

## Navigating the Evolving Field of Transgender Rights in Independent Schools



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Transgender rights are an evolving area of the law, where case law decisions are often inconsistent. But one thing is clear—failing to proactively develop policies will create uncertainty and require unnecessary time and energy when questions ultimately arise. And, at worst, being unprepared could result in challenges from all sides—challenges similar to those faced by Township High School District 211 in Illinois. In 2013, a transgender student filed a complaint with the U.S. Department of Education against the district. The district resolved the matter by agreeing to allow the student to use the locker room associated with the student's gender identity. As a result, a group of students and families who opposed this policy sued the district alleging privacy violations.

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Part I of this article provides an overview of the evolving legal issues, primarily using the lens of Title IX of the Education Amendments Act of 1972. It focuses primarily on how issues would affect a school in Pennsylvania (but does not address the exceptions for those educational institutions that are controlled by a religious organization. See 20 U.S.C. Section 1681). Part II of this article discusses other federal and state laws relevant to trans issues. Part III addresses the considerations schools should make when establishing, amending, or reviewing policies and best practices relevant to transgender students. Although many independent schools are not subject to Title IX, examining that legal framework is critical to understanding the evolving legal landscape and can help schools identify issues to address when developing policies and best practices.

## **PART I**

### **Title IX**

In the education setting, transgender rights are most often considered under Title IX. Title IX, like certain other federal statutes, prohibits discrimination based on sex, see *Evancho v. Pine-Richland School District*, 237 F. Supp. 3d 267, 295 (W.D. Pa. 2017). Title IX also allows certain distinctions based on sex. For example, separate living facilities are permitted by statute, 20 U.S.C. Section 1686, and separate toilet, locker room, and shower facilities are also permitted by regulation, 34 C.F.R. Section 106.33. Unfortunately, the law is unclear on what is encompassed by the term “sex.”

### **Sex or Gender?**

Does “sex” refer to biological sex or does it have a broader meaning that encompasses gender and gender identity? According to the American Medical Association as a publisher, not as medical opinion, “sex” “refers to the biological characteristics of males and females,” while “gender” can include more than biological characteristics, “and serves as a cultural indicator of a person’s personal and social identity.” When people identify as transgender, it means, “among other things, that their gender identities are at odds with the sexes listed on their original birth certificates and with their external sex organs.”

The case law is split on how to deal with these distinctions. In decisions recognizing transgender rights, courts conclude that “sex” encompasses sex-stereotyping and gender, while other decisions limit “sex” to biological sex, see *Compare Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017) (applying a theory of sex-stereotyping and finding that Title IX prohibits sex discrimination and treating transgender students differently than nontransgender students) with *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (holding that sex in the context of Title IX refers to biological sex).

This conflict is reflected within the U.S. Court of Appeals for the Third Circuit. For instance, a transgender male student sued the University of Pittsburgh for discrimination after he was barred from using locker rooms and restrooms reserved for men in *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*, 897 F. Supp. 3d 657 (W.D. Pa. 2015). In considering the university's motion to dismiss, the district court looked to Third Circuit precedent finding sex-segregated schools to be constitutionally permissible under Title IX. "Thus, while Title IX was intended to provide equal educational opportunities for both sexes, the statute does not necessarily prohibit sex-segregated spaces in educational settings." The district court also noted that the student was allowed to dress like a man, change his name to reflect his male gender, and enroll in weight-training classes designated for men. The court dismissed the plaintiff's Title IX claim, finding that the university "simply classified him based on his birth sex and prohibited him from entering sex-segregated spaces based on that classification, for the sole purpose of enforcing its policy of sex-segregated bathrooms and locker rooms."

