

TITLE IX GIVETH AND THE RELIGIOUS EXEMPTION
TAKETH AWAY: HOW THE RELIGIOUS EXEMPTION
EVisCERATES THE PROTECTION AFFORDED
TRANSGENDER STUDENTS UNDER TITLE IX

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The only way I will rest in peace is if one day transgender people aren't treated the way I was, they're treated like humans, with valid feelings and human rights. . . . Fix society. Please.

—Leelah Alcorn (1997–2014)¹

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¹ Leelah Alcorn was a male-to-female transgender seventeen-year-old who posted these words online before she committed suicide. Ashley Fantz, *An Ohio Transgender Teen’s Suicide, a Mother’s Anguish*, CNN (Jan. 4, 2015, 9:53 AM), <http://www.cnn.com/2014/12/31/us/ohio-transgender-teen-suicide>.

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INTRODUCTION

M, a college freshman, wants to experience life on campus doing the normal things other males do. He would like to live in a single-sex dormitory together with his other male friends, play on a male sports team, and use the men's restrooms and locker rooms. However, the religious university M attends refuses to accommodate him in all these areas because M was born a female and, although he identifies as male, he anatomically remains a female. While M was meant to be protected under the applicable federal non-discrimination law, the university relies on an escape clause made available to religious institutions allowing it to deny these accommodations to students such as M.

In enacting the federal non-discrimination law, Title IX of the U.S. Education Amendments of 1972 (Title IX),² the Department of Education sought to protect individuals from sex-based discrimination in federally-funded educational programs or activities.³ However, Title IX also sets forth a religious exemption, which is available to any educational institution that claims that compliance with Title IX's requirements would be inconsistent with the "religious tenets" of such

² 20 U.S.C. § 1681(a) (2012). Title IX states 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"

³ Title IX does not apply to institutions that operate without federal funding.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972 . . . which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part.

³⁴ C.F.R. § 106.1 (2015). As further discussed in Part II of this Note, the definition of what type of aid constitutes "federal financial assistance" for purposes of determining whether a particular institution is subject to the provisions of Title IX has evolved through court decisions over the years. See discussion *infra* notes 54–59 and accompanying text.

organization,⁴ thereby allowing such institutions to circumvent this law in situations such as the one described above.

Until April 2014, it was unclear whether the Title IX prohibition against sex discrimination extended to protect transgender students.⁵ In April 2014, the Department of Education's Office for Civil Rights (OCR)—the government entity in charge of Title IX enforcement—issued a document to clarify schools' obligations under Title IX.⁶ These guidelines contained an unequivocal declaration that the protections granted under Title IX extend to safeguard transgender students from discrimination in education.⁷

⁴ 20 U.S.C. § 1681(a)(3). Specifically, this section provides an exemption for such organizations stating that it “shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.” See discussion *infra* Part III.B for the procedures required for requesting a religious exemption.

⁵ Before the Office for Civil Rights took the position that transgender students were protected under Title IX, courts looked to the model provided by judicial decisions in Title VII cases, a tradition long followed by courts in Title IX cases. See *Franks v. Ky. Sch. for the Deaf*, 956 F. Supp. 741, 746 (E.D. Ky. 1996) (“Where Title IX law is silent, various courts direct us to borrow from the volumes of Title VII law.”); see also discussion *infra* Part II. However, the lack of uniformity in court decisions on claims brought by transgender individuals under Title VII made it difficult for transgender students to know with certainty whether they were a protected class under Title IX. See discussion *infra* Part II.

⁶ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (2014) [hereinafter OCR GUIDELINES].

⁷ *Id.* (“Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation.”). While the OCR guidelines are not legally binding, “there is no record of OCR ever[] modifying or rescinding a guidance document in response to criticism.” Catherine Y. Kim, *The Politics of Agency Enforcement Discretion*, 43 FLA. ST. U. L. REV. (forthcoming Mar. 2016) (manuscript at 35). Further, “[a] review of OCR’s use of guidance documents confirms that this mechanism [is] . . . subject to virtually no legal checks and only moderate political ones.” *Id.* In its strongest statement to date, on November 2, 2015, the OCR, in a letter to the Township High School District 211 in Illinois, took the position that requiring a transgender female to use private changing and showering facilities in lieu of having complete access to the girls’ facilities was a violation of Title IX. See Mitch Smith & Monica Davey, *Illinois District Violated Transgender Student’s Rights, U.S. Says*, N.Y. TIMES (Nov. 2, 2015), <http://www.nytimes.com/2015/11/03/us/illinois-district-violated-transgender-students-rights-us-says.html>. If the School District fails to comply with OCR’s mandate, it faces losing some or all of its Title IX funding. *Id.* It should also be noted that Title IX is not the only avenue a transgender student can use to seek a remedy for discrimination. Some states include gender identity in the list of categories protected by their state nondiscrimination statutes; however, to date, only eighteen states plus the District of Columbia have done this, and of these, the state statutes vary widely as to the level of education to which they apply. *Transgender People and the Law*, ACLU, <https://www.aclu.org/know-your-rights/transgender-people-and-law> (last visited Oct. 1, 2015). In addition, where a federal non-discrimination law exists, students should not have to rely on the availability of a state statute. See discussion *infra* note 213. There is also a proposed bill currently pending in Congress, the federal Student Non-Discrimination Act, which would protect transgender students in public schools from sex discrimination if it passes. See H.R. 846; S. 439, 114th Cong. (2015); Erin Buzuvis, “On the Basis of Sex”: Using Title IX to Protect Transgender Students from Discrimination in Education, 28

Transgender students face a myriad of obstacles in overcoming disparate treatment in universities, especially when it comes to campus life, including housing, the use of restrooms and other facilities, and participation in athletics.⁸ Single-sex dormitories at coeducational institutions present a university with the dilemma of whether to accommodate transgender individuals' preferences to be placed in housing according to the gender with which the student identifies.⁹ Similarly, single-sex universities face the challenges of whether to admit and how to accommodate transgender students while still maintaining the school's identity as a single-sex institution.¹⁰ While the April 2014 OCR guidelines were hailed as a victory for transgender students,¹¹ three recent instances of discriminatory policies against transgender students

WIS. J.L. GENDER & SOC'Y 219, 221 (2013); *Student Non-Discrimination Act*, HUMAN RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/student-non-discrimination-act> (last updated Oct. 15, 2015).

⁸ See JAIME M. GRANT, LISA A. MOTTET & JUSTIN TANIS, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 33 (2011) ("Nineteen percent (19%) of respondents expressing a transgender identity or gender non-conformity in higher education reported being denied access to gender-appropriate housing. Five percent (5%) were denied campus housing altogether. Eleven percent (11%) lost or could not get financial aid or scholarships because of gender identity/expression." (emphasis omitted)); Lara E. Pomerantz, Comment, *Winning the Housing Lottery: Changing University Housing Policies for Transgender Students*, 12 U. PA. J. CONST. L. 1215 (2010) (explaining that transgender students often lack safe and comfortable on-campus housing and stressing the need for new housing policies at universities). See generally EMILY A. GREYTAK ET AL., HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS (2009).

⁹ When a university houses students in separate dorms according to their sex, transgender students face the predicament of being housed with members of their sex assigned at birth rather than with members of the sex with which they identify. See 34 C.F.R. § 106.32 (2015) (stating that colleges and universities may provide separate dormitories, locker rooms, toilets, and showers for each sex as long as they are comparable in quality and proportionate in quantity); see also Pomerantz, *supra* note 8; Joshua Hunt & Richard Pérez-Peña, *Housing Dispute Puts Quaker University at Front of Fight Over Transgender Issues*, N.Y. TIMES, July 25, 2014, at A19.

¹⁰ See *All-Female Smith College to Accept Transgender Applicants*, ASSOCIATED PRESS (May 3, 2015, 10:02 PM), <http://bigstory.ap.org/article/c280a7a8cbaa4898bc74f948aebec01a/all-female-smith-college-accept-transgender-applicants>; Elizabeth A. Harris, *Barnard College, After Much Discussion, Decides to Accept Transgender Women*, N.Y. TIMES, June 5, 2015, at A22; Philip Marcelo, *Women's Colleges Address Transgender Applicants*, ASSOCIATED PRESS (Sept. 10, 2014, 3:10 PM), <http://bigstory.ap.org/article/womens-colleges-address-transgender-applicants>; Ruth Padawer, *Sisterhood is Complicated*, N.Y. TIMES MAG., Oct. 19, 2014, at MM34; Matt Rocheleau & Katherine Landergan, *Simmons College Welcomes Transgender Students*, BOS. GLOBE (Nov. 7, 2014), <http://www.bostonglobe.com/metro/2014/11/07/simmons-college-becomes-women-college-announce-will-accept-transgender-students/> znajjvxnxnt84Q0F9tCMi/story.html; *Scripps College Will Admit Transgender Women*, INSIDE HIGHER ED (Dec. 8, 2014), <https://www.insidehighered.com/quicktakes/2014/12/08/scripps-college-will-admit-transgender-women>; Editorial, *Transgender Students at Women's Colleges*, N.Y. TIMES, May 5, 2015, at A22.

¹¹ Emma Margolin, *Transgender Students Protected Under Title IX, DOE Says*, MSNBC (Apr. 30, 2014, 4:15 PM), <http://www.msnbc.com/msnbc/transgender-students-protected-under-title-ix>.

by religious universities illustrate that the victory is illusory. At George Fox University, a Quaker institution in Oregon, a transgender student brought a Title IX claim against the university alleging discrimination for refusing to allow him¹² to live in an all-male dormitory on campus.¹³ George Fox applied to the OCR and was granted a religious exemption from compliance with Title IX in its housing, restroom and locker room, and athletic policies.¹⁴ Religious exemptions were also granted to Simpson University¹⁵ and Spring Arbor University¹⁶ prior to any filing of a claim alleging discriminatory behavior against transgender students in school policy.¹⁷ In these latter two situations, the granting of religious exemptions effectively preempted any claims that might have been brought by transgender students against the universities. As will be discussed later in this Note, the ease with which religious exemptions from Title IX compliance are granted to religious institutions that

¹² Jaycen M. was born and biologically continues to be a female, but identifies as a male. See Hunt & Pérez-Peña, *supra* note 9. This Note will refer to him as a male.

¹³ See *id.*; Scott Jaschik, *Freedom of Religion or Free to Discriminate?*, INSIDE HIGHER ED (July 14, 2014), <https://www.insidehighered.com/news/2014/07/14/two-legal-cases-illustrate-growing-tensions-over-rights-transgender-students>.

¹⁴ Letter from Robin Baker, President, George Fox University, to Catherine Lhamon, Assistant Sec'y, U.S. Dep't of Educ., Office for Civil Rights (Mar. 31, 2014), <http://www.scribd.com/doc/235291763/Religious-Exemption-Requests> (requesting religious exemption for George Fox University); Letter from Catherine E. Lhamon, Assistant Sec'y, U.S. Dep't of Educ., Office for Civil Rights, to Robin Baker, President, George Fox University (May 23, 2014), <http://www.scribd.com/doc/235291763/Religious-Exemption-Requests> (granting religious exemption to George Fox University from compliance with Title IX regulations governing housing, restroom and locker room, and athletic policies).

¹⁵ Simpson University is a private university in California owned by and affiliated with the Christian Missionary Alliance. See Tyler Kingkade, *Religious Colleges Are Getting Legal Permission to Discriminate Against Trans Students*, HUFFINGTON POST (July 28, 2014, 2:59 PM), http://www.huffingtonpost.com/2014/07/28/religious-colleges-trans-students_n_5624139.html.

¹⁶ Spring Arbor University is a Michigan college affiliated with the Free Methodist Church. See *id.*

¹⁷ Letter from Robin Keith Dummer, Interim President, Simpson University, to Catherine Lhamon, Assistant Sec'y, U.S. Dep't of Educ., Office for Civil Rights (Oct. 7, 2013), <http://www.scribd.com/doc/235291763/Religious-Exemption-Requests> (requesting religious exemption for Simpson University); Letter from Catherine E. Lhamon, Assistant Sec'y, U.S. Dep't of Educ., Office for Civil Rights, to Robin Keith Dummer, Interim President, Simpson University (May 23, 2014), <http://www.scribd.com/doc/235291763/Religious-Exemption-Requests> (granting religious exemption to Simpson University from compliance with Title IX regulations governing different rules of behavior or sanctions, housing, restrooms and locker rooms, and athletics); Letter from Brent Ellis, President, Spring Arbor University, to Catherine Lhamon, Assistant Sec'y, U.S. Dep't of Educ., Office for Civil Rights (June 2, 2014), <http://www.scribd.com/doc/235291763/Religious-Exemption-Requests> (requesting religious exemption for Spring Arbor University); Letter from Catherine E. Lhamon, Assistant Sec'y, U.S. Dep't of Educ., Office for Civil Rights, to Brent Ellis, President, Spring Arbor University (June 27, 2014), <http://www.scribd.com/doc/235291763/Religious-Exemption-Requests> (granting religious exemption to Spring Arbor University from compliance with Title IX regulations governing different rules of behavior or sanctions, housing, restrooms and locker rooms, athletics, and employment).

receive federal funding eviscerates the protection of transgender students meant to be afforded by Title IX.

This Note will proceed in four parts. Part I will identify who falls into the category of a transgender individual and will provide background on the need for protection of transgender individuals, particularly in the school environment. It will also provide an in-depth analysis of Title IX, including its legislative history, the categories of individuals and institutions covered by the statute, and the activities prohibited by the statute. Part II will examine the analysis used by the courts to broaden the scope of Title IX to keep pace with courts' interpretations of the protections afforded under Title VII, the federal anti-discrimination statute governing employment practices.¹⁸ Part III will examine the religious exemption provided by Title IX and will compare and contrast the language and application of the religious exemption under Title IX with the religious exemption available in the context of Title VII employment cases. This Part will also examine the recent religious exemptions granted to universities, thereby allowing them to discriminate against transgender students in housing, facilities, and athletics.¹⁹ Part IV will address the challenge presented by granting the religious exemption without compromising the protections afforded under Title IX to transgender students seeking an education at a religious institution. This Note proposes a narrower application of the religious exemption in the context of Title IX and a limitation of the circumstances in which it is granted in order to effectuate the statute's purpose. Further, this Note recommends that stricter requirements be imposed on institutions seeking a religious exemption. While perhaps defensible in the employment arena, where an argument can be made that religious employers should be allowed to "discriminate" in order to hire like-minded individuals to carry out the employer's mission,²⁰ no such justification exists with respect to students seeking to learn in a

¹⁸ The text of Title VII states:

It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2012).

