

# The Complexities of Gender Fluid & Non-Binary Students



# Imprint

legal group



Jessica Heiser, Esq.  
[jheiser@ImprintLegalGroup.com](mailto:jheiser@ImprintLegalGroup.com)





# Ain't Gender Theory 401

We use **non-binary, gender fluid, gender creative, gender queer, and gender expansive** interchangeably and imprecisely here.

They all describe any identity that is not exclusively and consistently on the male/female binary, which can include **all** genders or **no** gender at all.

There are a bevy of ever-changing descriptors for each individual's experience of gender and we honor whatever language an individual uses to describe themselves.



Lesbian

Gay

Bisexual (pansexual)

Trans\*

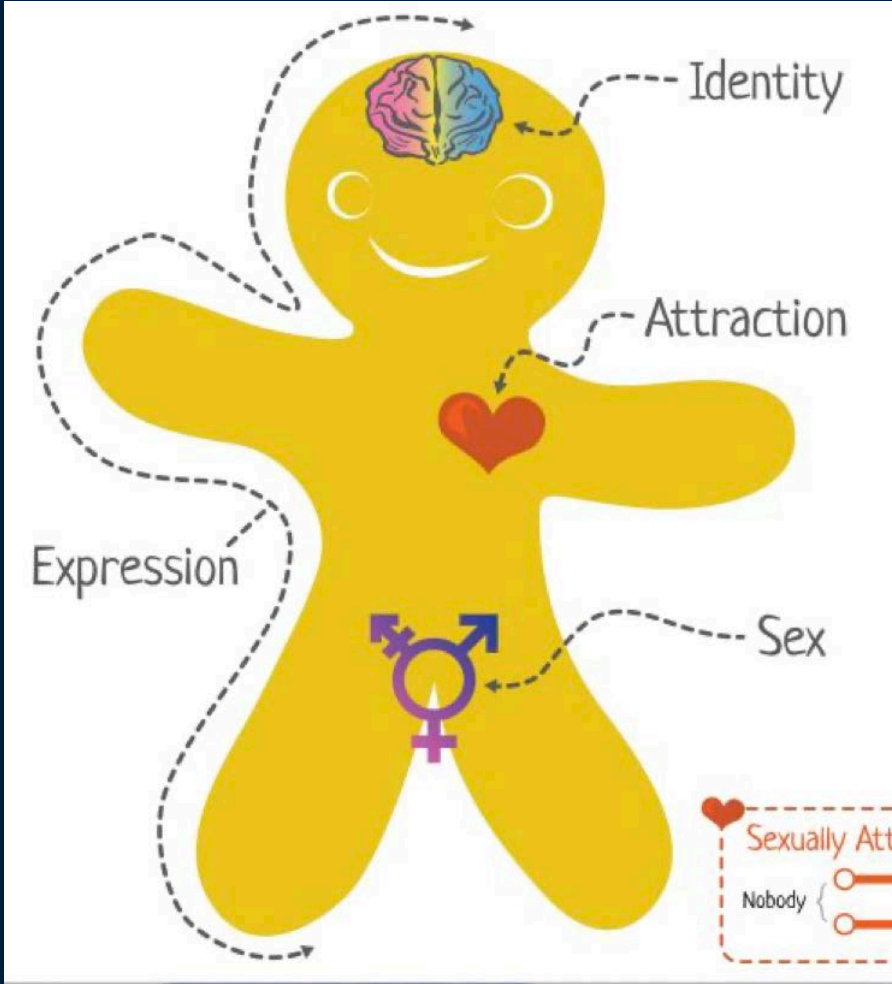
Queer/Questioning

Intersex

Asexual

[myriad of SOGI identities]





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Evolution  
of Title IX

2

Unique  
Challenges of  
Non-Binary  
Students

3

Application of  
Title IX

4

Forward  
Thinking/  
Inclusive  
Spaces



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# Evolution of Title IX





The background of the slide features three dancers in traditional Indian attire, specifically green and gold saris with intricate jewelry. They are captured in a dynamic dance pose, with their arms extended and hands in specific mudras. The setting appears to be a stage or a performance space with a dark background and some stage lighting visible on the right side.