Other courts have concluded differently. In *Evancho*, the school district treated three transgender students in accordance with their gender identities in most ways, but the students were required by a school board resolution to use either single-user bathrooms or bathrooms labeled as matching their assigned sexes, not their gender identities. The plaintiffs argued that this violated both Title IX and the Equal Protection Clause of the Fourteenth Amendment. The district court agreed in part, granting injunctive relief to the plaintiffs on constitutional grounds (although ruling that it was premature to do so under Title IX), and denying the school district's motion to dismiss. In 2017, the school district settled with plaintiffs, revising its policy and allowing students to use facilities consistent with their gender identity.

Similarly, in *A.H. v. Minersville Area School District*, No. 3:17-CV-391, 2017 U.S. Dist. LEXIS 193622, at \*1 (M.D. Pa. Nov. 22, 2017), the court denied a defendant's motion to dismiss claims by a transgender student. The plaintiff was an 8-year-old transgender girl who was prohibited from using the girls' restroom at school because her birth certificate listed her as male. There, the court relied in part on the U.S. Supreme Court's discussion of sex-stereotyping in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the court found that Price Waterhouse denied a promotion to a female accountant who did not dress and speak in the traditionally "feminine" manner expected by her male superiors. This, the court found, meant that Price Waterhouse discriminated against the woman "because of her sex." In *A.H.*, the Middle District noted that several courts have "embraced a broad reading of the term 'sex'" when interpreting federal antidiscrimina-

tion laws. *A.H.* The court noted that allegations from the complaint—including that the principal told the girl he was responsible for “protecting all of the students from” her was evidence of a discriminatory intent behind the school’s bathroom policy.

A Third Circuit panel recently noted in a precedential opinion that “barring transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation,” in *Doe v. Boyertown Area School District*, No. 17-3113 (June 18, 2018). The appellate panel there did not directly address the Western District’s *Johnston* decision. This was actually the panel’s second opinion on this issue. Earlier this summer it released its initial opinion, but the appellants sought rehearing en banc. While the Third Circuit denied that, four judges dissented, stating that the panel “went beyond what was necessary when it choose to address Boyertown’s tangential argument that the school district would have run afoul of Title IX had it implemented a policy that confined transgender students to use of bathrooms and lock rooms designed for their biological sex.” While rehearing was denied, the panel also vacated its earlier opinion and entered a new one, which softened some of the language regarding Title IX.

### **The Regulatory Guidance Is Unclear**

If the case law is inconsistent, the regulatory guidance is no more helpful.

In 2016, in the wake of several headline-making disputes about transgender students and bathrooms, the U.S. Department of Education issued a letter providing guidance on how it expected schools to treat transgender students, see *Dear Colleague Letter*, U.S. Department of Justice and U.S. Department of Education (May 13, 2016 available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>). In essence, the Education and Justice Departments interpreted sex broadly. That letter reasoned that Title IX’s ban on sex discrimination in educational settings extended to “discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.” It further stated that under Title IX “a school may provide separate [restroom and locker room] facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.”

That guidance was withdrawn in the early days of the Trump administration, see *Dear Colleague Letter*, U.S. Department of Justice and U.S. Department of Education (Feb. 22, 2017 available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>). The second letter observed that the 2016 Guidance had led to several court cases regarding transgender rights, and asserted that states and local school districts

have the “primary role” in setting educational policies. Because of that, the Education and Justice Departments decided to “rescind” the 2016 Guidance “in order to further and more completely consider the legal issues involved.”

## **PART II**

Private schools across the country continue to grapple with how to properly educate all students in light of still-developing issues regarding transgender rights, as well as continuing legal uncertainty about those rights. Part I of this article focused on Title IX of the Education Amendments Act of 1972, which remains a landmark federal law regarding education. Although private schools that do not receive federal funding are not subject to Title IX, other federal laws that prohibit discrimination based on “sex” may apply and can provide insight on evolving interpretations. In this section, we examine those other laws. Part III of this article will address the considerations schools should make when establishing, amending, or reviewing policies and best practices relevant to transgender students. Decisions under other federal statutes can be found on either side of the issue, but, if the arc of the law is bending, it bends toward the broader definition of “sex” and recognizing transgender rights.