¹⁹ In the case of Spring Arbor University, the religious exemption also extended to admissions policies and employment. See discussion *infra* Part III.C.

²⁰ See *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1366 (9th Cir. 1986) (stating that the religious exemption under Title VII allows religious employers to base their hiring and firing of employees on religious preferences without state interference).

non-hostile environment.²¹ This is especially true where the institution accepts financial assistance from the federal government.²² Lastly, because Title IX is being increasingly invoked to address discrimination against transgender students²³ and courts have yet to definitively deal with the issues presented by the application of the religious exemption to transgender individuals, this Note will discuss the impending need for clarification on the application of the religious exemption under Title IX.

I. BACKGROUND

A. Defining “Transgender” and the Need for Protection of Transgender Students in Education

While there is no definitive data on the exact number of transgender individuals in the world,²⁴ it was estimated that in 2011

²¹ See *Davis v. Monroe Cty. Bd. of Educ.*, 74 F.3d 1186, 1193 (11th Cir. 1996) (“The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior.”), *rev’d on other grounds*, 526 U.S. 629 (1999); see also JoAnn Strauss, Student Article, *Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions*, 10 LAW & INEQ. 163, 181 (1992) (stating that “[e]ducational institutions must be held to a higher standard” than employers).

²² Federally-funded grants and loans made to students are considered “federal financial assistance” under Title IX since the university benefits by not having to expend its own resources in the form of scholarships, for example, and by enlarging the pool of applicants who might otherwise be financially unable to attend such university. See *Grove City Coll. v. Bell*, 465 U.S. 555, 564 (1984); *Haffer v. Temple Univ.*, 678 F. Supp. 517, 538 (E.D. Pa. 1987), *modified by* No. Civ. A. 80-1362, 1988 WL 3845 (E.D. Pa. Jan. 19, 1988); *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 603 (D.S.C. 1974), *aff’d*, 529 F.2d 514 (4th Cir. 1975).

²³ See discussion *infra* Part III.C; see also Kate Abbey-Lambertz, *Transgender Student’s Family Sues Michigan School Districts for Discrimination*, HUFFINGTON POST (Dec. 23, 2014, 1:59 PM), http://www.huffingtonpost.com/2014/12/23/transgender-student-lawsuit-michigan_n_6372016.html (where a student who was born female but identified as male brought suit under Title IX against four Michigan school districts for harassment by students and teachers); William Bigelow, *Judge Rules Transgender Born a Girl Cannot Use Boys’ Restrooms*, BREITBART (Sept. 7, 2015), <http://www.breitbart.com/big-government/2015/09/07/judge-rules-transgender-born-a-girl-cannot-use-boys-restrooms> (where a student who was born female but identified as male brought suit against the Gloucester County School Board in order to use the male restroom); Ian Thompson, *A Win for Transgender Students You May Have Missed*, SLATE (Dec. 3, 2014, 5:47 PM), http://www.slate.com/blogs/outward/2014/12/03/u_s_department_of_education_comes_out_in_support_of_transgender_students.html (discussing guidance document released by the U.S. Department of Education which states that transgender students in elementary and secondary schools must be allowed to participate in single-sex classes consistent with their gender identity).

²⁴ See Mona Chalabi, *Why We Don’t Know the Size of the Transgender Population*, FIVETHIRTYEIGHT (July 29, 2014, 4:31 PM), <http://fivethirtyeight.com/features/why-we-dont->

approximately .3% of the population, or 700,000 adults, identified as transgender.²⁵ Measuring the transgender population is particularly difficult because the term “transgender” does not have one accepted definition.²⁶ Further, people have been hesitant to publicly identify as transgender for fear of discrimination and retaliation.²⁷ Transgender, when used as an umbrella term, refers to any individual who identifies as, behaves as, or expresses a gender different from that assigned to such individual at birth.²⁸ This definition can include transsexuals,²⁹ cross-dressers,³⁰ androgynous individuals,³¹ or individuals who identify as

know-the-size-of-the-transgender-population.

²⁵ See GARY J. GATES, THE WILLIAMS INSTITUTE, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 5–6 (2011) (this estimate only covered individuals ages eighteen to sixty-four). A 2007 study at the University of Michigan reported that one in every 2,000 to 4,500 people is a male-to-female transgender individual, and one in every 5,500 to 8,000 people is a female-to-male transgender individual. FEMKE OLYSLAGER & LYNN CONWAY, ON THE CALCULATION OF THE PREVALENCE OF TRANSSEXUALISM 23 (2007).

²⁶ Holly V. Franson, Comment, *The Rise of the Transgender Child: Overcoming Societal Stigma, Institutional Discrimination, and Individual Bias to Enact and Enforce Nondiscriminatory Dress Code Policies*, 84 U. COLO. L. REV. 497, 500 (2013) (“There is no accepted, concrete definition for the term ‘transgender.’”); Leslie J. Moran & Andrew N. Sharpe, *Violence, Identity and Policing: The Case of Violence Against Transgender People*, 4 CRIMINOLOGY & CRIM. JUST. 395, 403 (2004) (“[A] lot of people have absolutely no idea what a transgender person is or what it means.” (quoting an interview with Elizabeth Riley, Coordinator of the Sydney Gender Centre)).

²⁷ The transgender population as a whole remains one of the nation’s most marginalized groups of citizens. Editorial, *The Quest for Transgender Equality*, N.Y. TIMES, May 4, 2015, at A22 (“Over the decades, the transgender movement has been part of the broader quest for equality for sexual minorities, but while gays and lesbians have achieved far-reaching legal and political victories in recent years, transgender people, who may be gay or straight, remain among the nation’s most marginalized citizens. . . . Gays and lesbians are visible in all walks of life today, and many are celebrities and role models. Transgender Americans, meanwhile, remained largely unseen until fairly recently.”).

²⁸ NAT’L CTR. FOR TRANSGENDER EQUAL., TRANSGENDER TERMINOLOGY [hereinafter TRANSGENDER TERMINOLOGY], http://transequality.org/sites/default/files/docs/resources/TransTerminology_2014.pdf (last updated Jan. 2014).

²⁹ *Id.* (defining transsexuals as “people whose gender identity is different from their assigned sex at birth who seek[] to transition from male to female or female to male”); see HUMAN RTS. CAMPAIGN FOUND., TRANSGENDER INCLUSION IN THE WORKPLACE 3 (2d ed. 2008) [hereinafter HRC TRANSGENDER REPORT], http://www.fs.fed.us/cr/HRC_Foundation_-_Transgender_Inclusion_in_the_Workplace_2nd_Edition_-_2008.pdf. Sometimes courts and sources refer to transgender individuals as “transsexual,” but this Note will only use the term transsexual if quoting one of those courts or sources directly.

³⁰ TRANSGENDER TERMINOLOGY, *supra* note 28 (defining cross-dressers as “people who dress in clothing traditionally or stereotypically worn by the other sex, but who generally have no intent to live full-time as the other gender”); see also HRC TRANSGENDER REPORT, *supra* note 29, at 3.

³¹ Androgynous individuals are defined as “having the characteristics or nature of both male and female,” “neither specifically feminine nor masculine,” or “having traditional male and female roles obscured or reversed.” *Androgynous*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/androgynous> (last visited Oct. 19, 2014).

something other than male or female.³² Gender identity is an internal feeling where an individual identifies as male, female, both, or neither.³³ Gender expression is how an individual externally displays or expresses his or her gender identity, whether through dress, actions, or both.³⁴ This Note will use the term transgender broadly to mean any individual who identifies, expresses, or behaves differently from his or her sex assigned at birth.³⁵

The issue of gender identity is particularly significant in the realm of education, where transgender students are likely to be discriminated against, harassed, and bullied by fellow classmates and even teachers.³⁶

³² Jessie Brown, *Transgender Issues on Campus*, NACUANOTES (Nat'l Ass'n C. & U. Att'ys, Wash., D.C.), Dec. 21, 2012.

³³ *Id.*; see also TRANSGENDER TERMINOLOGY, *supra* note 28.

³⁴ TRANSGENDER TERMINOLOGY, *supra* note 28.

³⁵ In 2012, the American Psychiatric Association (APA) revised its Diagnostic and Statistical Manual (DSM) to no longer classify transgender individuals as having a "disorder." See Zack Ford, *APA Revises Manual: Being Transgender Is No Longer a Mental Disorder*, THINK PROGRESS (Dec. 3, 2012, 10:50 AM), <http://thinkprogress.org/lgbt/2012/12/03/1271431/apa-revises-manual-being-transgender-is-no-longer-a-mental-disorder>. Currently, the DSM uses the term "transgender" to "refer[] to the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013). In addition, the APA recently amended its guidelines to conform to research indicating that gender identity is itself rooted in biology and therefore, the DSM no longer uses the term "biological sex". See AM. PSYCHOLOGICAL ASS'N, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People* (2015), <http://www.apa.org/practice/guidelines/transgender.pdf>; M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 944 (2015). Accordingly, this Note will use the term "sex assigned at birth" instead of "biological sex" unless quoting from a source.

³⁶ A survey of students ages thirteen to twenty-one conducted in 2013 by the Gay, Lesbian & Straight Education Network revealed that

42.2% of transgender students had been personally prevented from using their preferred name; 59.2% of transgender students had been required to use the bathroom or locker room of their legal sex; and 31.6% of transgender students had been prevented from wearing clothes because they were considered inappropriate based on their legal sex.

JOSEPH G. KOSCIW ET AL., GLSEN, THE 2013 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 39–40 (2014) [hereinafter GLSEN SURVEY]. Another study reported that

[t]hose who expressed a transgender identity or gender non-conformity while in grades K–12 reported alarming rates of harassment (78%), physical assault (35%) and sexual violence (12%). . . . More than half (51%) of respondents who were harassed, physically or sexually assaulted, or expelled because of their gender identity/expression reported having attempted suicide. Of those who were physically assaulted by teachers/staff or students, 64% reported having attempted suicide. And three-quarters (76%) of those who were assaulted by teachers or staff reported having attempted suicide.

GRANT, MOTTET & TANIS, *supra* note 8, at 33 (emphasis omitted); see also DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (2015).

Transgender students need protection against discrimination in admissions policies, student housing, restroom accessibility, and athletics.³⁷ Congress enacted Title IX to fill the void created by the lack of existing federal civil rights laws offering protections against sex discrimination in education.³⁸ Further, sex discrimination in education becomes even more of an issue when the discrimination is not based on sex assigned at birth, but rather based on gender identity or nonconforming behavior or expression. While an educational institution that prohibits a female athlete from playing on an all-male sports team but offers an equivalent all-female team may not have violated Title IX,³⁹ a university that prohibits a female, who identifies as male, from playing on the same all-male sports team under the same scenario may well be held to have violated Title IX.⁴⁰ In the first

³⁷ See Padawer, *supra* note 10 (stating that transgender students in universities need protection). There are currently 989 colleges and universities that have non-discrimination policies including protection for gender identity and expression. See *Colleges and Universities with Nondiscrimination Policies that Include Gender Identity/Expression*, CAMPUS PRIDE, <http://www.campuspride.org/tpc-nondiscrimination> (last visited Nov. 17, 2015); see also GRANT, MOTTET & TANIS, *supra* note 8, at 33 (“Nineteen percent (19%) of respondents expressing a transgender identity or gender non-conformity in higher education reported being denied access to gender-appropriate housing. Five percent (5%) were denied campus housing altogether.” (emphasis omitted)).

³⁸ See Bernice R. Sandler, “*Too Strong for a Woman*”—*The Five Words that Created Title IX*, ABOUT WOMEN ON CAMPUS (Nat’l Ass’n for Women in Educ., Wash., D.C.), Spring 1997, at 1, 2 (“Although sex discrimination was indeed illegal in certain circumstances, I quickly discovered that *none* of the laws prohibiting discrimination covered sex discrimination in education. Title VII of the Civil Rights Act, which prohibited discrimination in employment on the basis of race, color, religion, national origin and sex, excluded ‘educational institutions in their educational activities,’ meaning faculty and administrators were exempt. Title VI of the same act prohibited discrimination on the basis of race, color and national origin in federally assisted programs, but did not cover sex discrimination. Thus, students were not protected against sex discrimination.”).

³⁹ See 34 C.F.R. § 106.41 (2015) (explaining that separate teams are acceptable as long as there is a team offered for the opposite sex, and if there is not, members of the opposite sex must be allowed to try out for the other sex’s team).

⁴⁰ See Jill Pilgrim, David Martin & Will Binder, *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 495, 541 (2003) (“Transsexuals who feel excluded from collegiate or extracurricular, scholastic, or athletic competition are likely to challenge such exclusion on the grounds that it is sex discrimination in violation of Title IX of the Education Amendments of 1972.”). While the issue of accommodating transgender students in collegiate athletics is not the focus of this Note, it bears mentioning because the three religious exemptions discussed in Part III.C extend to locker rooms and athletics, providing vivid examples of the expansive reach of the religious exemption as currently applied under Title IX. Moreover, even with Title IX, there remains a big hurdle for transgender students to overcome in the sports realm. The National Collegiate Athletic Association (NCAA) allows transgender student-athletes to participate in sex-segregated sports consistent with their gender identity; however, there are conditions. For example, a biologically-born female who identifies as male may compete on a men’s team if he is receiving hormone therapy. But, a biologically-born male who identifies as female may not compete on a women’s team until she has completed one year’s worth of testosterone suppression treatment and, during that interim, she may not compete on a women’s team. NCAA OFFICE OF

illustration, members of the same sex receive equal treatment, but in the second illustration, a transgender male is treated differently than other males.⁴¹

B. *The History, Evolution, and Expansion of Title IX*

In enacting Title IX, Congress sought to protect individuals from discriminatory practices and to prevent the use of federal resources to support such practices.⁴² This legislation was originally intended to protect women and end sex discrimination in education.⁴³ Prior to the enactment of Title IX, there was no federal protection against sex discrimination in education.⁴⁴ While the thrust of Title IX was meant to create equal access for the sexes to programs at schools and other educational facilities receiving federal assistance, the scope of Title IX has consistently been broadened as the need for protection against discrimination of other classes of individuals arose.⁴⁵

First, Congress extended Title IX by passing the Civil Rights Attorney's Fees Awards Act of 1976 (CRAFAA).⁴⁶ The CRAFAA increased the remedies available to a plaintiff bringing a Title IX claim by allowing courts to award "reasonable attorney's fee[s]."⁴⁷ The purpose of this amendment was to ensure that civil rights plaintiffs, even if indigent and unable to afford representation, could find

INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 13 (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

⁴¹ See, e.g., Smith & Davey, *supra* note 7.

