Title IX that includes the protection of transgender students.

[97] *Id.* at 7 ("The Court should review Plaintiff's allegations of discrimination on all three of these bases as claims of sex discrimination under Title IX and the Equal Protection Clause. The fact that Plaintiff is transgender, and asserts discriminatory conduct related to his gender expression or gender identity, does not, as Wyandotte suggests, defeat his sex discrimination claims as a matter of law.").

[98] *Id.* at 8-9 ("Federal courts routinely look to Title VII case law in construing Title IX's anti-discrimination provisions. *See, e.g., Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (applying the Supreme Court's interpretation of sex discrimination under Title VII to Title IX); *Fuhr v. Hazel Park Sch. Dist.*, 710 F.3d 668, 673 n.2 (6th Cir. 2013) ("Title IX retaliation claims are analyzed using the same standards as Title VII."); *Nelson v. Christian Bros. Univ.*, 226 Fed. Appx. 448, 454 (6th Cir. 2007) ("Generally, courts have looked to Title VII . . . as an analog for the legal standards in both Title IX discrimination and retaliation claims.")).

[99] *Id.* at 3.

[100] Arcadia Unified Sch. Dist., U.S. Dept. of Educ., OCR Case No. 9-12-1020 (July 24, 2013).

[101] *Id.*

tity from a young age, assuming a male first name and wearing boys' clothing.[102] At the completion of the student's fifth grade year, the student's classmates had begun to respect his gender transition and affirm his male identity.[103] Regardless of his burgeoning social acceptance, school officials continued to single him out in the course of their administrative decisions.[104] For instance, the Arcadia District required him to use a separate dressing area for physical education class, isolating him from his peers.[105] He was also required to use a restroom that was inconveniently located across campus, which forced him to miss class time and created a practical interference with his education.[106] Additionally, regardless of vocal approval and acceptance by his male peers, the school required him to use a separate housing facility for a trip in celebration of his seventh grade graduation.[107]

The adverse circumstances prompted the child's family to file a complaint with the OCR. The complaint letter alleged that the Arcadia Unified School District's conduct violated Title IX.[108] It alleged sex discrimination under Title IX on the basis of two theories: (1) sex stereotyping, and (2) change of sex.[109] With reference to discrimination on the basis of sex stereotyping, the complaint argued that in order to state a claim of sex stereotyping under Title IX, the plaintiff must prove (1) exclusion from participation in, denial of benefits of, or subjection to discrimination in an educational program, (2) that the program receives federal financial assistance, and (3) that the plaintiff's exclusion was on the basis of gender.[110] The complaint letter alleged that the school district's decision to isolate him from his peers on the school trip was based solely on his transgender identity.[111] Regarding discrimination on the basis of change of sex, the letter relied on *Schroer v. Billing*,[112] a Title VII case where the court determined that the plaintiff, a transgender employee, suffered sex discrimination due to her gender transition.[113] The complaint letter further argued that, although the student was not old enough to undergo certain features of medical transition, the student had undertaken all of the steps he could to complete his transition.[114] Finally, the complaint letter asked the OCR to find that the Arcadia Unified School District's conduct violated Title IX, and to

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102 Editorial Board, Editorial, *The Next Civil Rights Frontier*, N.Y. TIMES, Aug. 1, 2013, at A20.

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 Complaint at 4, Arcadia Unified Sch. Dist., U.S. Dept. of Educ., OCR Case No. 9-12-1020 (July 24, 2013) (Letter from Asaf Orr to U.S. Dep't of Educ., Office for Civil Rights (Oct. 10, 2011), http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia_Redacted_OCR_Complaint_07.24.2013.pdf.).

109 *Id.*

110 *Id.* at 5.

111 *Id.*

112 *Id.* at 6 (citing Vaden v. Conn., 557 F. Supp. 2d 293, 307 (D. Conn. 2008)).