Courts and OCR are in  
a constant dance



Title IX  
passes

1972



*Franklin v. Gwinnet  
County Public Schools*

SCOTUS: Title IX  
applies to victims of  
sexual assault

1992

OCR: Title IX  
applies to  
transgender  
students

(Revoked in 2017, reinstated  
2021)

2016

1989

*Price Waterhouse v.  
Hopkins*

“Sex stereotyping” is  
sex discrimination under  
Title VII

2011-13

OCR: Title IX  
applies to young  
parents,  
pregnant  
women



*G.G. v. Gloucester County School Board* (4th Cir)  
Title IX applies to transgender students



OCR: *Bostock* interpretation applies to Title IX.  
20 AGs sue.

*A.C. v. MSD of Martinsville and B.E. v. Vigo County School Corporation* (7th Cir.), *Grabowski v. Arizona Bd. of Regents* (9th Cir.) Title IX still applies to transgender students

*Adams ex rel. Kasper v. School Board of St. Johns County* (11th Cir.)  
No it doesn't

2017

2020

2021

2023

*Whitaker v. Kenosha Unified School District* (2017)

7th Cir: Title IX applies to transgender students



*Bostock v. Clayton Co.*

SCOTUS: Firing an employee for being gay or transgender is discrimination under Title VII



## Anticipated 2024-2025

- Title IX regs change (Biden)
  - Explicit protections for sexual orientation and gender identity
- Force and effect of Title IX regulations likely makes 20 AGs' challenge moot
  - *State of Tenn., et al. v. U.S. Dep't of Educ.*, No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022)
- SCOTUS to address circuit split



How do the courts  
“determine” someone is  
transgender?



## How have Courts Determined a Student is Transgender?

- Prolonged social transition (1+ yrs. using name, pronouns, haircut, clothing. “He has never wavered from this identity since his social transition.”)
- Gender dysphoria diagnosis
- Therapy



# How have Courts Determined a Student is Transgender?

- Prescribed hormone treatment for 1+ yr.
- Amended birth certificates w/ name & gender marker change (if okay'ed by state law)
- Doctor's sign-off
- Top surgery (mastectomy)

*A.C. v. MSD of Martinsville and B.E. v. Vigo County School Corporation (7th Cir. 2023); Grimm v. Gloucester County School Board (4th Cir. 2020), with Adams ex rel. Kasper v. School Board of St. Johns County, (11th Cir. 2023)*

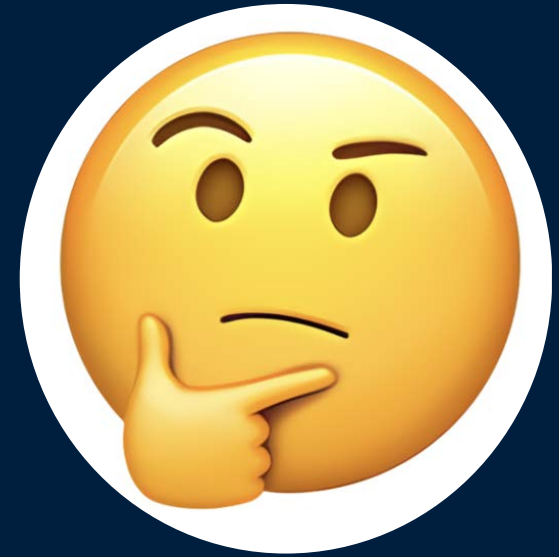


2

# Unique Challenges Posed by Non-Binary Students



In what ways do we  
require students to declare  
their gender at school?



**Dress code &  
uniforms**

**Roles in school play**

**ships &  
aid**

**Prom and  
homecoming  
courts**

**Graduation  
gowns**





“

These institutional binaries make non-binary young people **simultaneously invisible and hypervisible** in schools . . . : they are invisible because they are erased by the binary system and its assumptions, while being hypervisible due to their uncategorisability within a binary system.

”

Carrie Paechter, Alex Toft & Anna Carlile (2021) Non-binary young people and schools: pedagogical insights from a small-scale interview study, *Pedagogy, Culture & Society*, 29:5, 695-713, DOI: 10.1080/14681366.2021.1912160

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## Non-Binary Isn't Transgender

- Most transgender people are not non-binary
- Non-binary people may undergo medical procedures like hormone treatment
- Non-binary people may change legal name & gender marker (Is X available?)
- For non-binary people, navigating gendered spaces is especially fraught





The fluidity is the constant



JUNE 7, 2022



# About 5% of young adults in the U.S. say their gender is different from their sex assigned at birth

BY ANNA BROWN



A protester holds the trans flag and snaps in solidarity with other transgender rights advocates during a demonstration outside the Ohio Statehouse on June 6, 2021. (Stephen Zenner/SOPA Images/LightRocket via Getty)

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Transgender & non-binary young people  
are coming out at younger ages than ever  
before

... which leads to higher rates of suicide  
risk, being physically threatened, harmed,  
and discriminated against.

