

Transgender Issues in Schools

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Back to Basics

A whole new vocabulary: terms and definitions

- **GENDER IDENTITY:** A person's deeply held sense or psychological knowledge of their own gender. One's gender identity can be the same or different than the gender assigned at birth. All people have a gender identity, not just transgender people. Gender identity is an innate, largely inflexible characteristic of each individual's personality that is generally established by age four, although the age at which individuals come to understand and express their gender identity may vary based on each person's social and familial development. Gender identity is **DIFFERENT FROM** sexual orientation.
- **GENDER EXPRESSION:** The manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice or mannerisms.
- **TRANSGENDER:** An adjective describing a person whose gender identity or expression is different from that traditionally associated with an assigned sex at birth. Other terms that can have similar meanings are transsexual (a little different meaning, more narrow category of transgendered persons) and trans.
- **TRANSITION:** The process (and period of time) in which a person goes from living and identifying as one gender to living and identifying as another.

Defining Terms

- Bisexual
- Cisgender
- Crossdresser
- FTM/MTF
- Gay
- Gender
- Gender Expression
- Gender Identity
- Gender Non-Conforming
- Intersex
- Lesbian
- LGBTQ
- Queer
- Questioning
- Sexual Orientation
- Transgender
- Transitioning
- Transsexual

Why Should Our District Care?

- *Time* Magazine dubs this time “The Transgender Tipping Point.”
- *The Atlantic*, July 9, 2015
 - Schools are becoming ground zero for clashes over transgender rights.
- *The Atlantic*, May 31, 2016
 - America is experiencing a period of profound gender anxiety.
- Schools across the nation find themselves subject to OCR complaints and lawsuits based on equal access to school facilities.
- Students across the nation are protesting treatment of transgender students

State of the Law - Recently

- March 23, 2016 - North Carolina passes nation's first wide-ranging bill barring transgender people from bathrooms and locker rooms that do not match the gender on their birth certificates
- April 19, 2016 - 4th Circuit Court of Appeals finds Title IX extends to protect the rights of transgender students to use the bathroom that corresponds with the student's gender identity
- May 3, 2016 - EEOC releases Fact Sheet to Employers providing guidance under Title VII regarding bathroom access rights for transgender employees
- May 9, 2016 - Dueling lawsuits by NC and US DOJ over NC's bathroom bill
- May 13, 2016 - Significant guidance from DOJ and DOE to school districts across the nation
- May 25, 2016 - Wisconsin joins Texas and 9 other states in lawsuit against the federal government related to the DOJ's and DOE's guidance

Legally Defining the Issue

- In April, the state of Mississippi did something unusual.
- It made the definition of man and woman a matter of law
 - “Male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”
- Mississippi’s attempt to grapple with the meaning of “sex” and “gender”

North Carolina Bathroom Bill

- First in the nation
- Requires public agencies and local school boards to allow people to use only public bathrooms that correspond to their biological sex at birth
 - A similar bathroom bill was passed and vetoed earlier this spring in South Dakota.
 - The people of Washington will vote on a bathrooms ballot initiative in November.
- As of May 25, Wisconsin joined 10 other states, led by Texas, in suing the federal government over the DOE's and DOJ's guidance. The state has indicated that the guidance conflicts with both federal and state law in that Wisconsin law does not prohibit discrimination based on gender identity.

As to Employees.....

- Stems from a 1989 Supreme Court case, *Price-Waterhouse v. Hopkins*
 - Court said “sex stereotyping” may be a form of discrimination that falls within the category of sex discrimination under Title VII
- Two significant EEOC rulings - *Mia Macy* (2012) and *Lusardi* (2014)
 - EEOC has said discrimination based on transgender status is sex discrimination in violation of Title VII
 - Denying equal access to common restrooms corresponding to employee’s gender identity is sex discrimination
- 2014 DOJ Memorandum
 - DOJ espouses that the best reading of Title VII’s prohibition on sex discrimination is that it encompasses discrimination based on gender identity, including transgender status
- The Seventh Circuit Court of Appeals has declined to adopt an expansive reading of the term “sex” in Title VII cases

Use of Restrooms/Locker Rooms

- *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981 (8th Cir. 2002).
 - District designated its staff bathrooms on the basis of perceived gender, not sex.
 - This led to a claim by a female that the District created a hostile environment by allowing a transgendered female to use the women's restroom.
 - The Eighth Circuit stated that the “MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological sex.”
 - Decision based on Minnesota law.