113 *Id.*

114 *Id.*

provide relief by allowing the student to stay in the boys' cabin on the overnight graduation field trip; to withdraw its requirement that the transgender child be required to stay in a separate cabin with his parents; to provide training to the Board of Education, District Administration, and school principals regarding the rights of transgender students under Title IX; and to revise all Arcadia Unified School District policies to conform with Title IX.[115]

On July 24, 2013, the Arcadia Unified School District and the OCR entered into a resolution agreement.[116] The Arcadia Agreement required the Arcadia District to implement critical policy changes and forms of injunctive relief for the transgender student in compliance with Title IX.[117] The District agreed to hire third-party experts on gender identity to assist the District in the proper implementation of other provisions of the Arcadia Agreement.[118] The District agreed to provide the student with access to sex-segregated facilities designated for male students and to treat the student the same as other male students in every respect in the educational programs and activities offered by the school.[119] It also agreed to revise its policies to include "gender-based discrimination as a form of discrimination based on sex" and to state that "gender-based discrimination includes discrimination based on a student's gender identity, gender expression, gender transition, transgender status, or gender nonconformity."[120] Furthermore, the Arcadia Agreement contained specific provisions mandating federal oversight and reporting requirements to ensure long term, meaningful compliance with the policy implementations as required in the Arcadia Agreement.[121]

2. Downey Resolution Agreement

In October 2014, the OCR filed a complaint against the Downey Unified School District ("Downey District") on behalf of the family of a transgender girl who had previously filed a complaint with the Agency.[122] The complaint alleged a Title IX violation on two bases: (1) discrimination in the form of disparate treatment due to the student's gender identity, and (2) inadequate dealing of sexual and gender-based harassment the student faced from her peers. The student, assigned male at birth, had asserted a female gender identity at an early age and was diagnosed with gender dysphoria before beginning her kindergarten year in the Downey District.[123] The student's family had informed the District of the child's

115 *Id.*

116 Arcadia Unified Sch. Dist., U.S. Dept. of Educ., OCR Case No. 9-12-1020 (July 24, 2013).

117 *Id.*

118 *Id.* at 2.

119 *Id.* at 3.

120 *Id.* at 4.

121 *Id.* at 6-7.

122 Letter from U.S. Dep't of Educ., Office for Civil Rights, to John A. Garcia, Superintendent of the Downey Unified School District (Oct. 14, 2014), http://www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf.

123 *Id.* at 2.

transgender identity before the beginning of the school year.[124] From kindergarten through fifth grade, the student had continued to express a female gender identity, but had not begun using the girl's restroom and continued to use male pronouns in the classroom.[125] The complaint alleged that throughout the student's fifth grade year, staff at the school repeatedly disciplined her through confiscating her make-up.[126] Furthermore, school staff asked the student to write an apology letter to male students in the class who were made uncomfortable by her gender non-conformity.[127] The complaint also stated that the student faced constant verbal harassment by her peers.[128] In spite of repeated attempts to inform the administration about the harassment, administrators told the student's family to consider transferring the child to another school where no one would be aware of the student's transgender identity.[129] By the latter half of the student's fifth grade year, the student and her family requested that she be referred to with female pronouns and that she have access to the girl's bathroom.[130] In spite of the notice, the school staff refused to acknowledge the student with female pronouns and continued to penalize her for wearing girl's clothing.[131] For the student's sixth grade year, she was placed at the local middle school, but continued to face debilitating harassment there and as a result, requested transfer to a different middle school.[132] At the second middle school, the student continued to face harassment and further expressed concerns about the continuing animus she would face in one of the District's high schools.[133]

On October 8, 2014, the Downey Unified School District agreed to settle with the complainant through the OCR. The Resolution Agreement ("Downey Agreement") established a number of key provisions.[134] First, the Downey Agreement required the District to hire a third-party expert on gender identity to assist with implementation.[135] It also provided extensive injunctive relief for the student. For example, the Downey Agreement required the District to treat her as it would all other female students, allowing her access to sex-segregated accommodations and activities.[136] The Downey Agreement also required that the District discontinue penalizing the student for her gender non-conformity and mandated the creation of a student success plan to ensure that the student has equal access and