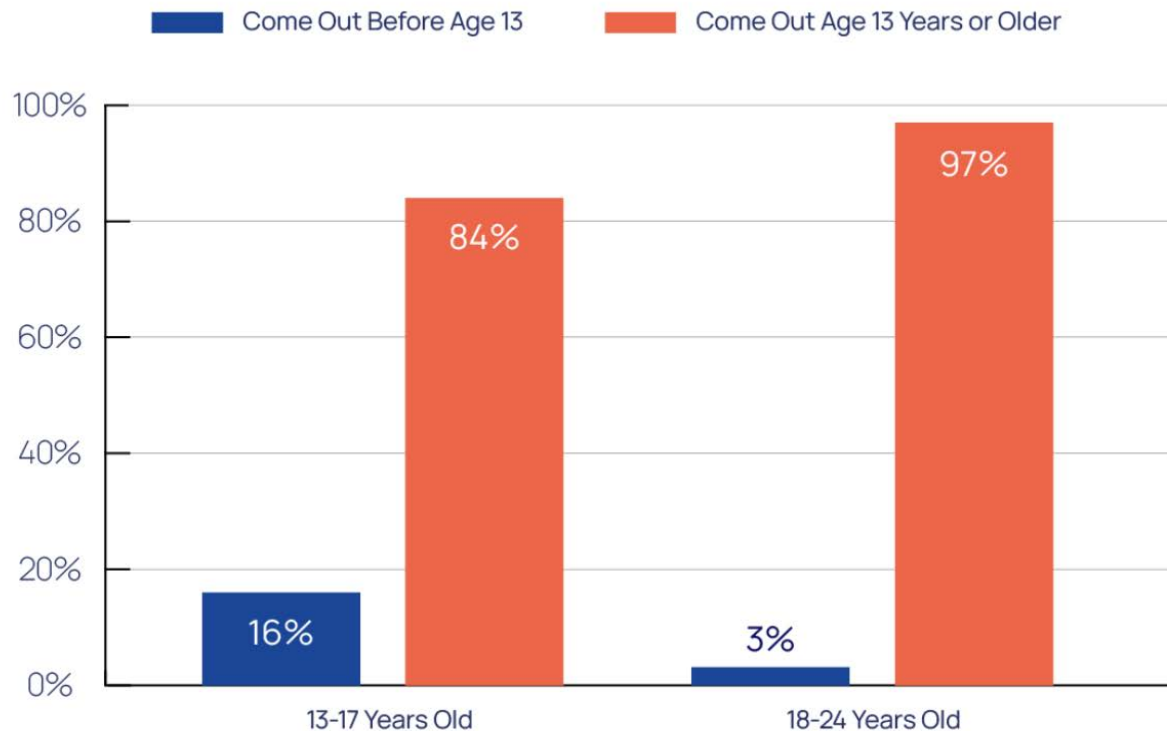
The Trevor Project. (2022). Age of Gender Identity Outness and Suicide Risk, <https://www.thetrevorproject.org/research-briefs/age-of-gender-identity-outness-and-suicide-risk-mar-2023/>.

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## Rates of Early Coming Out Among Transgender and Nonbinary Young People, by Age Group



Although the number is increasing, significant numbers of transgender and non-binary students do not come out in K-12 school, although they are questioning, exploring, and watching for safety cues.



3

# Application of Title IX to Non-Binary Students



# How OCR Has Applied Title IX to Non-Binary Students

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# OCR's Position

- OCR has declared that Title IX prohibits discrimination on the basis of “gender identity” since 2016
  - Revoked 2017-2021 during President Trump administration
  - Will be codified in 2023/24 Title IX regs
- Always lumped transgender & non-binary individuals together



# First Public OCR Resolution Agreement with Non-Binary Student (July 2023)

## **RESOLUTION AGREEMENT Rhineland School District OCR Case No. 05-22-1029**

The Rhineland School District (District) enters into this Resolution Agreement (Agreement) with the U.S. Department of Education, Office for Civil Rights (OCR), to resolve OCR Case No. 05-22-1029. The District assures OCR that it will take the following actions to comply with the requirements of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination based on sex in any education program or activity receiving federal financial assistance.



