

## Q & A

### Section 1557 of the Affordable Care Act: Protections for Transgender Individuals in Health Care Settings

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**Q:** A transgender man contacted the P&A after a psychiatric hospital placed him on a women's unit, with a female roommate, and repeatedly referred to him using female pronouns. Staff told him that "he would be happier if he accepted life as a woman," causing him extreme distress. What federal laws protect him and what recourse does he have?

**A:** Section 1557 of the Affordable Care Act (ACA) prohibits health programs and activities receiving federal financial assistance from discriminating on the basis of race, ethnicity, national origin, age, disability, and sex. Section 1557 is the first-ever federal statute to ban sex discrimination in health care, and this ban on sex discrimination has been interpreted to include discrimination on the basis of gender identity. However, at this time, an HHS administrative complaint is not a viable option for enforcement of the gender identity protections because of a nationwide injunction on this specific section of the HHS regulations. P&As can still litigate to enforce the gender identity protections of §1557 provision, but first, may want to consider some of the other enforcement strategies raised in this Q&A.

#### Discussion

Transgender individuals are often subjected to discrimination when receiving health care services. According to one national survey, a third of those who saw a health care provider in the past year reported having at least one negative experience related to being transgender, with higher rates for people of color and people with disabilities.<sup>1</sup> Of those surveyed who were in a nursing facility or other long term care facility, fourteen percent reported being denied equal treatment or service, verbally harassed, and/or physically attacked.<sup>2</sup> Prohibitions on discrimination on basis of gender identity in health

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<sup>1</sup> Sandy E. James *et al.*, Nat'l Ctr. For Transgender Equality, *Report of the 2015 U.S. Transgender Survey*, 219 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

<sup>2</sup> *Id.*

care facilities are an essential component of access to services for individuals with disabilities.

## Statutory Protection

Prior to the passage of the ACA, transgender individuals often had to rely on a confusing web of state and local laws to protect against gender identity discrimination in health care settings. Section 1557 of the ACA became the first federal law to provide protections to transgender individuals in health care settings.

Section 1557 provides that

an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 ..., title IX of the Education Amendments of 1972 ..., the Age Discrimination Act of 1975 ..., or section 504 of the Rehabilitation Act of 1973 ..., be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).<sup>3</sup>

Although Section 1557 does not contain an explicit prohibition against transgender discrimination, it imports the protections against sex discrimination contained in Title IX. As discussed below, decades of litigation has established that gender identity discrimination is a form of sex discrimination.

The Supreme Court first held that discrimination based on a failure to conform to gender stereotypes is a prohibited form of sex-based discrimination in *Price Waterhouse v. Hopkins*.<sup>4</sup> The Court held: “As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group ...”<sup>5</sup>

Since then, numerous courts, but not all, have held that discrimination against transgender individuals is prohibited discrimination “on the basis of sex.”<sup>6</sup> Some courts

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<sup>3</sup> 42 U.S.C.A. § 18116 (internal citations omitted).

<sup>4</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Although *Price Waterhouse* is an employment case brought under Title VII of the Civil Rights Act, courts often look to Title VII to inform discussions of the nature of sex discrimination under Title IX. *Whitaker by Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1047 (7th Cir. 2017) (“Although not as often as some of our sister circuits, this court has looked to Title VII when construing Title IX.”); *Wolfe v. Fayetteville*, 648 F.3d 860, fn. 4 (8th Cir. 2011); *Bolla v. McClain*, 2012 WL 600716 (9th Cir. 2012) (unreported); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”).

<sup>5</sup> See *Price Waterhouse v. Hopkins*, 490 at 251.

<sup>6</sup> See, e.g., *Rumble v. Fairview Heath Servs.*, Civ. No. 14–cv–2037, 2015 WL 1197415, at \*10 (D. Minn. Mar. 16, 2015) (order denying motion to dismiss claim under Section 1557); *Dodds v. U.S. Dept. of Ed.*,

allowed these claims to proceed because the plaintiff alleged the discrimination was motivated by non-gender conforming behavior.<sup>7</sup> Other courts have reasoned that Title IX inherently prohibits discrimination on the basis of transgender status because “by definition, a transgender individual does not conform to sex based stereotypes of the sex that he or she was assigned at birth.”<sup>8</sup> However, as detailed below in the section on “Prohibited Actions,” the extent of the right to be free from discrimination based on gender identity is unsettled. This is particularly true regarding the right of individuals in residential settings to access appropriate restroom and shower facilities.