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124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.* at 3.
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.* at 4.
133 *Id.*
134 Downey Unified Sch. Dist., U.S. Dept. of Educ., OCR Case No. 9-12-1095 (Oct. 8, 2014).
135 *Id.* at 1.
136 *Id.* at 2.

opportunity to all education programs.[137] In order to ensure compliance, the Downey Agreement required that the District provide the OCR with verification that a student success plan had been formed, in addition to verification that the District's previous discriminatory discipline was removed from the student's record.[138] With respect to District-wide policies and procedures, the Downey Agreement required the District to make any necessary modifications to ensure that transgender students are provided with an equal opportunity to participate in all programs and activities.[139] It also required the District to re-examine its internal harassment procedure to ensure that transgender students have an available remedy.[140] The OCR subsequently implemented reporting requirements in the Downey Agreement to ensure District compliance.[141] Additionally, to address the gaps in administrators' knowledge of issues pertaining to gender identity and discrimination, the Downey Agreement mandated the District to engage in trainings with the consultant.[142] Furthermore, the Downey Agreement required the consultant to aid the District with developing age-appropriate curricula on gender identity, stereotypes and discrimination.[143] Finally, the Downey Agreement featured a monitoring provision that allows the OCR to continue to oversee the fulfillment of the District's terms.[144]

C. The Guidance Documents

Recently, in 2014, the OCR issued two guidance documents stating that Title IX protections apply to transgender youth.[145] On December 1, 2014, the OCR published a guidance document providing clarity on the boundaries of permissible single-sex education in secondary and elementary programs.[146] The guidance provides, in relevant part, that "[u]nder Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes."[147] Additionally, on April 29, 2014, the OCR published a guidance document regarding Title IX's applicability to student victims of sexual violence.[148] The

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137 *Id.*

138 *Id.* at 3.

139 *Id.*

140 *Id.*

141 *Id.* at 4.

142 *Id.*

143 *Id.* at 5.

144 *Id.* at 6.

145 OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASS AND EXTRACURRICULAR ACTIVITIES 25 (2014) [hereinafter OCR-QA ON SINGLE SEX CLASS AND SCHOOL ACTIVITIES]; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 12 (2014) [hereinafter OCR-QA ON SEXUAL VIOLENCE].

146 OCR-QA ON SINGLE SEX CLASS AND SCHOOL ACTIVITIES, *supra* note 145, at 25.

147 *Id.*

148 OCR-QA ON SEXUAL VIOLENCE, *supra* note 145, at 12.

document states, in relevant part, that "Title IX protects all students at recipient institutions from sex discrimination . . . [including] transgender students."[149]

The OCR's administrative conduct shows that the Agency deems Title IX to apply to transgender students. The OCR's administrative conduct represents significant progress on the frontier of civil rights for transgender children. However, because the OCR's administrative activity as described is in procedural formats other than notice and comment rulemaking resulting in publication in the CFR, the activity lacks the "force of law," and is not compulsorily binding on federal courts under the Chevron doctrine. As a result, federal courts have a wider range of discretion in adhering to a formalistic interpretation of Title IX that does not encompass transgender students.[150] In sum, because the Department of Education, Office for Civil Rights has not yet passed federal regulations on Title IX's applicability to transgender children that appear in the CFR as the result of notice and comment rulemaking proceedings, federal courts presently retain a large amount of discretion in determining whether to accept the OCR's trans-inclusive interpretation of the statute.