⁴² See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

⁴³ Former Senator Birch Bayh of Indiana introduced the amendment in the Senate and explained in debate that

[t]he field of education is just one of many areas where differential treatment [between men and women] has been documented; but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.

118 CONG. REC. 5,804 (1972).

⁴⁴ See Sandler, *supra* note 38.

⁴⁵ Christine I. Hepler, *A Bibliography of Title IX of the Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441, 445–53 (2013); Jillian T. Weiss, *Protecting Transgender Students: Application of Title IX to Gender Identity or Expression and the Constitutional Right to Gender Autonomy*, 28 WIS. J.L. GENDER & SOC'Y 331, 332 (2013).

⁴⁶ 42 U.S.C. § 1988(b) (2012); Melanie Hochberg, Note, *Protecting Students Against Peer Sexual Harassment: Congress's Constitutional Powers to Pass Title IX*, 74 N.Y.U. L. REV. 235, 246 (1999).

⁴⁷ 42 U.S.C. § 1988(b).

competent counsel and bring litigation if they suffered discrimination.⁴⁸ Next, Congress enacted Section 1003 of the Rehabilitation Act Amendments of 1986, which allowed plaintiffs to recover against a state—previously protected from discrimination lawsuits by the sovereign immunity granted to states in the Eleventh Amendment—in federal court for a Title IX violation, thereby again expanding the reach of Title IX.⁴⁹

In addition, Congress enacted legislation expanding the scope of Title IX in response to the 1984 decision by the U.S. Supreme Court in *Grove City College v. Bell*.⁵⁰ In that case, the Court held that a university only had to comply with Title IX with respect to the specific “education program or activity” that was receiving federal funding.⁵¹ Subsequently, Congress enacted the Civil Rights Restoration Act (CRRA) in 1988 to broaden the reach of Title IX⁵² by clarifying that if an institution receives any federal funding, Title IX applies to any and all of its educational programs and activities, whether or not that program was the specific recipient of such federal funding.⁵³

As mentioned above, Title IX only applies to institutions receiving federal funding⁵⁴ at the time the discriminatory conduct is alleged to have taken place.⁵⁵ While the most common form of financial assistance is in the form of money, the financial assistance can also be in nonmonetary form.⁵⁶ Further, the federal financial assistance can be

⁴⁸ *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) (“It is true that the purpose of § 1988 was to make sure that competent counsel was available to civil rights plaintiffs . . .”).

⁴⁹ 42 U.S.C. § 2000d-7 (2012); Hochberg, *supra* note 46.

⁵⁰ 465 U.S. 555 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987 (CRRA), Pub. L. No. 100-259, 102 Stat. 28, *as recognized in* *Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459 (1999).

⁵¹ *Id.* at 570–76 (quoting 20 U.S.C. § 1681(a)). For example, Grove City College received federal financial assistance in the form of Basic Educational Opportunity Grants which provided federal financial assistance to the college’s own financial aid program, thereby subjecting only that program to regulation by Title IX. *Id.* at 559–60.

⁵² *Title IX Legal Manual*, U.S. DEP’T OF JUSTICE § III.C.2 (citing S. REP. NO. 100-64, at 2 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 3, 4–5), <http://www.justice.gov/crt/title-ix> (last visited Oct. 19, 2014) (“Congress [sic] intent in passing the CRRA was clear: to establish the principle of broad, institution-wide coverage under the four major civil rights statutes that prohibit discrimination in federally assisted programs.”).

⁵³ *Id.* (“Since passage of the CRRA, courts have consistently held that the receipt of federal funds results in entity-wide coverage under [Title IX].”).

⁵⁴ 20 U.S.C. § 1681(a) (2012).

⁵⁵ *Title IX Legal Manual*, *supra* note 52, § III.A (“It is also important to remember that not only must an entity receive federal financial assistance to be subject to Title IX, but the entity also must receive federal assistance at the time of the alleged discriminatory act(s) except for assistance provided in the form of real or personal property.”).

⁵⁶ *Id.* (“[F]ederal financial assistance may include the use or rent of federal land or property at below market value, federal training, a loan of federal personnel, subsidies, and other arrangements with the intention of providing assistance.”); *see also* U.S. Dep’t of Transp. v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 607 n.11 (1986). However, federal financial assistance

direct⁵⁷ or indirect.⁵⁸ Therefore, private universities that accept federal funding, or that admit students who accept federal monies (whether in the form of loans, grants, or scholarships), will be subject to Title IX. The legislative history of Title IX indicates Congress intended for its reach and scope to be quite broad.⁵⁹

In the seminal case of *Cannon v. University of Chicago*,⁶⁰ a woman brought a Title IX claim against various universities and officials of their medical schools, alleging that she was denied admission to the medical schools because of her sex.⁶¹ The District Court for the Northern District of Illinois dismissed the complaint, concluding that Title IX did not expressly authorize a private right of action for an individual claiming to be injured by violation of the statute.⁶² The Court of Appeals for the Seventh Circuit affirmed the district court ruling, but the U.S. Supreme Court reversed.⁶³ The Court relied on a comparison of Title IX to Title VI of the Civil Rights Act of 1964,⁶⁴ and held that individuals can bring private rights of action to enforce the rights guaranteed by Title IX.⁶⁵ *Cannon* opened the door to claims brought by individuals asserting violations of Title IX.

does *not* include “licenses”, “statutory programs or regulations that directly or indirectly support, or establish guidelines for, an entity’s operations”, “programs ‘owned and operated’ by the federal government”, “contracts of insurance or guaranty”, “procurement contracts,” or “direct, unconditional assistance to ultimate beneficiaries, the intended class of private citizens receiving federal aid” (e.g., social security payments and veterans’ pensions). *Title IX Legal Manual*, *supra* note 52, § III.A.3.

⁵⁷ Direct federal financial assistance is when the university is realizing some form of financial gain by receiving help from the government. *Title IX Legal Manual*, *supra* note 52, § III.A.2.

⁵⁸ Indirect federal financial assistance is when the university itself may not show a financial gain, but students who attend the university receive grants or loans from the government. *Id.* Thus, even though the school itself may not be receiving the money directly from the federal government, the school nonetheless benefits by not having to pay for certain costs, thereby freeing up the school’s own resources to be used for other programs and activities. *See* *Grove City Coll. v. Bell*, 465 U.S. 555, 564 (1984); *see also* *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 603 (D.S.C. 1974), *aff’d*, 529 F.2d 514 (4th Cir. 1975).

⁵⁹ Hochberg, *supra* note 46, at 246 (“The inescapable conclusion is that congress intended that . . . Title IX . . . be given the broadest interpretation.” (alterations in original) (quoting S. REP. NO. 100-64, at 7 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 3, 9)).

⁶⁰ 441 U.S. 677 (1979).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 42 U.S.C. § 2000d (2012) states: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

⁶⁵ *Cannon*, 441 U.S. at 709 (“Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination.”).

II. TITLE VII PAVES THE WAY FOR CLAIMS BY TRANSGENDER INDIVIDUALS UNDER TITLE IX

Since *Cannon*, courts have generally agreed that claims of sex discrimination and sexual harassment in education can be brought under Title IX.⁶⁶ However, courts have been reluctant to find that plaintiffs who brought discrimination claims based on gender identity had cognizable claims under Title IX.⁶⁷ Prior to the issuance of the 2014 OCR guidance document,⁶⁸ gender identity itself was not specifically addressed in Title IX cases. Therefore, in order to evaluate these claims, courts faced the task of deciding whether sex discrimination claims in education could be extended to include discrimination based on gender nonconformity or gender stereotyping.⁶⁹ In doing so, courts used the model supplied by cases interpreting sex discrimination under Title VII of the Civil Rights Act of 1964.⁷⁰

Title VII is the federal law that prohibits discrimination on the basis of an individual's race, color, religion, sex, or national origin in the employment context.⁷¹ Title VII was originally enacted in 1964 to officially end an era of racially-driven oppression, and to help better protect black individuals from discrimination in a changing society.⁷² However, it also sought to prohibit discrimination based on religion, sex, and national origin in the employment arena.⁷³

⁶⁶ See discussion *infra* Part II.B.

⁶⁷ See discussion *infra* Part II.B.

⁶⁸ See OCR GUIDELINES, *supra* note 6, at 5.

⁶⁹ See discussion *infra* Part II.B. Courts found that if a plaintiff were able to prove that the sex discrimination was based on gender nonconformity or gender stereotyping, the claim could go forward. However, where a plaintiff failed to prove that the harassment was based on failure to conform to particular sex stereotypes, the Title IX claim did not succeed. See *Cruz v. Seton Hall Univ.*, No. 11-1429, 2012 U.S. Dist. LEXIS 96005 (D.N.J. July 10, 2012); *Tyrrell v. Seaford Union Free Sch. Dist.*, 792 F. Supp. 2d 601, 622 (E.D.N.Y. 2011).

⁷⁰ See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting); *Davis v. Monroe Cty. Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *rev'd on other grounds*, 526 U.S. 629 (1999); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 248 (2d Cir. 1995); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993); see also *Title IX Legal Manual*, *supra* note 52.

⁷¹ See 42 U.S.C. § 2000e-2 (2012).

⁷² See Julius L. Chambers & Barry Goldstein, *Title VII: The Continuing Challenge of Establishing Fair Employment Practices*, LAW & CONTEMP. PROBS., Autumn 1986, at 9, 12.

⁷³ 42 U.S.C. § 2000e-2.

A. *Interpretation of Discrimination “Because . . . of Sex” Under Title VII Develops to Include Claims by Transgender Individuals*

At first, when faced with cases brought by transgender individuals under Title VII, courts were hesitant to find in favor of the transgender plaintiffs.⁷⁴ For example, in *Holloway v. Arthur Andersen & Co.*,⁷⁵ Ramona Holloway was fired from her job after transitioning from male to female.⁷⁶ Holloway urged the court to adopt a broader interpretation of “sex” under Title VII to include transgender individuals.⁷⁷ However, the Ninth Circuit refused to extend Title VII to protect transgender individuals and found in favor of her employer.⁷⁸ The Eighth Circuit took a comparable approach in *Sommers v. Budget Marketing, Inc.*⁷⁹ Audra Sommers was biologically a male, but identified as a female.⁸⁰ She was terminated from her job after only two days of employment.⁸¹ Sommers, like Holloway, argued that “sex” under Title VII should be expanded to protect people such as herself who are biologically male, but who are psychologically female.⁸² The court disagreed and held that Congress did not intend for Title VII to protect transgender individuals.⁸³ Similarly, in *Ulane v. Eastern Airlines, Inc.*,⁸⁴ Karen Ulane was fired from her job as a pilot for the defendant airline after undergoing sexual reassignment surgery.⁸⁵ Ulane brought a sex discrimination claim under Title VII, and while the district court found for Ulane, the Seventh Circuit reversed and found that Ulane, as a

⁷⁴ HRC TRANSGENDER REPORT, *supra* note 29, at 12 (“Federal sex discrimination law, under Title VII of the Civil Rights Act of 1964, has historically been interpreted to exclude transgender workers.”).

⁷⁵ 566 F.2d 659 (9th Cir. 1977), *overruling recognized by* *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

⁷⁶ *Id.* at 661.

⁷⁷ *Id.* at 662.

⁷⁸ *Id.* at 663 (“Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning. Therefore, this court will not expand Title VII’s application in the absence of Congressional mandate.” (footnote omitted)).

⁷⁹ 667 F.2d 748 (8th Cir. 1982) (per curiam).

⁸⁰ *Id.* at 748.

⁸¹ *Id.* Defendant employer claimed to terminate Sommers because “she misrepresented herself as an anatomical female when she applied for the job . . . [and] the misrepresentation led to a disruption of the company’s work routine in that a number of female employees indicated they would quit if Sommers were permitted to use the restroom facilities assigned to female personnel.” *Id.* at 748–49.

⁸² *Id.* at 749.

⁸³ *Id.* at 750. However, the court did go on to say that while it was sympathetic to Sommers’ plight, Budget had an overriding need to protect its female employees. *Id.*

⁸⁴ 742 F.2d 1081 (7th Cir. 1984).

⁸⁵ *Id.*

transgender female, was not protected from discrimination under Title VII.⁸⁶

However, beginning with the U.S. Supreme Court decision in *Price Waterhouse v. Hopkins*,⁸⁷ courts took a more expansive view of the class of individuals protected by Title VII. Ann Hopkins was passed over for a promotion because her employer claimed that she was too aggressive for a woman.⁸⁸ The Court found that discrimination based on plaintiff's failure to satisfy gender stereotypes constitutes discrimination "because of . . . sex" within the meaning of Title VII.⁸⁹ This case paved the way for transgender plaintiffs to prevail on sex discrimination claims brought under Title VII, and later under Title IX.⁹⁰

In 2004, the Sixth Circuit applied the *Price Waterhouse* rationale to find in favor of a transgender plaintiff.⁹¹ In *Smith v. City of Salem*,⁹² Jimmie Smith, a firefighter, began transitioning from male to female, and was suspended from her job.⁹³ Initially, the district court granted summary judgment to the defendant employer, holding that

⁸⁶ *Id.* at 1085 ("The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder (i.e., a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male); a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born. . . . The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals . . .").

⁸⁷ 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Tit. I, § 107(a), Pub. L. No. 102-166, 105 Stat. 1071, 1075, *as recognized in* *Burrage v. United States*, 134 S. Ct. 881, 889 n.4 (2014).

⁸⁸ *Id.* at 235 (Her boss suggested she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." (quoting the trial court opinion)).

⁸⁹ *Id.* at 251.