## Covered Entities

Section 1557’s prohibition on discrimination applies to “any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).”<sup>9</sup> This means that Section 1557 applies to:

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845 F.3d 217 (6th Cir. 2016) (upholding preliminary injunction that held that prohibiting an 11-year-old transgender girl from using the girls’ bathroom was a violation of Title IX); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir 2005.), cert. denied, 546 U.S. 1003 (2005) (Title VII); *Schroer v. Billington*, 577 F. Supp. 2d 293, 304 (D.D.C. 2008) (Title VII). But see *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (holding that discrimination against transgender individuals is not discrimination because of sex in the meaning of Title VII); *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 671 (W.D. Pa. 2015) (an individual treated in accordance with sex assigned at birth has not been discriminated against on the basis of sex under Title IX).

<sup>7</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (Title IX) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. ... There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms. ... Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”) See also *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Gender Motivated Violence Act) (holding that transgender plaintiff stated a claim of gender-motivated violence because the animus was motivated by plaintiffs “assumption of a feminine rather than a typically masculine appearance or demeanor.”)

<sup>8</sup> *Whitaker by Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1048 (7th Cir. 2017). A persuasive analogy and rationale for the position that transgender individuals are protected, per se, based on their transgender identity, was offered by the court in *Schroer v. Billington*:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only ‘converts.’ That would be a clear case of discrimination ‘because of religion.’ No court would take seriously the notion that ‘converts’ are not covered by the statute. Discrimination ‘because of religion’ easily encompasses discrimination because of a change of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that ‘transsexuality’ is unprotected by Title VII. In other words, courts have allowed their focus on the label “transsexual” to blind them to the statutory language itself.

577 F. Supp. 2d 293, 306–07 (D.D.C. 2008).

<sup>9</sup> 42 U.S.C. § 18116.

- any health program or activity any part of which received funding from HHS (including any facility that accepts Medicare or Medicaid);
- any health program or activity that HHS itself administers; and
- health insurance marketplaces and all plans offered by issuers that participate in those marketplaces.

On a practical level, virtually all hospitals, nursing facilities, Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/ID), Psychiatric Residential Treatment Facilities (PRTFs), home and community-based waiver service providers, and community-based mental health providers are covered by Section 1557. Most institutions for mental disease (IMDs) (e.g., freestanding psychiatric facilities for adults age 21 and over with more than 16 beds) are also covered, even though these facilities are primarily funded by state funds, because federal financial participation is available for IMD residents age 65 or older.<sup>10</sup> As long as one part of a facility receives federal funding, all parts of the facility must comply with Section 1557.<sup>11</sup>

### Prohibited Actions<sup>12</sup>

Since the passage of the ACA, case law has fleshed out what constitutes actionable discrimination in the health care settings. Courts have found that purposefully misgendering an individual, e.g. using incorrect pronouns or referring to a male as female or vice versa, in a form of prohibited form of discrimination.<sup>13</sup> Additionally, treating a patient with “hostility and aggression” or asking “pointed questions that were allegedly meant to embarrass” a patient may also constitute discrimination.<sup>14</sup> One court found that an unnecessary or assaultive exam was evidence of discrimination.<sup>15</sup>

In congregate care facilities, individuals often share bathrooms and shower facilities. Inappropriate room and unit assignments constitute common complaints and may be a prohibited form of discrimination. While this issue has not yet been addressed in any 1557 case law, active Title IX litigation complicates and informs the analysis.<sup>16</sup> In 2015,

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<sup>10</sup> 42 U.S.C. § 1396d(a)(14) (permitting a state to cover “inpatient hospital services and nursing facility services for individuals 65 years of age or over in an institution for mental diseases”);

<sup>11</sup> 45 C.F.R. § 92.4 (defining a covered entity as “[a]n entity that operates a health program or activity, *any part of which* receives Federal financial assistance[.]” (emphasis provided)).

<sup>12</sup> Questions regarding coverage of gender-confirming health care services are outside the scope of this Q&A. For additional information, see generally Sarah E. Gage, *The Transgender Eligibility Gap*, 49 New Eng. L. Rev. 499 (Spring 2015).