As to Students.....

- DOE's Office for Civil Rights has taken a clear position that discrimination against students because of their gender identity or transgender status violates Title IX
- November 2015 - DOE-OCR in Chicago issued scathing letter to school district finding district discriminated against a transgender student by failing to provide unfettered access to girls' facilities
- In April, 4th Circuit in *G.G. v. Gloucester County Sch. Bd.*, became first federal appeals court in the nation to find that Title IX extends to protect the rights of transgender students to use the bathroom that corresponds with the student's gender identity

Treatment of Transgender Status Under Title IX

- Title IX
 - Prohibits discrimination against students on the basis of sex.
 - No person in the [U.S.] shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.
- The fundamental question is whether Title IX protections extend to transgender students; namely, does the phrase “on the basis of sex” apply to transgender students.
- The *Price-Waterhouse* case is a Title VII case, but the Court’s holding that “sex stereotyping” may form a basis for a discrimination claim has been the basis on which several federal district courts have held that “sex stereotyping” may be a form of discrimination under Title IX.

Student Nondiscrimination

- Wisconsin school districts are prohibited from discriminating against students by Wis. Stat. § 118.13, which states that “no person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extra-curricular, pupil services, recreational or other program of activity because of the person’s sex ... [or] sexual orientation ... ”
- Transgender status is not specifically covered by this statute, and whether Wisconsin courts will read “sex or sexual orientation” to include transgender status is an open question.

Student Nondiscrimination

- The Department of Education’s Office for Civil Rights (“OCR”) has taken a clear position that discrimination against students because of their gender identity or transgender status violates Title IX.
 - OCR’s position: “[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX and Title IV.”
 - “When a school elects to separate or treat students differently on the basis of sex [such as with sex-segregated restrooms] a school generally must treat transgender students consistent with their gender identity.”

Wisconsin's Own Bathroom Bill - 2015 AB 469

- Introduced in October 2015
- Would have required school boards to designate restrooms and locker rooms for the exclusive use of either male or female students.
- Required a board to designate each pupil restroom/changing room located in a public school building and accessible by multiple pupils as for the exclusive use of pupils of only one sex.
- Defined “sex” as the physical condition of being male or female, as determined by an individual’s chromosomes and identified at birth by that individual’s anatomy.
- Prohibited a member of the female sex from using a room that has been designated as the male room and prohibits a member of the male sex from using a room that has been designated as the female room.
- Did permit a board to provide those who identify themselves as transgender with access to single-occupancy bathrooms or existing faculty and staff restrooms.

Assembly Substitute Amendment 1, to AB 469

- Includes definition of a gender neutral restroom - two separate stalls with floor to ceiling partitions and doors
- Exception is made for janitorial/maintenance personnel, teachers, administrators, police officers, emergency medical services personnel
- Requires a board to provide reasonable accommodations to a pupil to use a single-occupancy restroom or changing room or the regulated use of a faculty restroom or changing room if the parent or guardian of the pupil submits a written request to receive accommodations
- Allows a school board to provide gender-neutral restroom in a school in the school district for use by pupils.

