



## Legal Brief Gender and Disability



**Elizabeth A. Harkins Monaco, Ed.D.**  
Assistant Professor  
William Paterson University



**Meaghan M. McCollow, Ph.D., BCBA-D**  
Assistant Professor  
California State University, East Bay

Disability rights activists are aligning with LGBTQIA+ advocates to voice concerns about recent “bathroom bills” aiming to allow people to only use facilities consistent with their biological sex. The reality is these bills will affect the transgender community and they will also affect students and adults with disabilities because they do not accommodate for people who need assistance using restrooms. Sam Crane, legal director and director of public policy for Autistic Self Advocacy Network, claims that “many people with disabilities—including significant physical or developmental disabilities—are unable to use public bathrooms safely without assistance. Often, a person’s assistant will be someone of a different gender” (Walters, 2017). Individuals with disabilities who require assistance in restrooms are faced with a choice: use the bathroom aligning with their physical anatomy and potentially expose their assistants to fines or criminal penalties, or use the bathroom consistent with their assistants’ physical anatomy and incur fines or penalties themselves. Furthermore, “this law is problematic for people with disabilities not just because they might need assistance in the bathroom, but because people with disabilities are lots of other things,” says Corye Dunn, director of public policy for Disability Rights North Carolina. “They’re men, and they’re women, and they’re trans folks, and agendered people and visibly gender nonconforming people” (Sager, 2017).

### Relevant Cases

The highest-profile restroom case to date is Virginia’s *G.G. v. Gloucester County School Board* (American Civil Liberties

Union, 2017). Gavin Grimm, a transgender student, received permission from his high school principal to use the boys’ restroom. Several parents complained, leading to the school board mandating that multi-stall bathroom use correspond with biological sex or that students use single-stall restrooms. Grimm fought this ruling, going all the way to the United States Supreme Court (SCOTUS). In February 2017, SCOTUS referred the case back to the 4th Circuit U.S. Court of Appeals. In May 2018, the court ruled in favor of Grimm, stating he had suffered from sex discrimination and the bathroom policy resulted in sex stereotyping. The ruling stated, “There were many other ways to protect privacy interests in a nondiscriminatory and more effective manner than barring Mr. Grimm from using the boys’ restrooms. The Board’s argument that the policy did not discriminate against any one class of students is resoundingly unpersuasive” (Stevens, 2018).

### Federal Law

In May 2016, the U.S. Department of Education (DOE) and Department of Justice re-interpreted Title IX, the law that prohibits sex discrimination in education, and declared every K–12 school district, state education association, and high school athletic association “must not treat a transgender student differently from the way it treats other students of the same gender identity” (Underwood, 2017). To be compliant, schools were required to allow for school bathrooms and locker rooms to match students’ gender identities, even if their identity was not con-

gruent with their physical anatomy, and participation in sports matching their gender identity. In February 2017, the DOE withdrew support for the 2016 Title IX ordinance (The Leadership Conference on Civil & Human Rights, 2018). In February 2018, Secretary of Education Betsy DeVos stated the DOE will no longer review complaints or take action on discrimination cases and that Title IX prohibits discrimination on the basis of sex, not gender identity (The Leadership Conference on Civil & Human Rights, 2018). Any harassment, bullying, or punishment of transgender or gender-nonconforming students would still fall under federal jurisdiction but access to facilities would not: “Where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, that is sex discrimination prohibited by Title IX . . . In the case of bathrooms, however, long-standing regulations provide that separating facilities on the basis of sex is not a form of discrimination prohibited by Title IX” (Turner & Kamenetz, 2018). This legislation makes it illegal for anyone, even children as young as eight years old, to enter a bathroom with a sign not matching their physical anatomy.

## State Law

There are a wide range of transgender rights in the U.S. The three largest school districts in the country have inclusive gender procedures in place. Los Angeles affirms that students’ gender identity and expression are on a need-to-know basis; New York City’s policy states students should be addressed by the name and pronoun that corresponds to their gender identity; and Chicago’s policy calls for schools to organize a support team that consists of administration and guardians to address each individual and their needs (Kamenetz & Turner, 2017). The majority of the country doesn’t have equivalent policies. Many transgender students report being disciplined for using the “wrong” restroom and being isolated or excluded from school activities or trips, as well as school communities’ refusal to acknowledge preferred identities, names, and/or pronouns (Demissie, Rasberry, Steiner, Brener, & McManus, 2018).

## Resources

Disability and LGBTQIA+ communities already face barriers due to a lack of public understanding, support, and acceptance, and an increased shortage of access to public restrooms will only exacerbate risks for violence, bullying, or harassment. While there is much work to be done and a lack of protection and understanding related to supports individuals with disabilities may need and ways in which identities intersect, being aware and staying current on information is important. We recommend

visiting GLSEN, an advocacy group, to track information related to state legislation (<https://www.glsen.org/article/state-maps>). The Transgender Law Center provides resources for youth who are trans and their allies (<https://transgenderlawcenter.org/resources/youth>). It is also important to have an understanding of the American with Disabilities Act (ADA) and the rights of individuals with disabilities that fall under public accommodations (<https://www.ada.gov/cguide.htm#anchor62335>).

## References

- American Civil Liberties Union. (2017, March 6). *G. G. v. Gloucester County School Board*. Retrieved from <https://www.aclu.org/cases/gg-v-gloucester-county-school-board>
- Demissie, Z., Rasberry, C. N., Steiner, R. J., Brener, N., & McManus, T. (2018). Trends in secondary schools’ practices to support lesbian, gay, bisexual, transgender, and questioning students, 2008–2014. *American Journal of Public Health*, 108(4), 557–564.
- Kamenetz, A. & Turner, C. (2017, February 23). Trump and transgender rights: What just happened? *nprEd: How learning happens*. Retrieved from <https://www.npr.org/sections/ed/2017/02/23/516837258/5-questions-about-the-trump-administrations-new-transgender-student-guidance>
- The Leadership Conference on Civil & Human Rights. (2018). *Trump administration civil and human rights rollbacks*. Retrieved from <https://civilrights.org/trump-rollbacks/>
- Sager, J. (2017, May 16). Why parents of kids with special needs are fighting ‘bathroom bills’. *The Washington Post*. Retrieved from [https://www.washingtonpost.com/news/parenting/wp/2017/05/16/why-parents-of-kids-with-special-needs-are-fighting-bathroom-bills/?noredirect=on&utm\\_term=.33cc92030c3d](https://www.washingtonpost.com/news/parenting/wp/2017/05/16/why-parents-of-kids-with-special-needs-are-fighting-bathroom-bills/?noredirect=on&utm_term=.33cc92030c3d)
- Stevens, M. (2018, May 22). Transgender student in bathroom dispute wins court ruling. *The New York Times*. Retrieved from <https://www.nytimes.com/2018/05/22/us/gavin-grimm-transgender-bathrooms.html>
- Turner, C. & Kamenetz, A. (2018, February 12). The education department says it won’t act on transgender bathroom access. *nprEd: How learning happens*. Retrieved from <https://www.npr.org/sections/ed/2018/02/12/585181704/the-education-department-says-it-wont-act-on-transgender-student-bathroom-access>
- Underwood, J. (2017). The transgender question: What are schools to do? *Phi Delta Kappan: The professional Journal for Educators*. Retrieved from <https://www.kappanonline.org/the-transgender-question/>
- Walters, G. (2017). How bathroom bills affect kids with disabilities, & why their parents are fighting back. *Romper*. Retrieved from <https://www.romper.com/p/how-bathroom-bills-affect-kids-with-disabilities-why-their-parents-are-fighting-back-59565>