<sup>13</sup> *Prescott v. Rady Children’s Hospital-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal 2017) (viable claim stated under ACA for discrimination when hospital staff “discriminated against Kyler by continuously referring to him with female pronouns, despite knowing that he was a transgender boy and that it would cause him severe distress.”).

<sup>14</sup> *Rumble v. Fairview Hospital*, 2015 WL 1197415 (D. Minn. 2015).

<sup>15</sup> *Id.*

<sup>16</sup> Although no current case law addresses this, HHS OCR investigated The Brooklyn Hospital Center for sex-based discrimination under 1557 related to their rooming policies; the hospital entered into a voluntary resolution agreement revising its room placement policy. U.S. Health and Human Services, Office of Civil Rights, Bulletin, *The Brooklyn Hospital Center Implements Non-Discriminatory Practices to*

the Department of Education issued guidance stating that transgender students must have access to bathrooms appropriate to their gender. In 2016, the Department of Justice followed suit. But in 2017, the agencies jointly withdrew their previous guidance.<sup>17</sup> The Supreme Court then remanded a Fourth Circuit case giving a transgender male student access to the boys' bathroom, with instructions that the Fourth Circuit reevaluate its decision in light of the withdrawn guidance.<sup>18</sup> Due to this current litigation, the extent to which Title IX, and by extension Section 1557, mandates access to appropriate restrooms and room assignments remains unsettled.

Despite the current uncertain legal landscape, as a public health matter it is essential to allow individuals to use restrooms congruent with their gender identity, because denial of access could cause psychological harm.<sup>19</sup> Access to bathrooms is also necessary for physical health, insofar as delaying or avoiding bathroom use can lead serious physical injury or illness.<sup>20</sup> For similar reasons, advocates also recommend room assignments be made in accordance with a resident's self-identified gender, unless the resident requests otherwise.<sup>21</sup>

### Impact of *Franciscan Alliance v. Price*

Section 1557's implementing regulations explicitly define sex discrimination to include gender identity.<sup>22</sup> However, last year several state attorneys general and religiously affiliated providers filed *Franciscan Alliance v. Burwell*, challenging HHS' Section 1557 regulations. A Texas judge issued a nationwide injunction barring HHS from enforcing

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*Ensure Equal Care for Transgender Patients* (Jul. 14, 2015),

<https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/statement.pdf>.

<sup>17</sup> U.S. Department of Justice, Civil Rights Division and U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter* (Feb. 22, 2017),

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

<sup>18</sup> *Gloucester County Sch. Board v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (remanding Fourth Circuit case permitting individual student to use bathroom congruent with his gender identity for reconsideration in light of revised guidance).

<sup>19</sup> S.L. Reisner *et al.*, Fenway Health, *Discrimination and Health in Massachusetts: A Statewide Survey of Transgender and Gender Nonconforming Adults* 19 (July 2017), <http://fenwayhealth.org/documents/the-fenway-institute/policy-briefs/The-Fenway-Institute-MTPC-Project-VOICE-Report-July-2014.pdf> (finding that public accommodation discrimination in past twelve months was significantly associated with both negative emotional symptoms and a positive depression screen).

<sup>20</sup> Dept. of Labor Occupational Safety and Health Administration Guidance, <https://www.dol.gov/asp/policy-development/TransgenderBathroomAccessBestPractices.pdf>; see also Sandy E. James *et al.*, Nat'l Ctr. For Transgender Equality, *Report of the 2015 U.S. Transgender Survey*, 229 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (eight percent of transgender survey respondents reported having a urinary tract infection or other medical issue as a result of avoiding using public restrooms in the past year).

<sup>21</sup> Lambda Legal *et al.*, *Creating Equal Access to Quality Health Care for Transgender Patients: Transgender-Affirming Hospital Policies* 10 (Revised May 2016),

[https://assets2.hrc.org/files/assets/resources/TransAffirming-HospitalPolicies-2016.pdf?\\_ga=2.111662530.731899421.1515597485-1036993454.1515597485](https://assets2.hrc.org/files/assets/resources/TransAffirming-HospitalPolicies-2016.pdf?_ga=2.111662530.731899421.1515597485-1036993454.1515597485) (noting that transgender patients might avoid or delay necessary inpatient health care if appropriate rooming policies are not in place).