IV. THE NECESSITY OF FEDERAL REGULATIONS: TWO PROPOSED MODELS

A. Chevron Deference

The OCR has offered a trans-inclusive interpretation of Title IX throughout the course of its administrative conduct. However, because the OCR's interpretation of Title IX does not appear in the CFR following notice-and-comment rulemaking, the extent to which courts must rely on the OCR's trans-inclusive interpretation is limited under Chevron deference. Chevron deference determines the conditions under and extent to which courts must defer to an agency interpretation of a statute in instances of textual ambiguity.[151] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[152] involved the policy question of whether the Environmental Protection Agency's ("EPA") decision to treat pollution-emitting devices as though they were in a common "bubble" was a reasonable construction of the Clean Air Act's[153] permit requirements for "stationary sources."[154] Finding

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[149] *Id.*

[150] *See, e.g.*, G.G. v. Gloucester Cty. Sch. Bd., No. 4:2015cv00054 (E.D. Va. 2015) (dismissing a Title IX action brought on behalf of a transgender female-to-male high school student, stating that "[u]nlike regulations, interpretations in opinion letters, policy statements, agency manuals, and enforcement guidelines 'do not warrant 'Chevron-style deference' with regard to statutes").

[151] Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO L.J. 833, 835 (2001) ("Chevron expanded the sphere of mandatory deference through one simple shift in doctrine: It posited that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administrating.").

[152] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

[153] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §§ 111(a)(3), 172(b)(6), 302(j), 91 Stat. 685, 697-98, 747, 770 (codified as amended at 42. U.S.C. §§ 7411(a)(3), 7502(b)(6), 7602(j) (2012)).

[154] *Chevron*, 467 U.S. at 840-41.

error in the lower court's judicial construction of the term "stationary source" absent a clear definition provided by Congress, the Court reversed, and established a two-part test for determining when deference to an agency's construction is proper.[155] First, the reviewing court must look at whether Congress has spoken directly on the question at issue.[156] If congressional intent is clear, then the reviewing court must adjudicate in accordance with Congress's intended application of the relevant provision.[157] Second, in the absence of clear congressional purpose, the reviewing court must defer to the agency if its interpretation is based on a minimally "permissible construction" of the statute.[158] As the Supreme Court explained, the question was not whether the EPA's interpretation of a "stationary source" was "inappropriate in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of [the] particular program [was] a reasonable one."[159]

The Chevron doctrine, therefore, recognizes that on some matters of statutory interpretation, particularly in matters that concern public policy, federal agencies, as opposed to courts, may be the proper entities to provide the soundest construction of a statute. In determining of whether Title IX should apply to transgender youth, the OCR presumably has access to an abundance of data and consults with experts regarding the problems facing this population. As a result, for the purposes of determining whether Title IX should apply to transgender students, the OCR's resources may enable a more pragmatic and just interpretation of the statute than federal courts would offer autonomously.

Hickman and Merrill observe that the two-part deference test as first applied in *Chevron* is now frequently used by courts outside of the context of environmental law in a range of areas, including, labor law and tax law.[160] As the doctrine has evolved, the presumption in favor of its use is strong.[161] As a result, where *Chevron*'s strong form of deference is employed, a federal agency's interpretation of a statute has a 76.2% probability of judicial adherence.[162]

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155 *Id.* at 842.

156 *Id.*

157 *Id.*

158 *Id.* at 843.

159 *Id.* at 845.

160 Merrill & Hickman, *supra* note 151, at 838, 842 (citing Your Home Visiting Nurse Servs., Inc. v. Shalala, 525 U.S. 449, 452-53 (1999) (Medicare Provider Reimbursement Manual); Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995) (letter of Comptroller of Currency); Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 413-14 (1992) (adjudication by Interstate Commerce Commission); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 647-48 (1990) (informal adjudication); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 574 (1988) (NLRB adjudication); Young v. Cmty. Nutrition Inst., 476 U.S. 974, 978-79 (1986) (no-action decision of the Food and Drug Administration)).

161 *Id.* at 840.