⁹⁰ See *Dauen v. George Fox Univ.*, No. CV. 09-305-PK, 2010 WL 6089077 (D. Or. Dec. 3, 2010); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942 (S.D. Ind. 2007); *Theno v. Tonganoxie Unified Sch. Dist.* No. 464, 394 F. Supp. 2d 1299 (D. Kan. 2005); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

⁹¹ *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004) ("After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.").

⁹² *Id.*

⁹³ *Id.*

transgender individuals were not entitled to Title VII protection.⁹⁴ However, the Sixth Circuit reversed, holding that the earlier cases on which the district court had relied⁹⁵ were eviscerated by *Price Waterhouse*.⁹⁶ Thus, the reasoning used by the courts to find in favor of plaintiffs in gender stereotyping cases became the basis for extending Title VII protection to transgender plaintiffs.⁹⁷

In a more recent case, *Schroer v. Billington*,⁹⁸ the District Court for the District of Columbia found the defendant, the Library of Congress, in violation of Title VII for discriminating against a transgender woman, Diane Schroer.⁹⁹ Before Schroer began transitioning from male to female, she applied for a job as a Specialist in Terrorism and International Crime with the Congressional Research Service (CRS) at the Library of Congress.¹⁰⁰ Schroer applied for the position as “David J. Schroer,”¹⁰¹ and received the highest interview score among eighteen candidates.¹⁰² Schroer was offered the job, which she accepted, and the Assistant Director for Foreign Affairs, Defense and Trade, Charlotte Preece, began drafting the necessary paperwork.¹⁰³ Before Preece completed and submitted the paperwork, Schroer told Preece that she was transgender and would begin her new job as “Diane.”¹⁰⁴ Preece

⁹⁴ *Id.* at 572–73.

⁹⁵ *Id.* (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977)).

⁹⁶ *Id.* 572–75 (“[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”).

⁹⁷ *See also* *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (holding in favor of a pre-operative male-to-female transgender individual where she was demoted due to sex discrimination based on her failure to conform to sex stereotypes); *Mia Macy*, EEOC Doc No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (holding for a broad definition of the phrase “because of . . . sex” which includes discrimination on the basis of sex assigned at birth, discrimination on the basis of gender nonconformity, discrimination on the basis of change of sex, and discrimination on the basis of gender identity and transgender status).

⁹⁸ 577 F. Supp. 2d 293 (D.D.C. 2008).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 295.

¹⁰¹ *Id.* Schroer identified as a female, but had yet to begin presenting herself as one. *Id.* at 295–96.

¹⁰² *Id.* at 296.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

decided she no longer wanted to hire Schroer for the position,¹⁰⁵ and instead, hired a male.¹⁰⁶ Schroer advanced two theories of sex discrimination in her Title VII claim against the Library.¹⁰⁷ First, she alleged discrimination based on her failure to conform to sex stereotypes, and second, she alleged that discrimination on the basis of gender identity is discrimination “because of . . . sex.”¹⁰⁸ With respect to the first theory, the District Court for the District of Columbia grappled with finding in favor of Schroer because while the alleged discrimination was based on sex stereotyping, it seemed that the discrimination was based on Schroer’s transgender status itself, which generally had not been recognized as actionable under Title VII.¹⁰⁹ However, the court eventually based its decision on a finding of sex stereotyping in violation of Title VII.¹¹⁰

The district court in *Schroer* effectively declared that the prior cases holding that Title VII only prohibited discrimination based on a literal reading of “sex”, that is, discrimination against men because they are men and against women because they are women, were incorrect.¹¹¹ The court found that the Library’s refusal to hire Schroer after she told them she was planning to transition from male to female constituted discrimination “because of . . . sex” and accordingly, was a violation of Title VII. Therefore, *Schroer* represents a significant step towards recognizing that transgender individuals have an actionable claim under Title VII.¹¹² Since *Schroer*, the U.S. government has actively pursued

¹⁰⁵ Preece called Schroer to rescind the offer and said: “Well, after a long and sleepless night, based on our conversation yesterday, I’ve determined that you are not a good fit, not what we want.” *Id.* at 299 (quoting the trial record).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 302.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 305–06 (“What makes Schroer’s sex stereotyping theory difficult is that, when the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII. . . . Ultimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual. . . . I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping, [and] . . . that she is entitled to judgment based on the language of the statute itself.”).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 307–08.

¹¹² Brown, *supra* note 32 (“*Schroer* represents a significant step in the process of acceptance for transgender individuals in that it argues that sex stereotyping of any kind, regardless of the gender identity of the victim, constitutes sex discrimination actionable under Title VII.”); *see also* Finkle v. Howard Cty., 12 F. Supp. 3d 780 (D. Md. 2014) (holding that a transgender plaintiff’s Title VII claim that she was denied a job based on her transgender status could go forward). *But see* Eure v. Sage Corp., 61 F. Supp. 3d 651 (W.D. Tex. 2014) (holding that

enforcement of Title VII discrimination claims on behalf of transgender employees.¹¹³ Validating this position, in December 2014, former Attorney General Eric Holder announced that Title VII does, in fact, cover sex discrimination claims based on one's transgender status.¹¹⁴

B. *Title IX Follows the Lead of Title VII in Protecting Transgender Individuals*

Various courts have allowed Title IX lawsuits to proceed based on claims of gender stereotyping by using the analogous model presented by courts in extending Title VII protections.¹¹⁵ In *Montgomery v. Independent School District No. 709*,¹¹⁶ Jesse Montgomery, a student, brought a claim under Title IX against his former school district based on its failure to prevent harassment he experienced from other students during the eleven years he had attended the school.¹¹⁷ Montgomery alleged the harassment was based on both his gender nonconformity and his perceived sexual orientation.¹¹⁸ Relying on a comparison to Title

discrimination based solely on one's transgender status is not a cognizable Title VII sex discrimination claim).

¹¹³ See Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES (June 27, 2015), <http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html> ("In the past two years, the [EEOC] has successfully pursued 223 cases involving gay or transgender people who faced workplace harassment or other discrimination, gaining settlements or court orders . . ."); see also *United States v. Se. Okla. State Univ.*, No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. July 10, 2015) (claim brought on behalf of transgender professor who was denied tenure); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2015 WL 1808308 (E.D. Mich. Apr. 21, 2015) (claim brought on behalf of transgender funeral director/embalmer who was terminated); Complaint at 3-4, *EEOC v. Lakeland Eye Clinic, P.A.*, No. 8:14-cv-2421-T35 AEP (M.D. Fla. Sept. 25, 2014) (claim brought on behalf of transgender employee who was terminated; this case was later settled).

¹¹⁴ Holder's memo stated, "[a]fter considering the text of Title VII, the relevant Supreme Court case law interpreting the statute, and the developing jurisprudence in this area, I have determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status." Patrick McNeil, *DOJ Says Transgender Discrimination Covered Under Title VII*, LEADERSHIP CONF. (Dec. 18, 2014), <http://www.civilrights.org/archives/2014/1483-doj-transgender-discrimination.html>.

¹¹⁵ See *Davis v. Monroe Cty. Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *rev'd on other grounds*, 526 U.S. 629 (1999); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 248 (2d Cir. 1995); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993).

¹¹⁶ 109 F. Supp. 2d 1081 (D. Minn. 2000).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1084-85, 1090 ("He specifically alleges that some of the students called him 'Jessica,' a girl's name, indicating a belief that he exhibited feminine characteristics. Moreover, the Court finds important the fact that plaintiff's peers began harassing him as early as kindergarten. It is highly unlikely that at that tender age plaintiff would have developed any solidified sexual preference, or for that matter, that he even understood what it meant to be 'homosexual' or 'heterosexual.' The likelihood that he openly identified himself as gay or that

VII cases that held that similar harassment in the workplace constituted actionable harassment based on sex,¹¹⁹ the Minnesota District Court denied the defendant school district's motion for judgment on the pleadings and allowed the case to go forward.¹²⁰

In yet another case involving a sex-based harassment claim under Title IX, the Kansas District Court denied the defendant school district's motion for summary judgment.¹²¹ In that case, the plaintiff, Dylan Theno, asserted that other students harassed him by yelling crude remarks about his sexuality, watching him in the bathroom, and making obscene gestures at him.¹²² The court concluded that the harassers' intent was to humiliate and demean the plaintiff's masculinity, and that their actions were motivated by plaintiff's failure to conform to stereotypical gender roles.¹²³ Since a jury could classify the harassment as discrimination based on gender nonconformity, the court held that the claim was actionable under Title IX.¹²⁴

This line of reasoning continued to be applied by the Indiana District Court in the recent case of *Davis v. Carmel Clay Schools*.¹²⁵ In

he engaged in any homosexual conduct at that age is quite low. It is much more plausible that the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy. Plaintiff thus appears to plead facts that would support a claim of harassment based on the perception that he did not fit his peers' stereotypes of masculinity." (footnote omitted).

¹¹⁹ The court relied on the Eighth Circuit's decision in *Schmedding v. Tnemec Co.*, 187 F.3d 862 (8th Cir. 1999) and stated:

The Court's determination on this issue is buttressed by the Eighth Circuit's recent decision in *Schmedding*, 187 F.3d at 865. The misconduct alleged in *Schmedding* is strikingly similar to that plead in this case. In that case the claimant alleged that his co-workers taunted him about being a homosexual and spread rumors about his perceived sexual orientation, as well as subjecting him to other offensive harassment such as patting him on the buttocks, asking him to perform sexual acts, and forcing him to observe offensive exhibitions of sexually inappropriate behavior. *See id.* Although these acts are indicative of harassment based upon sexual orientation or perceived sexual orientation, the court held them sufficient to support a Title VII claim. In this case, plaintiff alleges that his harassers called him names targeted at homosexuals and spread rumors about his sexual orientation, as well as subjecting him to more severe forms of misconduct such as asking him for sexual favors, grabbing his buttocks and inner thighs, and subjecting him to acts of pretended anal rape. The Court finds these alleged acts to be at least as indicative of harassment based on sex as those asserted in *Schmedding*.

Id. at 1092-93 (footnote omitted).

¹²⁰ *Id.* at 1090-94.

¹²¹ *See* *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299 (D. Kan. 2005).

¹²² *Id.* at 1304-06.

¹²³ *Id.* at 1307 (The court suggested that the harassment was rather based on the fact that plaintiff wore earrings and enjoyed Tae Kwan Do).

¹²⁴ *Id.*

¹²⁵ No. 1:11-cv-00771-SEB-MJD, 2013 WL 5487340 (S.D. Ind. Sept. 30, 2013).

Davis, the plaintiff, M.D., brought a Title IX claim against his high school for the school's failure to report other students harassing him.¹²⁶ Over a period of three months, four students constantly harassed the plaintiff.¹²⁷ The defendant school argued that the plaintiff did not have a colorable Title IX claim because the harassment was not based on sex.¹²⁸ However, the court disagreed and held that there was at least a genuine issue of material fact regarding whether the harassment was based on sex, since the harassment could have been based on the plaintiff's failure to conform to male sex stereotypes.¹²⁹

While there have been many cases brought under Title IX by plaintiffs who have experienced discrimination because of gender nonconformity, there have been only a limited number of reported cases brought under Title IX by plaintiffs based on gender identity. In *Miles v. New York University*,¹³⁰ Jennifer Miles brought a Title IX discrimination claim against her professor for sexual harassment based on unwanted advances made to her as a female.¹³¹ The university defended the professor by claiming that Miles was not protected under Title IX because she was biologically a male at the time of the harassment and therefore, could not have been a victim of sexual harassment against a female.¹³² The District Court for the Southern District of New York did not agree with this defense and held that Miles could proceed with her Title IX sexual harassment claim.¹³³ This case seemingly opened the door for Title IX discrimination lawsuits to proceed based on gender

¹²⁶ *Id.*

¹²⁷ *Id.* at *1 (“[The students] taunted him with sexual innuendos, grabbed his genitals, and ‘gooched’ him, a term used to describe anal penetration by another person’s fingers, either over a layer of clothes or with skin-to-skin contact.”).

¹²⁸ *Id.* at *8–9.

¹²⁹ *Id.* at *10. In arguing that they had a valid claim under Title IX for discrimination based on sex,

[p]laintiffs emphasize that M.D. was not on the basketball team and that he was a weaker, smaller male than his attackers, weighing less than 165 pounds and standing less than 5’10” tall at the time of the harassment. M.D. also had an “artistic” side that Plaintiffs contend could be perceived as non-masculine; specifically, M.D. enjoyed hobbies such as writing poetry and creating music without lyrics.

Id. at *9.

¹³⁰ 979 F. Supp. 248 (S.D.N.Y. 1997).

¹³¹ *Id.* at 249 (“The advances included the fondling of breasts, buttocks, and crotch, forcible attempts to kiss, and repeated propositioning for a sexual relationship.”).

¹³² *Id.* This is a confusing argument, but one that the school did set forth. The school defended the professor by claiming that if Miles were biologically a male at the time of the alleged conduct, there could not have been sexual harassment within the meaning of Title IX since Miles was not a female, regardless of how everyone on campus perceived her. *Id.* at 249–50.

¹³³ *Id.* at 250.

identity,¹³⁴ in much the same way as *Schroer* did for Title VII sex discrimination claims.¹³⁵

However, there was a recent setback for transgender plaintiffs claiming sex discrimination under Title IX when the District Court for the Western District of Pennsylvania dismissed a transgender student's discrimination and retaliation claims against his school in *Johnston v. University of Pittsburgh*.¹³⁶ Seamus Johnston, a female-to-male transgender student, was expelled after continually using the men's facilities despite repeated warnings and citations issued by faculty and the campus police.¹³⁷ Johnston sued the university, claiming discrimination in violation of both the Equal Protection Clause of the Fourteenth Amendment and Title IX.¹³⁸ In analyzing whether Johnston had a cognizable claim under Title IX for discrimination "on the basis of sex," the court used a very narrow reading of the statutory language, and concluded that there could not be a cognizable Title IX claim based on one's transgender status.¹³⁹ The court relied on the rationale used in *Sommers*¹⁴⁰ and *Ulane*,¹⁴¹ rather than that used in *Price Waterhouse*¹⁴² and *Schroer*.¹⁴³ Further, the court found that Johnston's sex stereotyping claim failed because he did not allege that the discrimination resulted from his failure to conform to sex stereotypes.¹⁴⁴ Rather, the court held that the university's maintenance of sex-segregated restrooms and locker rooms is permitted under Title IX and the regulations promulgated thereunder and granted the university's motion to dismiss.¹⁴⁵ It remains to be seen whether this case is an anomaly or

¹³⁴ *Id.* ("Title IX was enacted precisely to deter that type of behavior, even though the legislators may not have had in mind the specific fact pattern here involved.")