<sup>22</sup> 45 C.F.R. § 92.4.

the “rule’s prohibition against discrimination on the basis of gender identity or termination of pregnancy” and stayed further court proceedings while HHS “reconsiders” the regulations at issue.<sup>23</sup>

It is important to note what the *Franciscan Alliance* injunction *does not* do. It does not nullify established Title IX and Title VI case law holding that discrimination on the basis of sex includes discrimination due to transgender identify, nor does it affect the statutory protection of Section 1557. The *Franciscan Alliance* injunction has not stopped courts from enforcing these protections. For example, in *Prescott v. Rady Children’s Hospital-San Diego*, a federal court denied the hospital’s motion to dismiss a claim that it discriminated against a transgender boy.<sup>24</sup> Kyler Prescott was a 14-year-old transgender boy who sought hospital treatment for suicidal ideation. While Kyler was hospitalized, staff repeatedly referred to him as a girl and verbally harassed him, despite protests from him and his family. According to the complaint, the harassment was so severe and was causing Kyler such distress that Kyler’s medical providers concluded he should be “discharged early because of staff conduct.”<sup>25</sup> Five weeks later, Kyler died by suicide.<sup>26</sup> The hospital asked to stay the proceedings pending the outcome of *Franciscan Alliance*, but the court denied the stay, noting that, “the Court’s decision under the ACA do not depend on the enforcement or constitutionality of the HHS’s regulation.”<sup>27</sup>

Not all 1557 regulations are impacted by the *Franciscan Alliance* injunction. The *Franciscan Alliance* court was specific that only the “[r]ule’s prohibition against discrimination on the basis of gender identity or termination of pregnancy” is preliminarily enjoined.<sup>28</sup> Therefore, the remainder of the regulations continue to provide important protections from discrimination, including regulations regarding effective communication.<sup>29</sup> The current administration has not issued amended regulations on the gender identify protections or any other parts of the 1557 regulations, but HHS has indicated it is “reconsidering the rule” in light of the District Court’s injunction, and that a “draft of a proposed rule is going through the clearance process within the Executive

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<sup>23</sup> While Franciscan Alliance only challenged two specific provisions of HHS’ rule, if HHS decides to reopen and rewrite the regulation, HHS’ changes would not necessarily be limited to those sections challenged in Franciscan Alliance. However, an agency cannot issue rules that are: “Arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A). Other limitations to an agency’s rulemaking powers also exist. For more information, see Nat’l Health Law Program, *Rulemaking, Agency Authority, and the Administrative Procedures Act* (May 5, 2017), [http://www.healthlaw.org/storage/NHeLP\\_APA\\_Overview.Final\\_5.5.17.pdf](http://www.healthlaw.org/storage/NHeLP_APA_Overview.Final_5.5.17.pdf)

<sup>24</sup> *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017).

<sup>25</sup> *Id.* at 1106-7.

<sup>26</sup> Complaint at 2, *Prescott v. Rady*, No. 16-cv-02408 (S.D. Cal. Sept. 26, 2016), [https://docs.google.com/viewerng/viewer?url=http://transgenderlawcenter.org/wp-content/uploads/2016/09/Prescott-Complaint-USDC-Southern.pdf&hl=en\\_US](https://docs.google.com/viewerng/viewer?url=http://transgenderlawcenter.org/wp-content/uploads/2016/09/Prescott-Complaint-USDC-Southern.pdf&hl=en_US)

<sup>27</sup> *Prescott*, 265 F. Supp. 3d at 1105.

<sup>28</sup> Order on Motion for Preliminary Injunction, *Franciscan Alliance v. Burwell*, 7:16-cv-00108-O (N.D. Tex. Dec. 31, 2016).

<sup>29</sup> See Jane Perkins *et al.*, Nat’l Health Law Prog., *Issue Brief: Highlights of the Section 1557 Final Rule* (May 16, 2016), <http://www.healthlaw.org/publications/browse-all-publications/1557-Highlights>.

Branch.”<sup>30</sup> However, any attempt to change or eliminate regulations must follow the federal Administrative Procedures Act, which requires public notice and a comment period, and requires a reasoned explanation for the change.<sup>31</sup> Last, it should be noted that while new administrations have the authority to amend or revise regulations, a new administration cannot revise statutory text.