### **Fair Housing Act**

A federal judge in Colorado ruled that the Fair Housing Act (FHA) can encompass discrimination against transgender people in the housing context, see *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1197-99 (D. Colo. 2017). The plaintiffs, a transgender woman and her family, sought rental housing but were denied. The court found that this was a violation of the FHA based on a “sex stereotyping” theory in that the defendant relied on stereotypes “of to or with whom a woman (or man) should be attracted, should marry, or should have a family.” The plaintiffs also argued that the defendant discriminated based on sexual orientation or gender identity, but the court declined to rule on those issues as they were not actually pleaded in the complaint. While *Avanti* did not involve a school, because the FHA may apply to schools that provide certain types of housing, it may capture schools that are not subject to Title IX.

### **Title VII**

Title VII, the federal statute targeting discrimination in employment, has unsurprisingly emerged as a legal battleground for transgender rights. This year, in a case involving a transgender woman who was fired from the funeral home where she worked, the U.S. Court of Appeals for the Sixth Circuit has held that such treatment of employees, “be-

cause of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII,” as in *Equal Employment Opportunity Commission v. R.G.*, No. 16-2424, 2018 U.S. App. LEXIS 5720, at \*91 (6th Cir. Mar. 7, 2018). However, transgender employees have been unsuccessful elsewhere. See, e.g., *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1218 (10th Cir. 2007) (affirming summary judgment for an employer sued after terminating a transgender woman after the trial court determined that “the prohibition against sex stereotyping recognized by some courts should not be applied to transsexuals”). Circuit splits on the issue of transgender rights in the employment context may ultimately prompt the U.S. Supreme Court into providing more guidance on those rights. In the meantime, schools should be aware of the trend of decisions in the Title VII context.

### **The ADA**

The Americans with Disabilities Act (ADA) may also implicate transgender issues, even despite a statutory exclusion, see *Blatt v. Cabela’s Retail*, No. CIV. A. 14-4822, 2017 U.S. Dist. LEXIS 75665, 2017 WL 2178123, at \*4 (E.D. Pa. May 18, 2017) (holding that the “gender identity disorder” exclusion in the ADA does not encompass gender dysphoria because that condition goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other disabling impairments). This matter settled shortly after the district court decision, and will not be subject to appeal. Thus, at least according to the holding of *Blatt*, a transgender student who claimed discrimination because of gender dysphoria (but not solely based on gender identity) could assert a claim under the ADA.

### **State and Local Laws**

Some states provide specific protections that address gender identity, with a minority of states specifically addressing gender identity discrimination. Other states have bills pending that restrict bathroom access to an individual’s biological sex.

Pennsylvania has no current specific statewide protections for transgender individuals. However, by executive order, agencies under the governor’s jurisdiction are prohibited from discriminating against any employee or applicant for employment on the basis of gender expression or identity, see Commonwealth of Pennsylvania, Governor’s Office, executive order 2016-04. In addition, contractors or grantees of the commonwealth are prohibited by executive order from discrimination in the hiring and treatment of their employees.

Cities and municipalities may also provide protections. For example, State College, Pennsylvania, prohibits discrimination on the basis of gender or gender identity in employment. Other municipal ordinances are not specific with respect to gender identity and simply apply to “sex,” creating the same interpretation questions that exist under federal civil rights laws.

### **Nontransgender Students and Privacy**

When schools permit transgender students to use facilities consistent with gender identity, not all parties have been satisfied. Students and parents have challenged these policies on constitutional grounds, albeit so far unsuccessfully, alleging that they violate the privacy rights of nontransgender students by requiring them to use facilities with members of the opposite biological sex.

Although courts have recognized limited privacy rights, they generally have not found that allowing transgender students to use facilities consistent with the student’s gender identity infringes on nontransgender students’ privacy rights. For instance, in an unusual ruling from the bench, the Third Circuit recently affirmed the denial of such an argument raised by nontransgender students who were seeking to enjoin enforcement of a school district’s policy allowing transgender students to use restrooms corresponding with their gender. See *Doe v. Boyertown Area School District*, No. 17-3113 (3d Cir. May 24, 2018). While it is likely that any such claims against a private or independent school would be unsuccessful, schools can mitigate associated risks further by establishing policies in a student handbook.