¹³⁵ See *supra* notes 98–112 and accompanying text.

¹³⁶ 97 F. Supp. 3d 657 (W.D. Pa.), *appeal filed*, No. 15-2022 (3d Cir. 2015).

¹³⁷ *Id.* at 663–64.

¹³⁸ *Id.* at 666. Johnston also claimed discrimination and retaliation in violation of various state statutes. *Id.*

¹³⁹ *Id.* at 672–82.

¹⁴⁰ See *id.* at 672 n.15, 674–78; see also *supra* notes 79–83 and accompanying text.

¹⁴¹ See *Johnston*, 97 F. Supp. 3d at 674–76; see also *supra* notes 84–86 and accompanying text.

¹⁴² See *Johnston*, 97 F. Supp. 3d at 679 & n.21; see also *supra* notes 87–90 and accompanying text.

¹⁴³ See *Johnston*, 97 F. Supp. 3d at 679 n.21; see also *supra* notes 98–112 and accompanying text.

¹⁴⁴ See *Johnston*, 97 F. Supp. 3d at 679–82.

¹⁴⁵ *Id.* at 683–84. In another setback for transgender students, a federal judge in the Eastern District of Virginia dismissed a student's Title IX claim against his school board for preventing him from using the boy's bathroom. See G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., Civil No. 4:15cv54, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015), *appeal filed* No. 15-2056 (4th Cir. Oct. 21, 2015). Despite the Justice Department filing a statement of interest on behalf of the plaintiff, the judge stated, "[y]our case in Title IX is gone, by the way . . . I have chosen to dismiss Title IX. I decided that before we started." Dominic Holden, *Judge Throws Out Key*

whether other courts will also ignore the expanded definition of “sex discrimination” that has prevailed since *Price Waterhouse*.

III. AN ANALYSIS OF THE RELIGIOUS EXEMPTIONS PROVIDED UNDER TITLE VII AND TITLE IX

Following the various courts’ decisions discussed above, the recent guidelines issued by the OCR have explicitly provided that transgender students are protected under Title IX.¹⁴⁶ Unfortunately, the dilemma does not end here. Unlike the religious exemption under Title VII, which has been narrowly applied through judicial interpretation,¹⁴⁷ the religious exemption under Title IX has not been the subject of much judicial scrutiny.¹⁴⁸ Despite the clear intent and action to broaden the scope of Title IX to unambiguously include transgender students among the class of protected individuals,¹⁴⁹ religious universities can continue to discriminate on the basis of sex because of the existence of the religious exemption.

A. Title VII’s Religious Exemption

The religious exemption available to employers under Title VII is very limited.¹⁵⁰ It only allows for religion-based discrimination, while still prohibiting discrimination based on race, sex, and national

Argument in Transgender Student Restroom Case, BUZZFEED (July 27, 2015, 7:21 PM), <http://www.buzzfeed.com/dominicholden/judge-throws-out-key-argument-in-transgender-student-restroom>. If that were not bad enough, in a hearing, the judge stated that he considered being transgender as having a “mental disorder.” *Id.* (quoting U.S. District Court Judge Robert Doumar).

¹⁴⁶ OCR GUIDELINES, *supra* note 6.

¹⁴⁷ *See infra* Part III.A.

¹⁴⁸ *See infra* Part III.B.

¹⁴⁹ *See* OCR GUIDELINES, *supra* note 6.

¹⁵⁰ *See* 42 U.S.C. § 2000e-1(a) (2012) (“This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”); *see also* *Ziv v. Valley Beth Shalom*, 156 F.3d 1242 (9th Cir. 1998) (unpublished table decision) (holding that a religious organization can be liable for retaliation and national origin discrimination); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (holding that religious organizations may not discriminate on the basis of age). *But see* Kevin Theriot & Jeremy Tedesco, *Maintain Schools’ Religious Character to Protect Religious Freedom*, ISSUE BULL. (Cardinal Newman Soc’y, Manassas, Va.), Jan. 9, 2014, at 2 (arguing that Title VII’s religious exemption is much broader than Title IX’s religious exemption).

origin.¹⁵¹ Title VII also provides a bona fide occupational qualification (BFOQ) exception to an employer hiring on the basis of religion, sex, or national origin where those factors are necessary occupational qualifications for the job, or to a school in the hiring of employees of a particular religion if the school is a religious entity.¹⁵² Thus, the practical effect of the narrow exemptions provided under Title VII is to allow a religious employer or institution to discriminate only on the basis of an employee not conforming to the particular religion of such employer or institution.¹⁵³

The legislative history of the religious exemption under Title VII points to its intended narrow scope.¹⁵⁴ The original Act passed by the House provided a “blanket exemption” from Title VII compliance for

¹⁵¹ See 42 U.S.C. § 2000e-1(a).

¹⁵² See 42 U.S.C. § 2000e-2(e) (“(1) [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.”). It should be noted that BFOQs are narrow exceptions and have not often been successfully invoked. See U.S. Equal Emp. Opportunity Comm’n, Opinion Letter on Religious Organization/Religious BFOQ (Mar. 8, 2004), http://www.eeoc.gov/eeoc/foia/letters/2004/religious_org_bfoq.html.

¹⁵³ See U.S. EQUAL EMP. OPPORTUNITY COMM’N, NO. 915.003, COMPLIANCE MANUAL ON “RELIGIOUS DISCRIMINATION”: SECTION 12, at 18 (2008), <http://www.eeoc.gov/policy/docs/religion.pdf> (“This exception . . . only allows religious organizations to prefer to employ individuals who share their religion. The exception does not allow religious organizations otherwise to discriminate in employment on protected bases other than religion, such as race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races. Similarly, a religious organization is not permitted to deny fringe benefits to married women but not to married men by asserting a religiously based view that only men can be the head of a household.” (footnotes omitted)); see also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (holding that Title VII includes a “ministerial exception” allowing for a religious institution to discriminate in the hiring and firing of its ministers); *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997) (finding that School of Divinity did not need to employ a professor who did not adhere to theology taught by its leadership); *Herx v. Diocese of Fort Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168, 1175–76 (N.D. Ind. 2014) (holding that Title VII’s religious exemption is limited to claims of discrimination premised upon religious preferences, and does not extend to claims of discrimination based on race, sex, or national origin); *Tsirpanlis v. Unification Theological Seminary*, No. 99 Civ. 0013(LMM), 2001 WL 64739 (S.D.N.Y. Jan. 24, 2001) (holding that a Greek Orthodox employee could not sue seminary operated by Unification Church for religious discrimination based on being terminated for refusing to accept the teachings of such Church).

¹⁵⁴ See *infra* notes 155–58 and accompanying text.

religious entities.¹⁵⁵ However, a subsequent amendment narrowed the Act to only provide an exemption for religious employers to employ persons of a particular religion to perform work in connection with the carrying out of the entity's religious activities.¹⁵⁶ In 1972, the statute was further amended by deleting the word "religious" before "activities,"¹⁵⁷ but that was the furthest that Congress would expand the exemption.¹⁵⁸

Courts have taken Congress' intent to limit the scope of the religious exemption into account when deciding cases alleging Title VII discrimination. In *EEOC v. Pacific Press Publishing Ass'n*,¹⁵⁹ Lorna Tobler filed charges with the Equal Employment Opportunity Commission (EEOC) against her employer for sex discrimination and retaliation.¹⁶⁰ Her employer, Pacific Press, was a nonprofit corporation affiliated with the Seventh-Day Adventist Church, which publishes, prints, advertises, and sells material concerning religion.¹⁶¹ In order to work for Pacific Press, one must be a member in good standing of the church.¹⁶² Pacific Press paid its employees according to written wage scales that discriminated on the basis of sex.¹⁶³ Once Tobler brought a sex discrimination claim, she was stripped of most of her duties and left with only secretarial work.¹⁶⁴ Pacific Press claimed that as a religious employer, it was entitled to discriminate on the basis of sex pursuant to

¹⁵⁵ See H.R. REP. NO. 88-914 (1964), reprinted in 1964 U.S.C.C.A.N. 2391, 2402 ("[T]he requirements of the title will not apply with respect to . . . religious corporations, associations, or societies."); see also McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972) ("The original House version of § 702 . . . provided a religious organization with a blanket exemption from the provisions of Title VII.")

¹⁵⁶ Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified as amended at 42 U.S.C.A. § 2000e-1 (2012)).

¹⁵⁷ See *supra* note 150 for the language of the Title VII religious exemption. One could argue that by deleting the word "religious" before "activities," Congress in effect broadened the religious exemption by allowing qualifying religious entities to discriminate with respect to *all* their activities, not just religious activities. However, that argument was rejected in both *EEOC v. Pacific Press Publishing Ass'n* and *EEOC v. Fremont Christian School*. See *infra* notes 159–73 and accompanying text.

¹⁵⁸ Congress specifically rejected later proposals to further broaden the scope of the exemption. See S. SUBCOMM. ON LABOR OF THE COMM. ON LABOR & PUB. WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1229–30, 1258–60 (Comm. Print 1972).

¹⁵⁹ 676 F.2d 1272 (9th Cir. 1982).

¹⁶⁰ *Id.* at 1275.

¹⁶¹ *Id.* at 1274.

¹⁶² *Id.*

¹⁶³ *Id.* at 1275 ("[M]arried men received a higher rental allowance than single men, who in turn, received more than female employees regardless of their marital status. As a married woman, Tobler did not receive an annual utility allowance received by married men, nor was she paid automobile allowances paid to married male, single male and single female employees.")

¹⁶⁴ *Id.*

the religious exemption under Title VII.¹⁶⁵ The Ninth Circuit rejected this argument, holding that the religious exemption under Title VII did not permit sex discrimination and found in favor of the plaintiff on the discrimination claims.¹⁶⁶ The court, relying on the legislative history of Title VII's religious exemption,¹⁶⁷ reasoned that the application of the exemption should be limited to allow for Pacific Press to discriminate only in favor of co-religionists.¹⁶⁸

In a later Ninth Circuit case, *EEOC v. Fremont Christian School*,¹⁶⁹ Ruth Frost filed a sex discrimination charge with the EEOC, and the EEOC in turn brought a Title VII action against Fremont Christian School.¹⁷⁰ Fremont, a private religious educational institution, had a policy of providing health insurance to heads of households, which, Fremont maintained as part of its religious beliefs, only applied to single persons or married men.¹⁷¹ Frost was a married female employee of Fremont, and therefore was ineligible for health insurance benefits under the school's policy.¹⁷² Fremont argued that the religious exemption under Title VII entitled it to continue this discriminatory policy. The Ninth Circuit again held that the religious exemption and the BFOQ exception found in Title VII are limited, and did not allow for Fremont's discriminatory policy, thereby finding Fremont in violation of Title VII.¹⁷³ Thus, it is clear, based on legislative history and

¹⁶⁵ *Id.* at 1276.

¹⁶⁶ *Id.* ("Congress specifically considered the scope of Title VII protection within religious institutions and rejected proposals that provided religious employers a complete exemption from regulation under the Act. Title VII provides only a limited exemption enabling Press to discriminate in favor of co-religionists. . . . The legislative history of this exemption shows that although Congress permitted religious organizations to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, national origin, or for retaliatory actions against employees who exercise their rights under the statute.")

¹⁶⁷ *Id.* at 1276-77. The court drew upon the fact that proposals to broaden the exemption were rejected.

¹⁶⁸ *Id.*

¹⁶⁹ 781 F.2d 1362 (9th Cir. 1986).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1364-65 ("Fremont Christian believes that, in any marriage, only the man can be the head of the household, regardless of what his salary is in relation to that of his wife. As explained by Rev. Rankin, the superintendent of Fremont Christian, the test for routine eligibility for health insurance for women is whether they are married. If so, the husband is presumed to be the head of the household, rendering women ineligible for health benefits.")

¹⁷² *Id.*

¹⁷³ *Id.* at 1365-67 ("Both the language and legislative history of Title VII . . . indicate that the statute exempts religious institutions only to a narrow extent. . . . While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, 'religious employers are not immune from liability [under Title VII] for discrimination based on . . . sex' Furthermore, Congress and this court have specifically 'rejected proposals that provide[] religious employers a complete exemption from regulation

judicial interpretation, that the exemption from Title VII compliance available to religious employers is narrow and limited both in scope and application.

B. Title IX's Religious Exemption

Title IX provides a religious exemption to any educational institution controlled by a religious organization if compliance with Title IX would not be consistent with the organization's religious tenets.¹⁷⁴ When an educational institution receives federal funds, the OCR requires that institution to execute and submit to its office an "Assurance of Compliance"—a document in which such institution promises compliance with Title IX and other civil rights laws.¹⁷⁵ Institutions that wish to file for a religious exemption from compliance with Title IX must submit to the Assistant Secretary of the OCR a written request executed by the highest ranking official of the institution, identifying which parts of Title IX compliance conflict with the institution's religious tenets.¹⁷⁶ While this would seem to impose a high burden of proof on the entity seeking the exemption, the actual threshold of proof required is low.¹⁷⁷

under the [Civil Rights] Act [of 1964].” (alterations in original) (citation omitted) (quoting *EEOC v. Pac. Press Publ'g Ass'n.*, 676 F.2d 1272, 1276 (9th Cir. 1982)).

¹⁷⁴ 20 U.S.C. § 1681(a)(3) (2012). (“[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.”). Far from being available only to religious educational institutions, the religious exemption available under Title IX is available to entities that one would not identify in the first instance as religious. *See Title IX Legal Manual*, *supra* note 52, § II.2 (“[T]he CRRRA expanded the exemption for entities controlled by religious organizations. Under the CRRRA, the exemption is no longer limited to *educational institutions* that are controlled by religious organizations with tenets contrary to Title IX. Instead, any educational operation of an entity may be exempt from Title IX due to control by a religious organization with tenets that are not consistent with the provisions of Title IX. Further, the exemption would apply to a particular education program operated by a recipient if this separate program is subject to religious tenets that are not consistent with Title IX.”).