Other States' Legislation

- Similar bills in Kentucky, Florida, Minnesota, Nevada, and Texas.
- CONVERSELY:
 - Jan. 1, 2014 - California was the first state to have a law mandating that schools must respect students' preferences for what programs they participate in and what facilities they use.
 - California, Washington, Colorado, Connecticut, Massachusetts, New York and the District of Columbia have adopted policies requiring schools to permit transgender students to use bathrooms and locker rooms based on the student's gender identity.
- Eleven other states have general anti-discrimination policies on the books that might also protect the rights of transgender students in schools

Nicole Maines Case - 2014

- Transgender student was awarded \$75,000 by the Maine Supreme Judicial Court in a discrimination lawsuit against a school district that forced her to use a staff restroom rather than a facility reserved for pupils.
- Court ruled that the school district had violated the state's Human Rights Act.
- Case marked the first time a state's highest court ruled that a transgender person has the right to use the restroom of the gender with which they identify.

DOE-OCR - “Letter of Findings” - *Palatine-Schaumburg Twnshp. High Sch. Dist. 211 (2015)*

- DOE found a Chicago-area school district discriminated against a transgender student by failing to provide her full access to girls' locker rooms.
 - *District must give unfettered access to transgender student*
 - The DOE gave the school 30 days to resolve the dispute, or risk forfeiting Title IX funding.
- Resolution agreement Between DOE and District 211
 - Provide the student with access to the girls' locker rooms
 - Privacy curtains and alternative options
 - Coordinate with hosts of off-campus, district-sponsored activities
 - Engage a consultant, establish support team
- This case marked the first time that the OCR found a school in violation of civil rights laws over transgender issues - in prior cases, settlements were reached.

G.G. v. Gloucester County School Board

- First federal appeals court to find that Title IX extends to protect transgender students to use the bathroom that corresponds with the student's gender identity
- Focus of the decision was interpretation of DOE's regulations
- Public restrooms, locker rooms, and showers historically have been separate on the basis of sex, and that individuals have a legitimate and important interest in bodily privacy and safety of all individuals.
- HOWEVER - the Court stated that these safety concerns or privacy interests should be addressed by the DOE or Congress, and not the Court.
- Court was required to afford deference to the DOE's interpretation.
- Court held that an individual's sex should be determined by reference to the student's gender identity, i.e., consistent with DOE interpretation.
- On Tuesday, May 31, the Fourth Circuit declined en banc review (to rehear the case before the full court)
- Paves the way for an appeal to the Supreme Court

DOE and DOJ “Dear Colleague” Letter - May 13, 2016

- Provides a variety of compliance guidelines to ensure equal treatment of transgender students
- Guidelines:
 - Honor student’s expressed gender identity
 - Use names and pronouns consistent with expressed gender identity
 - Prohibits medical documentation requirement
 - Requires unfettered access to restrooms/locker rooms/changing facilities
 - May provide individual user options for all students
 - May continue to use sex-segregated athletic teams but allow equal participation
 - Equal application of all school policies
 - Retain confidentiality in gender for student records purposes
 - Limitations on disclosure to school personnel of gender status

WIAA Policy

- School is responsible for determining student eligibility to participate
 - School's policy should provide that the student and parents/guardian notify the school in writing that the student is transgender and list the WIAA sports the students would like to participate
- The following criteria should be used to determine which gender the student will participate on the school's teams:
 - Current school registration information
 - Written statement from student and parent/guardian affirming the consistent gender identity and expression to which the student self-relates
 - Documentation affirming the actions, attitudes, and dress which demonstrate the student's consistent gender identification and expression
 - Medical documentation (hormonal therapy, sexual re-assignment surgery, counseling, etc.)

WIAA Policy, con't.

- Medical documentation (hormonal therapy, sexual re-assignment surgery, counseling, etc.)
 - A FTM student who has started hormone therapy is only eligible for male teams
 - A FTM student who has not started hormone therapy may participate on female teams if desired
 - A MTF student must have one calendar year of medically documented testosterone suppression therapy to be eligible to participate on a female team
 - A MTF student who has not started testosterone suppression therapy may participate on male teams if desired



Transition Plans

- Are they necessary?
- Transition may look very different for each student and not all students desire the same outcome.
- Transitioning is a private matter; students may or may not want parental participation in the process
- Note that transition plans will vary with the age of the student
- Planning Tools