162 William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1127 (2008).

However, as Merrill and Hickman note, there is little indication of under what circumstances it is proper to extend Chevron deference to agency adjudications or official statements of policy in the absence of a regulation in the CFR.[163] Therefore, as the scholars observe, there is a degree of uncertainty regarding "agency interpretations advanced in procedural formats other than in notice-and-comment rulemaking."[164] Additional rulings support this contention. *Christensen v. Harris County*[165] confirms the lack of clarity regarding the applicability of Chevron deference to agency interpretations that are not expressed through the notice-and-comment rulemaking procedure that results in the passage of a federal regulation in the CFR.[166] *Christensen* involved the question of whether to extend deference to the Department of Labor's interpretation of a "comp-time" provision of the Fair Labor Standards Act,[167] which would have required an agreement between a governmental employer and employee to allow the employer to fulfill overtime compensation with time-off instead of monetary compensation.[168] The Supreme Court refused to apply Chevron deference to the Wage and Hour Division's interpretation, distinguishing between agency interpretations that have the "force of law" and interpretations that do not, finding only interpretations that possess the former to be eligible for Chevron deference.[169] The Supreme Court provided examples of agency interpretations that lack the force of law, citing "opinion letters, policy statements, agency manuals, and enforcement guidelines."[170] In comparison, the Court noted that agency interpretations that do have the "force of law" are narrowed to "notice-and-comment rulemaking and formal adjudication."[171]

Interpretations that lack the "force of law" as articulated by the Supreme Court should be granted the standard of deference articulated in *Skidmore v. Swift Co.*, i.e. whether the agency's interpretation has the "power to persuade."[172] Factors that inform whether an agency interpretation has the "power to persuade" under *Skidmore* include the "thoroughness of the agency's decisions, its logic, its consistency with prior interpretations, and the degree of expertise the agency brings to the issue."[173] As Merrill and Hickman note, such inquiries do not appear under the Chevron test that asks only whether Congress has spoken on the statutory issue and if not, whether the interpretation offered by a federal agency is minimally "reasonable" or "permissible."[174] *Skidmore*, therefore, requires a weaker form of defer-

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163 Merrill & Hickman, *supra* note 151, at 842.

164 *Id.*

165 Christensen v. Harris Cty., 529 U.S. 576 (2000).

166 *Id.*

167 Fair Labor Standards Act, 29 U.S.C. § 207 (2012).

168 Merrill & Hickman, *supra* note 151, at 844.

169 *Id.* at 846.

170 *Id.*

171 *Id.*

172 *Id.* (citing Skidmore v. Swift Co., 323 U.S. 134, 140 (1944)).

173 *Id.* at 855 (citing *Skidmore*, 323 U.S. at 140).

174 *Id.* (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984)).

ence and confers a broader grant of interpretive autonomy to the judiciary, removing important policy questions from the purview of federal agencies that may be more equipped to settle such questions.[175]

In the absence of regulations promulgated by the Department of Education, Office for Civil Rights, uncertainty remains regarding the extent to which courts will employ a trans-inclusive reading of Title IX that imposes a minimal burden on transgender youth and their families. At present, the OCR's administrative conduct, when examined by a court, is likely to be evaluated under Skidmore's less deferential "power to persuade" test instead of Chevron's mandatory deference because the OCR's position on Title IX is not formalized in the CFR following notice-and-comment rulemaking.[176]

B. The HUD's Gender Identity Federal Regulation and Massachusetts's Gender Identity Law as Models for a Title IX Federal Regulation

In 2011, in response to findings that LGBT persons are subjected to widespread discrimination in housing practices, HUD, the federal entity charged with the regulation of the Fair Housing Act, promulgated a regulation to extend anti-discrimination protections to persons on the basis of "gender identity."[177] The final rule prohibits eligibility determinations for HUD-assisted or insured housing to be made on the basis of "actual or perceived sexual orientation, gender identity, or marital status."[178] The regulation supplements the Fair Housing Act's otherwise ambiguous statutory language that prohibits discrimination in housing practices on the basis of "sex".[179] The implementation of a regulation similar to HUD's by the OCR with reference to Title IX would work to settle definitively the policy issue of whether Title IX's prohibition of "sex" discrimination applies to gender identity expression, and by extension, to transgender students. While the type of discrimination that the HUD regulation attempts to remedy is different, it serves as an example of how federal agencies may settle statutory ambiguity in a manner that soundly addresses policy concerns.