# OCR Resolution on Non-Binary Student (July 2023)

- Rhinelander School District in Wisconsin
- Non-binary student bumped in hallway, called slur, repeatedly harassed by other students (whispering and misgendered)
- Teachers repeatedly “failed to use Student A’s name and pronouns associated with their gender identity”
- School changed Student A’s schedule to attend school in-person only part-time



# OCR's 4 Big Concerns (Typical)

1. Record keeping
2. Title IX Coordinator was not informed
3. Moved student to part-time school
4. Training
  - a. Specific district policies & procedures
  - b. Specific situations





**Harassment is  
harassment**



# How Courts Have Applied Title IX to Non-Binary Students

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# Federal Circuit Cts Yet to Address Non-Binary

- Other federal circuits' rulings only addressed transgender students explicitly
- 11th Circuit addressed “gender fluid” students as a cautionary tale around bathrooms in December 2022



## The *Adams* Outlier (11th Cir. 2022)

- School district policy: transgender students must use bathroom of biological sex or gender-neutral bathroom
- Court: The school was rightly concerned about student safety and student privacy. Title IX allows for sex-segregated spaces.



“

The School Board’s decision to maintain the longstanding bathroom policy separating bathrooms based on biological sex, while providing sex-neutral bathroom accommodations for transgender students under the Best Practices Guidelines, **was motivated, in part, by the issue of gender fluidity in which students may switch between genders with which they identify.**

”



## Old Rationale

We can't let transgender students use the bathroom of their gender identity because **transgender** boys will "**fake transgender**" so they will use the girls' bathroom.

## New Rationale

We can't let transgender students use the bathroom of their gender identity because **gender fluid** boys will want to use the girls' bathroom one day.

“

The majority opinion warns that ruling for Adams would ‘have ramifications far beyond the bathroom door.’ . . . If we ruled for Adams, the majority opinion cautions, our decision would ‘transform schools’ living facilities, locker rooms, showers, and sports teams into sex-neutral areas and activities.’ . . . One School Board witness expressed concern that, without the bathroom policy, ‘the football quarterback’ could say ‘I feel like a girl today,’ gain entry to the girls’ restroom, and harm female students. . . .

”



“

. . . most of the majority opinion’s concerns, and the concerns of the School District, have to do with gender fluid individuals—people who are not transgender or cisgender, but who instead, according to the record, have a flexible view of gender that ‘changes between male and female.. . . This case has no bearing on the question how to assign gender fluid individuals to sex-separated bathrooms, though. The School District’s bathroom policy categorically bans only transgender students—defined as those who “consistently, persistently, and insisently” identify as one gender—from using the restroom that matches their gender identity. . . .

”





“

... By its plain terms, the policy simply does not apply to gender fluid individuals. **So, for today, we can set aside the concerns about gender fluidity.**

”



# How do we program for...?

... Situations in which transgender and non-binary students may need something different from each other, like bathrooms or changing spaces?

... Students who have gender-neutral pronouns?

**Harassment? Easy.**

**Dress code? Easy.**

**Everything else? Easy.**



4

# Forward Thinking & Inclusive Spaces



# Do we need to separate by gender here?

*Is there a reason that separating by sex or gender furthers an important interest, without resorting to gender stereotypes?*

**There will be YESes  
There will be more NOs**



**Reduce  
labeling or  
dividing  
children by  
gender in  
general**



# Update information management systems



**Reduce  
assumptions  
and gendered  
descriptions in  
general**



**Reduce  
stereotypical  
images &  
language  
in general**





**Mindful facility  
design, safety  
referenda, and  
simple solutions**



# Northwestern

A-Z Listings >

Layers v

- Buildings
- Parking
- Athletics
- Campus Landmarks
- Libraries
- Bike Racks
- All-Gender Bathrooms
- Lactation Rooms

Shuttle Map ↗

Sustainability ↗

[Go to Chicago](#)