¹⁷⁵ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., OMB APPROVAL NO. 1870-0503, ASSURANCE OF COMPLIANCE-CIVIL RIGHTS CERTIFICATE, <http://www2.ed.gov/about/offices/list/ocr/letters/boy-scouts-assurance-form.pdf> (“The applicant provides this assurance for the purpose of obtaining Federal grants, loans, contracts . . . or other Federal financial assistance from the Department [of Education]. . . . The applicant assures that it will comply with: . . . Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 *et seq.*, which prohibits discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.”).

¹⁷⁶ 34 C.F.R. § 106.12 (2015).

¹⁷⁷ *See* *Hall v. Lee Coll., Inc.*, 932 F. Supp. 1027, 1033 (E.D. Tenn. 1996) (“It may very well be that to claim the exemption found in the statute, an educational institution need do nothing more than just raise the exemption.”); 134 CONG. REC. S205-02 (1988) (“Current title IX

Unlike the religious exemption under Title VII, which includes a separate “ministerial exception” permitting gender discrimination only in the very limited instance of faith-based hiring of members of a single sex to hold certain positions,¹⁷⁸ the Title IX religious exemption has been liberally granted.¹⁷⁹ Moreover, an entity must only assert that compliance with Title IX is inconsistent with its religious tenets, without any inquiry into the sincerity of such beliefs.¹⁸⁰ Thus, although the actual wording of the religious exemption available under Title IX would seem to call for a narrow interpretation, in practice, it enjoys a much broader and more liberal application than the religious exemption under Title VII.¹⁸¹

The religious exemption under Title IX has rarely been challenged. In one of the only reported cases, *Petruska v. Gannon University*,¹⁸² the District Court for the Western District of Pennsylvania went beyond the language of the religious exemption set forth in the Title IX statute. The plaintiff, Lynette Petruska, was formerly a chaplain at a Catholic university and alleged that she was demoted and subsequently

regulations provide for a religious exemption to the statute where it is inconsistent with the religious tenets of the institution. An educational institution need only make application to the Department of Education for such an exemption. To date, no institution that has completed an application has been denied an exemption. According to a 1987 Department of Education report, there are 150 institutions that have been granted religious exemptions.”); *see also* Letters from Lhamon to Baker, Dummer, and Ellis, *supra* notes 14, 17 (demonstrating that only after a complainant comes forward to challenge the religious exemption given to an entity does the OCR require an investigation into the religious rationale and nature of an institution under Title IX).

¹⁷⁸ For example, Title VII’s ministerial exception would allow for a religious organization to hire only males as ministers. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

¹⁷⁹ The religious exemption afforded under Title IX is not limited to the hiring practices of a religious educational institution and it is not limited to discrimination based on nonconforming religion; rather, the exemption allows the “religious” entity to discriminate on the basis of sex if it claims that such discrimination is consistent with its religious tenets. *See* Sam Hotchkiss, Comment, *Disputes Between Christian Schools and LGBT Students: Should the Law Get Involved?*, 81 UMKC L. REV. 701, 705 (2013).

¹⁸⁰ Merriam-Webster defines a “tenet” as a belief “held in common by members of an organization, movement, or profession.” *Tenet*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/tenet> (last visited Dec. 1, 2014). Therefore, a “religious tenet” can be taken to mean a belief held in common by the members of a particular religion. Yet, no one would argue that racial discrimination should be allowed because of a religiously held belief in the supremacy of one race over another. In fact, it must be noted that racial discrimination laws are typically applied without religious exemptions. *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 592–93 (1983) (where the university designed its racially discriminatory admissions policy and student code of conduct on a sincerely-held religious belief prohibiting interracial dating and marriage, but the U.S. Supreme Court refused to grant tax-exempt status to the university because even religious universities cannot discriminate on the basis of race).

¹⁸¹ *See* discussion *supra* Part III.A.

¹⁸² No. 1:04-cv-80, 2008 WL 2789260 (W.D. Pa. Mar. 31, 2008).

discharged because of her gender.¹⁸³ Petruska argued that the defendant university did not have a defense to her Title IX claim because the university could not prove that compliance with Title IX went against the religious tenets of the university. Accordingly, Petruska argued that the religious exemption was not available to the defendants under the statute.¹⁸⁴ However, the court rejected this argument and held not only that religious universities did not have to apply for the religious exemption under Title IX in order to avoid compliance, but rather, that the university was entitled to the “ministerial exception” under the First Amendment of the Constitution.¹⁸⁵ This district court effectively gave religious universities an even broader exemption, allowing them to circumvent Title IX claims of sex discrimination. Since this decision, there have been no reported federal cases challenging the religious exemption under Title IX.

C. Recent Claims of Religious Exemptions by Universities

An examination of three recent instances where Title IX was held not to apply to universities due to the granting of religious exemptions¹⁸⁶ demonstrates the ease with which the protections otherwise applicable to transgender students under Title IX are taken away.¹⁸⁷ After the OCR issued its statement that discrimination against

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at *5–8 (“Plaintiff overlooks the fact that the ministerial exception is rooted in a source of law higher than legislative enactments—namely, the First Amendment of the Constitution. As we previously observed, ‘the ministerial exception is not a doctrine borne of any express statutory exemption,’ but is rather ‘a judicially created doctrine which arises from well-recognized First Amendment principles and which exists quite independent of Title VII or any other statute.’” (quoting *Petruska v. Gannon Univ.*, 350 F. Supp. 2d 666, 681 (W.D. Pa. 2004)). Simply put, the court interpreted the Free Exercise Clause of the First Amendment to be, in effect, a “ministerial exception” allowing religious employers the freedom to choose their ministers free from government interference. For further discussion on the court-created “ministerial exception,” see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

¹⁸⁶ See Kingkade, *supra* note 15.

¹⁸⁷ In each letter from the OCR granting the exemptions, the OCR states that

in the unlikely event that a complainant alleges that the practices followed by the institution are not based on the religious tenets of the controlling organization, OCR is obligated to contact the controlling organization to verify those tenets. If the organization provides an interpretation of tenets that has a different practical impact than that described by the institution, or if the organization denies that it controls the institution, this exemption will be rescinded.

Letters from Lhamon to Baker, Dummer, and Ellis, *supra* notes 14, 17. However, as this Note will propose, in order to avoid a chilling effect on the pursuit of Title IX claims by transgender students against religious institutions, there should be no presumptions, and inquiries and

transgender students is prohibited by Title IX, both Simpson University and Spring Arbor University preemptively filed for religious exemptions in order to avoid any claim that they were violating the law.¹⁸⁸ Simpson University cited its affiliation with the Christian and Missionary Alliance and referenced those portions of the Bible stating that God created man and woman as two distinct sexes and therefore, any tampering with one's assigned sex at birth is a sin.¹⁸⁹ The then-interim President of Simpson University wrote that the university could not support or encourage a student to live in conflict with the Bible, and that a student who does in fact violate the campus standards of "biblical living" is subject to discipline, which could include expulsion.¹⁹⁰ The Assistant Secretary for the OCR responded with extreme deference and granted Simpson University's request for a religious exemption.¹⁹¹

Spring Arbor University went even further in its request for a religious exemption, asking for exemptions from Title IX compliance in its admissions and employment policies, in addition to housing,

investigations as to the impact of permitting the discriminatory behavior should be made at the time the original exemption request is filed, not only when a complainant comes forward. See discussion *infra* Part IV.

¹⁸⁸ Letter from Dummer to Lhamon, *supra* note 17 ("I have become aware that the Departments of Education and Justice recently interpreted Title IX's ban on sex discrimination in education to include discrimination based on gender identity. . . . I hereby request, under 34 C.F.R. § 106.12, an exemption for Simpson from this interpretation of Title IX, due to the religious beliefs of our institution."); Letter from Ellis to Lhamon, *supra* note 17.

¹⁸⁹ Letter from Dummer to Lhamon, *supra* note 17 ("The University and its denomination believe that human beings, fashioned by God in His own image, are created male and female (Genesis 1:27). . . . We reject all attempts at constructing one's own sexual identity by medically altering the human body, cross dressing, or similarly practicing behaviors characteristic of the opposite sex as morally objectionable and sinful (Deuteronomy 22:5)." (footnote omitted)). Deuteronomy 22:5 states: "[a] woman must not wear men's clothing, nor a man wear women's clothing, for the Lord your God detests anyone who does this." *Deuteronomy 22:5*. But see Emma Margolin, *Transgender Woman Sues Christian University that Expelled Her*, MSNBC (Apr. 25, 2014, 7:38 PM), <http://www.msnbc.com/msnbc/transgender-expelled-california-baptist-university> ("There's nothing in Christian doctrine that addresses gender identity. . . . [T]he only recurring argument as 'God created gender' in uncritical, decontextualized, mistranslated reference to Genesis 1.26–28 that God created a binary gendered pair of humans originally. . . . However, in the original Hebrew it is quite clear that the original human . . . is undivided into genders—one we might call transgender or intersex these days. The division into two genders happens AFTER God creates and calls this original human good. . . . So it's a bad argument and not one I take seriously." (quoting H. Adam Ackley, a "gender and sexuality studies professor")).

¹⁹⁰ Letter from Dummer to Lhamon, *supra* note 17. The letter specifically stated that the University would not be able "to allow a female student presenting herself as male to use the restroom, locker room, and living accommodations of her choice, and to participate in boys' athletic programs." *Id.*

¹⁹¹ Letter from Lhamon to Dummer, *supra* note 17 (restating portions of Mr. Dummer's letter indicating the inconsistencies between the university's religious tenets and Title IX as applied to transgender students and granting a religious exemption in all aspects requested).

facilities, and athletics.¹⁹² Spring Arbor University is affiliated with the Free Methodist Church.¹⁹³ Instead of relying primarily on commonly cited Biblical verses, which formed the basis of Simpson University's request, Spring Arbor University relied on its own mission statement¹⁹⁴ and the "Spring Arbor Concept"¹⁹⁵ in order to "prove" that compliance with Title IX regulations requiring it to accommodate transgender students would be inconsistent with the religious tenets of the university. In fact, the president of Spring Arbor University, Brent Ellis, specifically requested that the university be permitted to "discriminate."¹⁹⁶ Moreover, the university referred to an earlier BFOQ exception it had been granted, which allowed the university to hire only Christian employees without being in violation of Title VII.¹⁹⁷ There is a

¹⁹² Letter from Ellis to Lhamon, *supra* note 17 ("The University also believes, based upon Biblical principles, that a person cannot change their birth gender. Based upon its religious beliefs, it is the University's position that a person who self-identifies as the opposite sex cannot reside with individuals who are of the sex with which that person identifies. This is true whether or not the person has undergone surgery or hormonal treatment to assume the physical characteristics of the opposite sex. Such a living arrangement would be deemed to be cohabitation, and under the religious tenets of the Free Methodist Church and the University's Christian religious principles and practices, it would be sinful behavior. Similarly, a person who self-identifies as the opposite sex, but who has expressed an attraction to members of their birth sex, would not be permitted to engage in dating or sexual activity with a person of their birth sex, because this behavior is considered to be homosexual in nature, based upon the University's religious beliefs. . . . An individual who identifies as being of the opposite sex from their birth gender also would not be permitted to play on the athletic teams of the sex which was opposite from their birth gender. . . . Employment of an individual who identifies as being of the opposite sex from their birth gender, and who expresses that identification through behavior and/or dress is against the religious beliefs of the University, on the same basis and for the same religious reasons as set forth above, regarding students with gender identity issues. . . . Based upon the Christian religious beliefs of the University and the tenets of the Free Methodist Church, the University is requesting exemption on religious grounds from Title IX . . . to allow the University religious freedom to discriminate on the basis of sex, including gender identity, and sexual orientation . . ."); *see also* Kingkade, *supra* note 15.

¹⁹³ Letter from Ellis to Lhamon, *supra* note 17.

¹⁹⁴ *Id.* ("Spring Arbor, an evangelical Christian university affiliated with the Free Methodist Church, is committed to excel in liberal arts, professional, and graduate studies. Through the influence of an affirming academic community where a faculty of Christian scholars integrates faith with experiential learning, students develop intellectually, grow as persons, and are challenged by the call to vibrant Christian service.").

¹⁹⁵ *Id.* ("Spring Arbor University is a community of learners distinguished by our lifelong involvement in the study and application of the liberal arts, total commitment to Jesus Christ as the perspective for learning, and critical participation in the contemporary world.").

¹⁹⁶ The letter from Ellis to Lhamon requests an exemption "so that the University may discriminate on religious grounds in regard to its students and employees." *Id.*

¹⁹⁷ *Id.* Recognizing that the exemptions available to religious employers under Title VII have been narrowly applied to cover only religious discrimination, Spring Arbor University felt the need to ask for a further and preemptive religious exemption under Title IX with respect to its employees to enable them to discriminate "on the basis of sex," something expressly prohibited in employment since *Price Waterhouse*. *Id.* ("Employees are considered to be representatives of the University, and are required to model appropriate Christian behavior. A male employee who announced himself to be female, or who adopted the appearance of a female, would not be

difference between allowing an employer, such as a university, to hire only employees of the same faith, and allowing discrimination against transgender students¹⁹⁸ who share the same religious beliefs.¹⁹⁹ The

modeling appropriate Christian behavior acceptable to the religious beliefs of the University, nor would a female employee who announced herself to be a male, or who adopted the appearance of a male.”). Why should an exemption be granted allowing it to discriminate against individuals who share the same Methodist theology but who do not identify with the sex assigned to them at birth? It is important to note that Spring Arbor University has a history of dealing with a transgender employee. In February 2007, the university terminated an associate professor and assistant dean, Julie Nemecek, who had been at the university for seventeen years when she began her transition from male to female. See Shannon Greenwood, *Religious University President: We Want Permission to Discriminate but We Won't Use It*, THINKPROGRESS (Aug. 5, 2014 4:15 PM), <http://thinkprogress.org/lgbt/2014/08/05/3467738/spring-arbor-university-title-ix-exemption-letter>; Todd A. Heywood, *Transgender Odyssey: Workplace Inequity Takes Teacher from Michigan Campus to National Stage*, BETWEEN LINES NEWS, Jan. 31, 2008, <http://www.pridesource.com/article.html?article=29018>. When Nemecek first told the president of the university she was transgender and would begin living as a female, the university was supportive. See Heywood, *supra*. However, as time went on, the university began to subject her to rules and restrictions applicable solely to her (she was prohibited from wearing women's clothing on campus, she could not identify herself as an employee of the university, and her salary was cut). *Id.* When the university terminated her, it used the pretext that she had revealed her status as an employee of the university by wearing a Spring Arbor t-shirt to a grocery store. *Id.* Nemecek filed a Title VII claim with the EEOC alleging discrimination, but later settled. See Greenwood, *supra*. In 2008, Nemecek expressed her hopes for a better future for transgender individuals:

Within a year, I think all the major universities in the state will have added gender identity and expression into their policies The growth (of protections) has been phenomenal. [If it] continues at this rate, we will have more than half of the businesses in the Fortune 500, and that will have a trickle-down effect.