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[175] *Id.*

[176] *Id.*

[177] 24 C.F.R. § 5.105 (2011).

[178] 24 C.F.R. § 5.105(a)(2) (2011).

[179] 42 U.S.C. § 3604 (2012) ("As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful--(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin; (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin; (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available; (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.").

In addition to a federal regulation that defines "sex" as encompassing "gender identity," the Department of Education, Office for Civil Rights must pass a regulation that governs the types of inquiries schools can make when determining whether a transgender student may access a sex-segregated program or accommodation in order to prevent schools from authorizing unduly burdensome requirements.[180] Massachusetts's gender identity law provides a viable framework on which a federal regulation governing proof of transgender status in the educational setting may be modeled.[181] The Massachusetts law allows a student's gender identity to be:

> Shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity, or *any other evidence that the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for an improper purpose.*[182]

The Massachusetts law implicitly discourages schools from relying on overly burdensome medical proof of transgender status and allows for alternate forms of non-medical proof that are more feasible. The availability of non-medical proof of transgender identity is particularly important for the families of transgender children whose resources and access to adequate health care may be limited. Finally, the Massachusetts law permits schools to provide for the public safety by screening out those who may falsely assert a transgender identity to improperly gain access to sex-segregated facilities (although it is unclear whether even one such case has ever been substantiated).[183] Adapting this law to a federal regulation would enable schools to make holistic inquiries into a child's identity and would discourage over-reliance on medical forms of proof unattainable or undesirable to trans-youth and their families. Additionally, using the language of the Massachusetts law would grant schools sufficient regulatory oversight to provide for the safety of all students by addressing any concerns about impermissible accommodations access.[184]

CONCLUSION

The OCR's recent administrative conduct offering a trans-inclusive interpretation of Title IX marks a shift towards the emerging recognition of the rights of transgender children. It is clear that as transgender people begin to transition at a younger age, in part, as the result of progress in prevailing medical doctrine and increased social awareness of transgender issues, there is a corresponding need to

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[180] *See, e.g.*, ALLY WINDSOR HOWELL, TRANSGENDER PERSONS AND THE LAW 82 (2013) (citing the unduly burdensome requirements imposed on Osborne, including proof of sex reassignment surgery).

[181] MASS. GEN. LAWS ch. 4, § 7 (2013).

[182] *Id.* (emphasis added).

[183] *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, EQUALITY MATTERS (Mar. 20, 2013, 10:00 AM), http://equalitymatters.org/factcheck/201403200001.

[184] MASS. GEN. LAWS ch. 4, § 7 (preventing the assertion of transgender gender identity for an improper purpose).

protect transgender children in the educational setting. However, absent a regulation in the CFR explicitly stating that Title IX's prohibition on "sex" discrimination encompasses "gender identity," federal courts will continue to retain a large degree of interpretive leeway when determining whether Title IX applies to transgender youth. Additionally, a regulation that clarifies the kinds of inquiries schools are permitted to make when determining whether a student qualifies for a sex-segregated program or accommodation is needed to ensure that transgender students will not be presented with overly burdensome requirements when attempting to receive the equal access and opportunity that the law should provide.

The proposed regulations are by no means a sufficient remedy to the problems facing transgender youth in the nation's schools. Because discriminatory attitudes toward transgender children are the product of deep-seated social mores, administrators and educators must take active roles in uprooting de facto cultural intolerance. Changing school culture to be trans-inclusive may be achieved by increasing the visibility of transgender issues on school campuses and incorporating trans-related themes into curricula where relevant. As social advancements, medical advancements, and the law continue to operate in symbiosis expanding the scope of transgender civil rights, there is cause to believe that the roads traveled by transgender youth will be done so with greater dignity, if not ease.