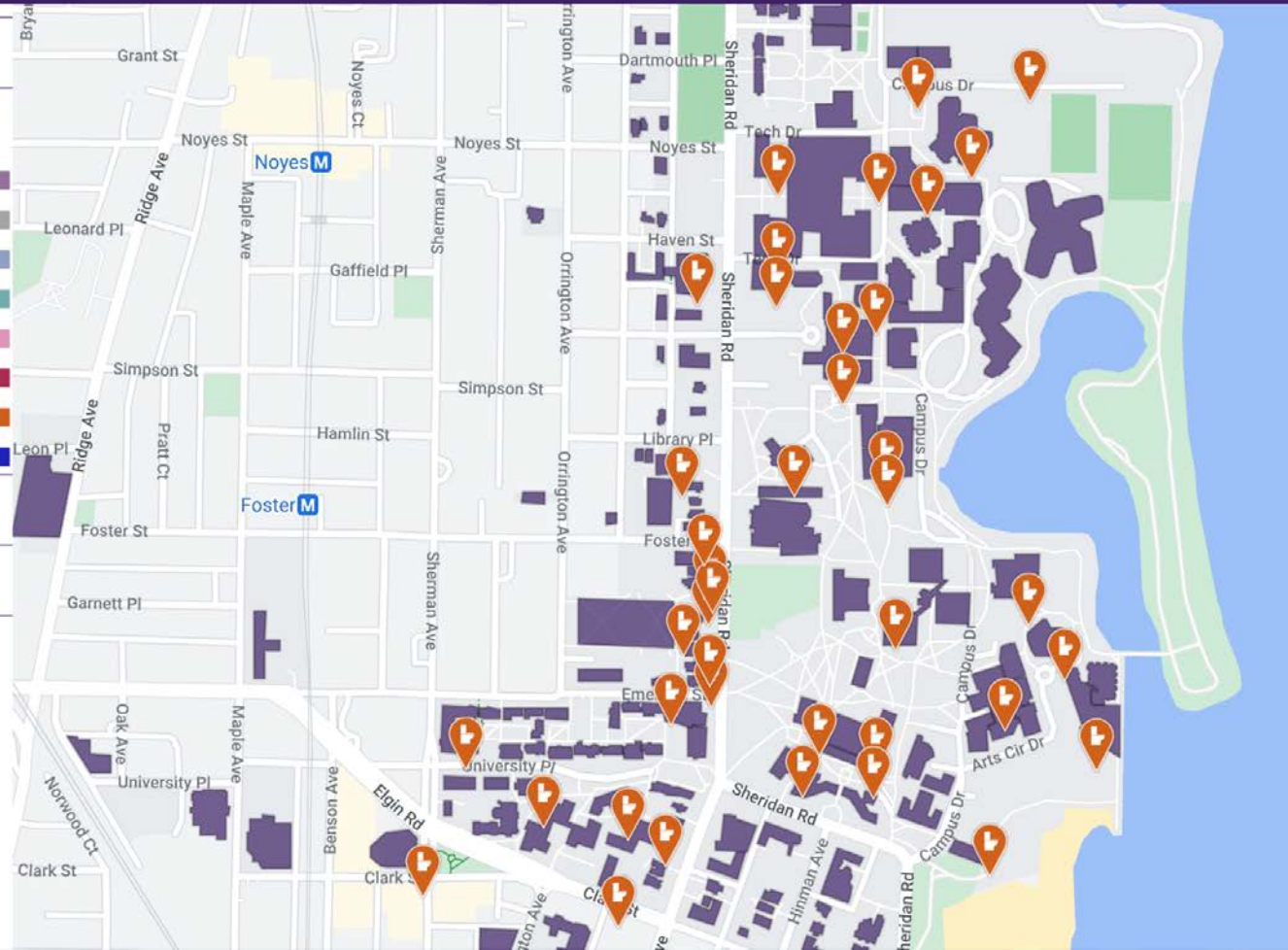
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# Training & everyday course corrections



““

Because schools and colleges only appeared to develop strong policies and practices **if they knew they had a trans or non-binary student** . . . a vicious circle developed that actively prevented young non-binary people from coming out. The lack of anticipatory action from schools and colleges meant that the underlying ethos of a school community might include tolerance of transphobia, with the result that **young people were afraid to come out as non-binary, so were invisible to the institution.**

””

Carrie Paechter, Alex Toft & Anna Carlile (2021) Non-binary young people and schools: pedagogical insights from a small-scale interview study, *Pedagogy, Culture & Society*, 29:5, 695-713, DOI: 10.1080/14681366.2021.1912160

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