Transgender Policies

- How should school districts handle protection of transgender and non-transgender students and their rights?
- Develop and/or revise policies.
 - Consider whether to create a new, transgender student-specific policy
 - Consider whether to revise current student non-discrimination policy
- Suggested Provisions
 - Records
 - Confidentiality
 - Etiquette and proper manner to address students
 - Physical Education
 - Restrooms/Locker rooms
 - Sports and athletic activities
 - Other school sponsored activities and events
 - Student Dress
 - Bullying and harassment

Accommodation Issues

- Use of a chosen name or pronoun
 - School districts should use (and reinforce the use) of the name and pronouns appropriate to the student's new gender. Continued misuse, particularly if it is intentional, may lead to data privacy issues or a claim of disparate treatment or hostile environment discrimination.
 - Consider: Would a school district honor the request of a student named "Matthew" that he be called "Matt"? How about an "Elizabeth" that wants to be called "Liz."

Etiquette

- What do I call you?
 - Transgender and gender nonconforming youth use a number of words to describe their lives and gendered experiences.
 - Terminology and language describing transgender individuals can differ based on region, language, race or ethnicity, age, culture, and many other factors.
 - Generally speaking, school staff and educators should inquire which terms students may prefer and avoid terms that make these students uncomfortable; a good general guideline is to employ those terms which the students use to describe themselves.
 - Note that “transgender” is an adjective, not a noun so it is more appropriate to say “transgender person” instead of “transgendered”.
- What pronoun do I use?
 - Pronouns for the identified gender.

Etiquette

- What should I require as proof that the student is not just kidding around?
 - Accept the student's assertion of his/her gender identity and not require particular substantiating evidence.
 - If district personnel have a credible basis for believing that a student's gender-related identity is being asserted for an improper purpose, this basis should be documented and a written response should be provided to the student, and if appropriate, his/her parents or guardians.
 - May be prudent to ask the student if you can discuss with parent/guardian and seek conversation with parent/guardian to ensure protection and accommodation of student's gender identity and practical issues (e.g., bathroom and locker room usage, student's preferred name and any name change, student's needs during transition to identified gender).
- What if I personally have a problem with this?
 - Just like any issue you personally disagree (e.g., religion, sports, politics), we are all professionals and expected to give others the upmost respect and courtesy.

Accommodation Issues

- Student Dress Codes
 - Enforce as written

Example: Within the constraints of the District's dress code policy and dress codes adopted by the school, students may dress consistently in accordance with their full-time gender identity. School personnel shall not enforce a dress code more strictly against transgender and gender nonconforming students than other students.

Accommodation Issues

- School Records
 - Day-to-day documents and assignments
 - District should use and reinforce the use of a student's chosen name.
 - Official Records
 - District must ensure all data on individuals is accurate, complete, and current. Official records should reflect the student's legal name and sex (as they appear on a birth record or other official document) and should not change official records unless a student can demonstrate by court order that the name has been legally changed.

Accommodation Issues

- School sports
 - Should a student who has the biology of a boy but identifies as a girl be allowed to play on, say, the girls' basketball team?
 - Should she be allowed to shower alongside girls in the girls' locker room?
- Physical Education Class
 - Should a transgender student be permitted to participate in physical education classes and intramural sports in a manner consistent with the gender identity that the student regularly asserts at school and in other social environments?
 - Should a transgender student be permitted to “dress out” for class in the locker room of the gender in which the student identifies?

Practical Advice and Considerations

- Records
- Confidentiality
- Etiquette and proper manner to address employees or students
- Restrooms/Locker rooms
- Sports and athletic activities, classes, other school activities
- Dress codes
- Bullying and harassment
- Special education considerations

Best Advice?

- Develop or revise policies?
- Revise current non-discrimination policy?
- Do what is best for the student?
- Comply with OCR/DOJ?
- Develop internal processes?
- Wait-and-see and do nothing?
- The fool-proof, “no-way-your-district-will-get-sued” solution?

Questions



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