As long as the *Franciscan Alliance* injunction exists, HHS’ administrative complaint process is not a viable route enforcing 1557 claims based on gender identity. Furthermore, courts that previously relied upon HHS’ regulations to uphold claims of discrimination may be tempted to stay proceedings in light of HHS’ statement that is “reconsidering” the regulation at issue.<sup>32</sup>

## Conclusion and Recommendations

Section 1557 remains an extremely important law to prevent harassment and discrimination in health care settings. While advocates should be aware of *Franciscan Alliance*, the current nationwide injunction on HHS’ regulations related to discrimination on the basis of gender identity, and HHS’ indication it intends to “revisit” 1557’s regulations, there are still many viable avenues for advocacy:

- P&As can provide resources regarding best practices in hospitals and other residential settings. Lambda Legal has created Model Transgender-Affirming Hospital Policies that residential facilities can adopt, including model policies on rooming and access to bathrooms and practical solutions for resolving conflicts and increasing all residents’ privacy;<sup>33</sup>
- P&As can encourage facilities and other providers to voluntarily adopt gender-affirming practices. P&A are well-positioned to play this role due to their ongoing relationships and presence in many facilities;

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<sup>30</sup> Defendants’ Status Report, *Franciscan Alliance v. Price*, 7:16-cv-00108-0 (N.D. Tex. Dec. 15, 2017).

<sup>31</sup> 5 U.S.C. § 706(2)(A).

<sup>32</sup> See e.g. *Rumble v. Fairview Health*, 2017 WL 401940 \*4 (D. Minn. Jan. 30, 2017) (staying proceedings pending the outcome of *Franciscan Alliance*) (settled and dismissed on June 6, 2017). But see *Prescott v. Rady Children’s Hospital-San Diego*, 265 F. Supp. 3d 1090, 1103 (S.D. Cal 2017) (refusing to stay proceedings in light of *Franciscan Alliance*, and distinguishing *Rumble* on grounds that *Rumble* relied on an HHS opinion letter in reaching its decision, while *Prescott* is based on statutory interpretation).

<sup>33</sup> Lambda Legal et al., *Creating Equal Access to Quality Health Care for Transgender Patients: Transgender-Affirming Hospital Policies* (Revised May 2016), [https://assets2.hrc.org/files/assets/resources/TransAffirming-HospitalPolicies-2016.pdf?\\_ga=2.111662530.731899421.1515597485-1036993454.1515597485](https://assets2.hrc.org/files/assets/resources/TransAffirming-HospitalPolicies-2016.pdf?_ga=2.111662530.731899421.1515597485-1036993454.1515597485); see also World Professional Organization for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7th Version (2011), [https://s3.amazonaws.com/amo\\_hub\\_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf); Nat’l LGBT Health Educ. Center, *Focus on Forms and Policy: Creating an Inclusive Environment for LGBT Patients*, <https://www.lgbthealtheducation.org/wp-content/uploads/2017/08/Forms-and-Policy-Brief.pdf>

- Many states and municipalities have statutes that explicitly prohibit discrimination in health care on the basis of transgender status.<sup>34</sup> State law claims may be a prudent alternative to or additional claim in Section 1557 litigation;
- Litigation to enforce Section 1557 is possible. As *Prescott* demonstrates, claims may still be successful if firmly grounded in the statute itself (as opposed to the regulation) and rely on the substantial Title VII and Title IX precedent in this arena;
- If the health care provider is a state actor and constitutional claims are appropriate, advocates may also want to consider adding a claim of sex-based discrimination pursuant to the Equal Protection clause of the 14<sup>th</sup> Amendment.<sup>35</sup>

If you are considering litigation under Section 1557, please contact NHeLP. We are interested in helping with these issues and are closely tracking the case law.

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<sup>34</sup> Lambda Legal maintains a state directory of LGBT legal protections. Lambda Legal, <https://www.lambdalegal.org/states-regions/in-your-state> (last visited Jan. 18, 2018).

<sup>35</sup> At least three Circuits (6th, 7th and 11th) have allowed claims to proceed under an Equal Protection Clause theory. See *Whitaker by Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (while declining to hold that transgender individuals are a suspect class, still applying intermediate scrutiny to claims of transgender student under Title IX because the school's actions also constituted discrimination on the basis of sex); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) ("We conclude that a government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity."); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (denying motion to dismiss equal protection claim of terminated city firefighter).