Heywood, *supra* (quoting Julie Nemecek). Further, she feels very strongly about her religious faith and served as senior pastor for over twenty years in three different churches. “It has drawn Joanne,” Nemecek’s wife, “and I together and deepened our faith, . . . [w]e are very aware of God’s presence.” *Id.* Unfortunately, having been granted a broadly-worded Title IX religious exemption recently, Spring Arbor University would be free to fire a transgender employee and there would be little anyone could do about it.

¹⁹⁸ Letter from Ellis to Lhamon, *supra* note 17 (“It is the University’s position, based upon its religious beliefs taken from Biblical principles and the Doctrine of the Free Methodist Church, that a person cannot change his or her birth sex. Although they may undergo surgery or hormone treatments to alter their physical characteristics, only the outward appearance is changed.”).

¹⁹⁹ The religious exemption request asks for “an exemption from the specific Title IX regulations referenced in this letter, so that the University may discriminate on religious grounds in regard to its students and employees.” *Id.* The university is arguing that based on its religious beliefs, it cannot comply with the new guidelines issues by the OCR stating that Title IX regulations apply to transgender individuals. However, students who are likely to attend a university such as Spring Arbor would most likely identify as Christian, but may also in fact identify as transgender. By granting the religious exemption, the OCR is denying students who identify as both Christian and transgender the freedom to attend this university safely. In applying for admission to Spring Arbor University, an applicant must agree to adhere to certain campus policies (such as attending chapel twice a week, not engaging in premarital or extramarital sex, and not engaging in “homosexual activities”). *Application for Admission*, SPRING ARBOR U., <https://mysau3.arbor.edu/ics/public/onlineapp.jnz> (last visited Nov. 19, 2015). In fact, the student handbook states, “Spring Arbor University will not support

Assistant Secretary for the OCR again responded with extreme deference to Spring Arbor's requests. She presumed that everything stated in the university's request was true and correct and granted Spring Arbor a religious exemption from complying with Title IX to the extent that it protects transgender students from discrimination in admissions, housing, facilities, and athletics.²⁰⁰

Unlike the preemptive religious exemptions granted to Simpson University and Spring Arbor University, George Fox University requested and was granted a religious exemption only after a transgender student requested to live in an on-campus dormitory with members of the sex with which he identifies rather than with members of his sex assigned at birth.²⁰¹ Jaycen, known as Jayce, who was born a female but identifies as male, attends George Fox University, a small Christian college in Oregon.²⁰² On April 11, 2014, the Oregon State Circuit Court legally changed his sex from female to male.²⁰³ Despite this legal change in gender, George Fox University continued to view Jayce as a female, and denied his request to live with male friends in university housing, unless and until he underwent gender reassignment surgery.²⁰⁴ Instead, George Fox offered Jayce a single-person apartment

persistent or conspicuous examples of cross-dressing or other expressions or actions that are deliberately discordant with birth gender." *2015–2016 Student Handbook*, SPRING ARBOR U. 29, <http://www.arbor.edu/wp-content/uploads/2015/08/15-16-Student-Handbook1.pdf> (last visited Nov. 19, 2015).

²⁰⁰ Letter from Lhamon to Ellis, *supra* note 17 (effectively reusing the letter to Dummer and granting all aspects of religious exemption requested).

²⁰¹ Hunt & Pérez-Peña, *supra* note 9.

²⁰² *Id.*

²⁰³ *Id.* Effective January 1, 2014, Oregon no longer requires sexual reassignment surgery in order to legally change one's sex. See Amanda Goad et al., *Oregon Legislature Repeals Surgery Requirement for Gender Change on Birth Certificate*, ACLU: SPEAK FREELY BLOG (June 14, 2013, 3:55 PM), <https://www.aclu.org/blog/lgbt-rights-womens-rights/oregon-legislature-repeals-surgery-requirement-gender-change-birth>.

²⁰⁴ Hunt & Pérez-Peña, *supra* note 9. In the letter from Baker to Lhamon, the President of George Fox explains that the university cannot "support or encourage an individual to live in conflict with biblical principles," as this would violate the university's religious tenets; however, it appears that George Fox is advocating for an action (i.e., gender reassignment surgery) which would seem to violate these same professed religious beliefs. This is just another example of the problems inherent with the automatic granting of a religious exemption based on inconsistency with "religious tenets." Had Lhamon made further inquiry, the president of George Fox University would have had to explain why housing a transgender student who underwent gender reassignment surgery together with members of the "opposite" sex is not supporting "an individual to live in conflict with biblical principles." Letter from Baker to Lhamon, *supra* note 14. It bears noting that in an effort to appear conciliatory toward accommodating transgender students who have undergone gender reassignment surgery, in July 2014, George Fox implemented new housing policies which stated that "[c]ommon residence halls are single-sex, defined anatomically." *George Fox U. Alters Policy on Transgender Students*, INSIDE HIGHER ED (July 18, 2014) (quoting *Transgender Student and Housing at George Fox University*, GEORGE FOX U., <https://web.archive.org/web/20150116224748/http://www.georgefox.edu/transgender> (George Fox's prior housing policy)). However, the university presumably realized that

on campus, or off-campus housing.²⁰⁵ However, as Jayce explained, not being able to live together with other males on campus is extremely difficult for him.²⁰⁶ Citing the fact that George Fox University is owned by the Northwest Yearly Meeting of Friends, part of the Quaker movement,²⁰⁷ the university was granted a religious exemption from Title IX compliance with respect to housing, restroom and locker room, and athletic policies.²⁰⁸

This situation illustrates how a claim of gender discrimination under Title IX brought by a student whose religious beliefs are important to him, but who also identifies as transgender,²⁰⁹ could not go forward because the university was granted a religious exemption. Jayce explained that he wanted to show that lesbian, gay, bisexual, transgender, and queer (LGBTQ) students can feel comfortable in faith-

anatomical scrutiny would be difficult to police and, in a recent statement, the George Fox Board of Trustees adopted the following as its position on transgender housing:

As George Fox University works diligently to fully care for and love students as they journey through questions of gender identity, we simultaneously adhere to our theological commitments grounded in Scripture and expressed in our statement of faith and lifestyle covenant. . . . Since the university's founding, our convictions around sexual purity and modesty have led us to provide separate housing for each sex. We intend to maintain our same-sex housing, although the realities of transgender processes may require special considerations. To ensure the privacy and well-being of all George Fox students, housing units with private restrooms and living spaces will be provided for students identifying as transgender where possible. With approval and consistent with housing policy, this may include living in a room in a shared house (or appropriate apartment) on campus with a student's legally-recognized gender, provided housemates/apartment mates have agreed to such an arrangement. A guiding consideration will always be ensuring that students remain connected to community.

Students Identifying as Transgender, GEORGE FOX U., <http://www.georgefox.edu/transgender> (footnotes omitted) (last visited Aug. 22, 2015).

²⁰⁵ Hunt & Pérez-Peña, *supra* note 9. While Jayce does plan to undergo the surgery, many transgender individuals choose to live as another gender without undergoing the surgery. *Id.* A university should not condition a housing placement based on an extremely expensive and life-altering procedure. In addition, George Fox's student insurance policy does not cover any transition-related care. Zack Ford, *After Outrage, School Agrees to House Trans Students by Gender—But Only if They've Had Surgery*, THINKPROGRESS (July 21, 2014, 9:41 AM), <http://thinkprogress.org/lgbt/2014/07/21/3462137/george-fox-transgender-surgery>.

²⁰⁶ Hunt & Pérez-Peña, *supra* note 9. (“Living in a female dorm means that each day, the first thoughts I have are about my struggles living in a body that never felt right to me,” he said. Living there while undergoing testosterone therapy has been a particular challenge. ‘I’ve got the libido of a 14-year-old boy, and I’m living with a bunch of young women,’ he said. ‘It’s not a good recipe for promoting the kind of behavior that a Christian university expects from its students.’” (quoting Jayce)).

²⁰⁷ Letter from Baker to Lhamon, *supra* note 14.

²⁰⁸ Letter from Lhamon to Baker, *supra* note 14.

²⁰⁹ Hunt & Pérez-Peña, *supra* note 9. (“Jaycen . . . describes himself as deeply committed to his faith . . . but he says he suffers from depression, a common problem among transgender people, worsened by the strain of dealing with the university.”).

based education.²¹⁰ The liberal application of the religious exemption under Title IX does not allow for this to occur. While religious freedom has always been fundamental in American society, a line needs to be drawn.²¹¹ When a religious university accepts federal funding and reaps its benefits, that university should be expected to adhere to the same laws applicable to all other universities that accept federal funding.²¹² While Title IX seeks to protect students against all forms of sex discrimination, the religious exemption threatens the achievement of this goal.

IV. PROPOSAL FOR A NARROWER APPLICATION OF THE RELIGIOUS EXEMPTION UNDER TITLE IX IN ORDER TO EFFECTUATE THE OCR GUIDELINES PROTECTING TRANSGENDER STUDENTS

The three recent instances described above exemplify how the use of the religious exemption available under Title IX defeats the core purpose of the law protecting transgender students from discrimination in education. Federal laws are meant to provide consistency and uniformity, and transgender students should not have to rely only on state laws to protect them.²¹³ In keeping with the tradition of courts

²¹⁰ *Id.*

²¹¹ Kristine E. Newhall, a Title IX scholar, explained that the Department of Education has not been clear as to what criteria a school must meet to show it is controlled by a religious organization and therefore, “[t]his is where we’re worried about a slippery slope.” Kingkade, *supra* note 15 (quoting Kristine E. Newhall). Newhall also stated that while she does not doubt the strong religious traditions of the three schools that were granted religious exemptions in the spring of 2014, she remains “a little bit concerned in this Hobby Lobby-era moment we seem to be in, [that] the criteria seems to be a little bit lax.” *Id.*

²¹² Jayce’s lawyer explained: “[i]t’s unfair to invite a student to apply and to extend aid and then to deny him appropriate on-campus housing The real crime here is that George Fox has requested an exemption that allows it to get public money while discriminating” Jaschik, *supra* note 13 (quoting Paul Southwick). If a religious university feels strongly about keeping the university homogeneous in its religious beliefs, then such university could forfeit the receipt of federal funding.

²¹³ An individual’s civil rights should not be left to chance. As previously noted, only eighteen states and the District of Columbia currently have nondiscrimination statutes protecting transgender students. *See* discussion *supra* note 7. Moreover, state nondiscrimination statutes do not necessarily afford the same level of protection as Title IX. In the summer of 2014, a California judge ruled that California Baptist University was within its rights to expel a transgender student. *See Cabading v. Cal. Baptist Univ.*, No. RIC1302245 (Cal. Super. Ct. July 11, 2014); Jaschik, *supra* note 13. In 2011, Domaine Javier was expelled from California Baptist University after revealing her transgender identity on an MTV reality show. *Id.* Javier brought suit under California’s Unruh Civil Rights Act, a state statute that prohibits various forms of discrimination. *See* Margolin, *supra* note 189. While Unruh does not have a religious exemption, the judge still found that the law did not apply to organizations “whose primary mission is ‘the inculcation of a specific set of moral values.’” *See* Jaschik, *supra* note 13 (quoting *Cabading*, No. RIC1302245, slip op. at 5). Therefore, California Baptist University was

using Title VII analysis when adjudicating Title IX claims, logic dictates that the same should be followed when applying the religious exemption provision of Title IX.

In an ideal world, the religious exemption available under Title IX should be eliminated in its entirety. Given the importance of equality of access to education for *all* students, to allow discrimination on any basis would be repugnant to most people.²¹⁴ However, this would require a bipartisan act of Congress which, in this post-*Hobby Lobby* environment, is unrealistic.²¹⁵ Further, eliminating any exemption based on religion runs the risk that a future U.S. Supreme Court could conceivably invalidate Title IX as unconstitutional on the basis that it violates the First Amendment.²¹⁶ Religious freedom ideals dictate that religious institutions should be free to pursue their religious beliefs

within its rights to ban Javier from the undergraduate, on-campus program of the university. *Id.* However, the university could not ban her from the library, counseling center, art gallery, or online courses, since those programs and facilities do not require participants or patrons to adhere to any code of moral conduct and “are essentially indistinguishable from similar commercial activities in the community.” *Id.* (quoting *Cabading*, No. RIC1302245, at 8). To avoid uncertainty and conflicting court rulings, “we need a broader bill that puts discrimination based on sexual orientation and gender identity on the same footing as race, religion and gender.” Eckholm, *supra* note 113 (quoting Shannon P. Minter, legal director at the National Center for Lesbian Rights).

²¹⁴ See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 592–93 (1983) (“[T]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. . . . Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.”).

²¹⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). After the U.S. Supreme Court granted a for-profit religious corporation an exemption from providing certain types of government mandated contraception to their employees, it would be an extremely difficult task to find Republicans in Congress who would be willing to vote to get rid of the religious exemption under Title IX in its entirety. In an effort to bypass partisan politics, in the summer of 2014, President Obama used his executive powers to sign an executive LGBT non-discrimination order, barring discrimination on the basis of sexual orientation or gender identity among federal government contractors. See Mark Joseph Stern, *Obama Signs Historic LGBT Non-Discrimination Order*, SLATE (July 21, 2014, 10:40 AM), http://www.slate.com/blogs/outward/2014/07/21/obama_signs_history_executive_enda_forbidding_lgbt_discrimination.html. President Obama *did not* include a broad religious exemption requested by religious faith leaders, but only included a limited exemption allowing for religiously affiliated contractors to hire only people of a certain religion. See *id.* Such an approach is consistent with the limited availability of religion-based discrimination allowed under Title VII. While this is a big step in the right direction, it must be noted that the Pentagon continues to ban openly transgender individuals from joining the military. See *The Quest for Transgender Equality*, *supra* note 27.

²¹⁶ See U.S. CONST. amend. I, cl. 1–2; Steven H. Aden & Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act’s Exemption for Religious Organizations*, 11 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 4 (2010) (explaining that anti-discrimination laws without religious exemptions are in themselves discriminatory because they discriminate against religious organizations by forcing them to affirm conduct which is opposed to their religious beliefs).

without interference from the federal government.²¹⁷ This guiding principle forms the basis for having religious exemptions in the first place.²¹⁸

The next best approach would be for Congress to narrow the language of the religious exemption included under Title IX. This would be consistent with the approach taken by courts when dealing with the application of religious exemptions under Title VII.²¹⁹ The current statutory language—“would not be consistent with the religious tenets of such organization”²²⁰—should be replaced with, “would contravene the stated religious tenets of such organization.” This language would allow a religious university to maintain its religious identity without discriminating against students who, like Jayce, comply with the religious requirements of the university but identify as transgender.²²¹

²¹⁷ See U.S. CONST. amend. I, cl. 1–2; Laurie Goodstein & Adam Liptak, *Schools Fear Gay Marriage Ruling Could End Tax Exemptions*, N.Y. TIMES (June 24, 2015), <http://www.nytimes.com/2015/06/25/us/schools-fear-impact-of-gay-marriage-ruling-on-tax-status.html> (“We need to draw lines around the power of government, lines that are there to protect the people from the overpowering influence of government—an overpowering influence that can, from time to time, trample on religious freedom.” (quoting Senator Mike Lee, Republican of Utah)). See generally Shelley K. Wessels, Note, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201 (1989).

²¹⁸ Not only is there a risk in not providing a religious exemption, there is also a risk in providing an unlimited broad exemption. Broadening the scope of the religious exemption in a nondiscrimination statute in an effort to gain support from conservative lawmakers runs the risk of alienating the people who originally advocated for passage of the bill. For example, the proposed Employment Non-Discrimination Act (ENDA), which passed the Senate, is languishing in Congress due to its overly broad religious exemption. See Chris Geidner, *Three Reasons LGBT Groups Are Fighting Over a Bill that Isn’t Going to Become Law*, BUZZFEED (July 9, 2014, 2:42 AM), <http://www.buzzfeed.com/chrisgeidner/three-reasons-lgbt-groups-are-fighting-over-a-bill-that-isnt>. To overcome this obstacle, on July 23, 2015, a new comprehensive federal non-discrimination bill, the Equality Act, was introduced in the Senate and House of Representatives. See Equality Act, H.R. 3185, 114th Cong. (2015); see also Mara Keisling, *The Equality Act Is the LGBT Rights Bill We Want and Need*, NAT’L CTR. FOR TRANSGENDER EQUAL.: BLOG (July 22, 2015), <http://transequality.org/blog/the-equality-act-is-the-lgbt-rights-bill-we-want-and-need>. The purpose of this bill is to replace ENDA, and

[w]hereas ENDA would have created a new law specific to LGBT people, the Equality Act will add LGBT protections to existing civil rights laws like the Civil Rights Act of 1964 It is being done this way to ensure that LGBT people are protected equally compared to other marginalized groups that are already protected.

Keisling, *supra*. Further, the Equality Act seeks to bypass the debates on the scope of religious exemptions that plagued ENDA’s passage by tying the Equality Act to existing Civil Rights legislation and only using those “religious exemptions that have been in place for fifty years Mainly this means that religious institutions can continue to prefer individuals of their own faith.” *Id.*

²¹⁹ Geidner, *supra* note 218 (“While Title VII provides a broad exemption from its religious anti-discrimination requirements, race, sex, and national origin anti-discrimination measures have a more narrow one.”).

²²⁰ 20 U.S.C. § 1681(a)(3) (2012).

²²¹ While some may claim that being transgender is *inconsistent* with the religious tenets of a religious university, a transgender lifestyle does not necessarily *contravene* those same religious

However, any attempted legislative reform runs the same inherent risks as eliminating the exemption in its entirety.

On the other end of the spectrum, there are those who argue that Title IX's religious exemption is actually much narrower than Title VII's religious exemption.²²² They argue that unlike the religious exemption under Title VII, Title IX places the burden on the institution to affirmatively pursue the religious exemption.²²³ Moreover, they assert that Title IX requires the institution to provide specific reasons as to how and why Title IX compliance would be inconsistent with the institution's religious tenets.²²⁴ However, as indicated in this Note, under the current language of Title IX, an institution need do nothing more than request an exemption and cite broad religious doctrine as the basis for its request, and it will be granted the exemption.²²⁵ Thus, this argument has no merit.

Rather than relying on legislative action to limit the religious exemption, the more practical approach (and the one most likely to succeed), would be to have the OCR implement further guidelines specifically addressing the religious exemption available under Title IX.²²⁶ First and foremost, when an institution files for a religious

tenets. Therefore, the stricter language of "contravene" would help students such as Jayce who follow the faith of the university.

²²² See, e.g., Theriot & Tedesco, *supra* note 150, at 5 ("Title IX's exemption for religious organizations is far narrower than [sic] the Title VII exemption . . .").

²²³ *Id.* However, an examination of Title VII case law contradicts this assertion. See, e.g., EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458, 460 (9th Cir. 1993) (explaining that "[w]e construe the statutory exemptions narrowly, and the Schools bear the burden of proving they are exempt" (citation omitted) (citing *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967); *EEOC v. Boeing Co.*, 843 F.2d 1213, 1214 (9th Cir. 1988))). Also, in the one reported Title IX case discussed *supra* Part III.B, the court did not require the religious institution to affirmatively pursue the religious exemption. See *Petruska v. Gannon Univ.*, No. 1:04-cv-80, 2008 WL 2789260 (W.D. Pa. Mar. 31, 2008).

²²⁴ Theriot & Tedesco, *supra* note 150, at 5–6.

²²⁵ See *supra* notes 177–80 and accompanying text.

²²⁶ On July 25, 2014, the Gay, Lesbian and Straight Education Network (GLSEN) advocated this exact position by

call[ing] on the Office of Civil Rights to expand upon its official guidance released just a few months ago clarifying that transgender and gender nonconforming students are protected under Title IX. GLSEN also urged members of Congress to act to narrow the broad exemption found within Title IX. . . . "The Office of Civil Rights' clarification in April that transgender students are protected under Title IX was a groundbreaking moment in the fight to end discrimination in education. However, these recent religious exemptions highlight the need for clarification of the full protections afforded transgender students under Title IX and an explanation of the rigorous standard needed to qualify for such an exemption."

LGBT Group Seeks Guidance Under Title IX After Education Dept. Grants Religious Exemptions to Schools, WIS. GAZETTE (July 25, 2014, 9:58 AM) (quoting GLSEN executive director Eliza Byard), <http://www.wisconsin Gazette.com/trending-news/lgbt-group-seeks-guidance-under-title-ix-after-education-dept-grants-religious-exemptions-to-schools.html>.

exemption, the burden should rest on the institution to state the specific area(s) in which the institution could not accommodate transgender students due to its religious tenets.²²⁷ After the institution has filed for a religious exemption, a hearing should take place.²²⁸ This hearing would provide a forum for students and others to express their views that accommodating transgender students would *not* prevent the school from promoting its religious tenets.²²⁹ The religious institution would present its proof as to the ways in which compliance with Title IX in the contested area would prevent it from achieving the religious goals set forth in its mission statement. Only after *both* sides have presented their respective arguments, should the OCR decide whether or not it would be appropriate to grant such institution a religious exemption. Once granted, there should be an annual review to ensure that the exemption is not being used for noncompliance in areas other than those for which the exemption was specifically granted.²³⁰ This process would ensure that no broad-brush exemptions are granted without due consideration of both the rationale for the requested religious exemption and the need for protection of students from discrimination.²³¹

Religious groups counter that it should not be left to the government, in this case, the OCR, to decide which religious convictions are important enough to justify the granting of an exemption and which are not as compelling so as to deny an exemption request.²³² Moreover,

²²⁷ As it currently stands, the institution requesting the exemption need only write a letter stating that its religious tenets conflict with accommodating transgender students, and no real proof is required. *See supra* notes 175–80 and accompanying text. Under this proposal, the institution would have to provide specific details of how the accommodation conflicts with the institution’s religious principles. The institution should be required to present this proof in each area (admissions, housing, restrooms, athletics, and employment) for which it is requesting a religious exemption.

²²⁸ The OCR guidelines outline an optional hearing process that may be used in investigating claims of alleged campus sexual violence brought under Title IX. These guidelines could be instructive in establishing the hearing process proposed here. *See* OCR GUIDELINES, *supra* note 6, at 30–32.

²²⁹ This is not to suggest that the OCR would be deciding on the validity of an institution’s religious beliefs, but rather whether the accommodation in question can be reconciled with the institution’s religious tenets.

²³⁰ While some may argue that this would be unduly burdensome on the OCR, it should be noted that the OCR is currently required to issue an annual report to the Secretary, the President, and Congress “summarizing the compliance and enforcement activities of the Office for Civil Rights and identifying significant civil rights or compliance problems as to which such Office has made a recommendation for corrective action and as to which, in the judgment of the Assistant Secretary, adequate progress is not being made.” 20 U.S.C. § 3413(b)(1) (2012).

²³¹ Religious institutions may argue that filing for a preemptory religious exemption helps by setting the standard before any student could file a complaint, thereby preventing costly litigation. However, granting exemptions before any sort of hearing and investigation takes place would seriously undermine the protections afforded transgender students by Title IX.

²³² *See* Brett McCracken, *The Freedom to Be a Christian College: As Religious Convictions Are Met with New Legal Challenges, What’s at Stake for Schools like Biola?*, BIOLA MAG., Fall

it can be argued that especially in the cases where an individual has yet to bring a Title IX claim, a religious institution should not have to go through a lengthy process in order to be granted a religious exemption. However, especially where antidiscrimination statutes are involved, there needs to be some level of oversight and balance to ensure civil liberties while preserving religious freedom.²³³

Applying this Note's proposal to the recent instances discussed in Part III.C would have eliminated the sweeping preemptive religious exemptions granted to both Simpson University and Spring Arbor University. Both Simpson and Spring Arbor would have been required to formally submit detailed requests, together with specific religious rationale, for each activity for which the schools were requesting an exemption from compliance with Title IX.

With respect to George Fox University, it would not have qualified for the religious exemption it was requesting. A more thorough investigation would have revealed that the denial of on-campus housing according to gender identity was not the real issue. Although the university stated that it could not support transgender individuals because they live in conflict with the school's religious principles, the recent change in housing policies at George Fox indicates that transgender students could be accommodated while still maintaining the religious identity of the university.²³⁴ Therefore, George Fox's exemption request would not have met the burden of proof required by this proposal, as it did not prove that housing transgender students based on gender identity is inconsistent with its religious tenets. Further, after due consideration to both the university and Jayce, the OCR could reasonably have concluded that the harm caused by denying on-campus housing to a transgender student necessitates the withholding of a religious exemption.²³⁵

2014, <http://magazine.biola.edu/article/14-fall/the-freedom-to-be-a-christian-college> (Russell Moore, President of the Southern Baptist Ethics & Religious Liberty Commission, explained, "[i]f you give to the government the ability to differentiate between what religious convictions are really and truly important or not, then we will wind up with a state-established religion.").

²³³ See Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV 781 (2007).

²³⁴ See *Students Identifying as Transgender*, *supra* note 204.

²³⁵ Jayce has strong support both inside of George Fox University and outside. Most of the minority bar associations in Oregon (the Oregon Hispanic Bar Association, Oregon Asian Pacific American Bar Association, Oregon Minority Lawyers Association, Oregon Women Lawyers, and The LGBT Bar Association of Oregon) have submitted a letter to George Fox University urging them to change their policies with regards to transgender students. A portion of the letter stated,

Our members know the emotional, financial, and physical pang of discrimination based on who we are. . . . We wholeheartedly support Jayce and his right to be who he is. . . . Setting Jayce aside in his own housing would deny his identity, degrade his

CONCLUSION

While protecting transgender students may not have been on Congress' radar when Title IX was originally enacted, it is clear from courts' decisions and the recent OCR guidelines that transgender students are entitled to protection under Title IX.²³⁶ By granting broad religious exemptions without investigation and without opportunity to challenge the ways in which Title IX is claimed to be inconsistent with specific religious tenets, transgender students are being denied the protection meant to be afforded them under the law. This will only occur more frequently in the future, as more students identify as transgender.²³⁷ Moreover, when a religious entity accepts federal funds, it should be expected to comply with federal laws. In the coming years, as universities digest the recent OCR guidelines, there no doubt will be lawsuits challenging the religious exemption allowing for discrimination of transgender students in all aspects of campus life. With all the media attention currently being given to transgender issues,²³⁸ the use of the religious exemption currently available under Title IX should not be overlooked and must be reexamined and narrowly applied by the OCR in order to rectify this growing problem.

self-worth, deny other students the benefit of his company, and so isolate Jayce as to drive home day in and day out the pain of difference.

Daniel Borgen, *Jayce M. Carries on, Undeterred; George Fox Refuses to Change Course*, PQ MONTHLY (Oct. 15, 2014) (quoting the letter from the minority bar associations to George Fox University's board of trustees), <http://www.pqmonthly.com/jayce-m-carries-undeterred-george-fox-refuses-change-course>.

²³⁶ *But see* Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657 (W.D. Pa.), *appeal filed*, No. 15-2022 (3d Cir. 2015); G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., Civil No. 4:15cv54, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015), *appeal filed* No. 15-2056 (4th Cir. Oct. 21, 2015).

²³⁷ *See supra* notes 24–34 and accompanying text.

²³⁸ As declared on the front page of the New York Times,

[i]t is a transgender moment. President Obama was hailed just for saying the word “transgender” in his State of the Union speech this year, in a list of people who should not be discriminated against. They are characters in popular television shows. Bruce Jenner’s transition from male sex symbol to a comely female named Caitlyn has elevated her back to her public profile as a gold-medal decathlete at the 1976 Summer Olympics.

Anemona Hartocollis, *New Girl in School: Transgender Surgery at 18*, N.Y. TIMES, June 17, 2015, at A1.