Privacy claims involve a fact-intensive and context-specific analysis. In *Students & Parents for Privacy v. U.S. Department of Education*, No. 16-cv-4945, 2016 U.S. Dist. LEXIS 150011 (N.D. Ill. Oct. 18, 2016), the court framed the issue as whether there is a “constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs.” In finding no privacy violation, the court noted that the school’s policies allowed students to use private stalls and alternative facilities if the private stall did not ensure the student’s privacy needs. In *Doe v. Boyertown Area School District*, a court in the Eastern District of Pennsylvania has followed this approach. See 2017 U.S. Dist. LEXIS 137317 (E.D. Pa. Aug. 25, 2017) (denying preliminary injunction and holding that allowing transgender students to use facilities consistent with their gender identity did not involve forced exposure and the school provided numerous privacy protections). In its opinion explaining its earlier affirmance of that decision, the U.S. Court of Appeals for the Third Circuit panel stressed the importance of allowing

transgender students to use facilities that reflect their gender identities. “Forcing transgender students to use bathrooms or locker rooms that do not match their gender identity is particularly harmful. It causes severe psychological distress often leading to attempted suicide. The result is that those students avoid going to the bathroom by fasting, dehydrating, or otherwise forcing themselves to not use the restroom throughout the day. This behavior can lead to medical problems and decreases in academic learning,” No. 17-3113 (3d Cir. June 18, 2018). While other students may be uncomfortable with transgender students using restrooms matching their gender identity, the panel wrote, that was not “comparable to the plight of transgender students who are not allowed to use facilities consistent with their gender identity.”

The courts in both *Students* and *Doe* held that no constitutional rights were violated, primarily based on the factual nature of the interactions and the way the right was framed. Because privacy concerns are fact-specific inquiries, different factual situations may create different results. For example, strip searches of students by members of the opposite biological sex have been prohibited, see *Cornfield v. Consolidated High School District*, No. 230, 991 F.2d 1316 (7th Cir. 1993). If a student is strip-searched by a transgender teacher of the opposite biological sex, it would present a different factual scenario, with a potentially different outcome.

### **PART III**

Courts have yet to definitively settle questions surrounding transgender rights in the educational context. Schools can help mitigate some of that uncertainty, however, by proactively developing policies to address the rights of transgender students and others. Part I of this article gave an overview of this area of the law, primarily by discussing Title IX of the Education Amendments Act of 1972. Part II discussed other relevant federal and state laws. This section outlines what schools should consider as they make, amend, or review policies and best practices relevant to transgender students.

#### **What Does a School Need to Consider?**

Policies matter. Each school is unique and needs to develop—and update—policies that further the culture and mission of the school. Policies also provide certainty to staff and establish expectations for students and their families. When a school has not developed intentional policies, it develops informal ones by default. As schools address or update policies, they will need to consider a variety of questions, including the following:

- *Does the school treat students according to gender identity if it is different than the student's biological sex?*

This is the core issue. It will guide the development of all policies from locker room access to dress codes.

If the school treats students consistent with their gender identity when it conflicts with biological sex, does the school make accommodations for students who have privacy concerns about sharing facilities with a transgender student? Additionally, if the school is a residential school, there may be other interactions among students that create heightened privacy concerns and require additional privacy options. Moreover, what, if anything, does a student need to do to establish his or her gender identity?

If the school does not treat students consistent with their gender identity, and if the school falls within the scope of Title IX, the school may violate Title IX. See *Doe v. Boyertown Area School District*, No. 17-3113 (June 18, 2018). Remedies available to individual plaintiffs in Title IX cases include compensatory damages, injunctive relief and attorney fees, see, e.g., *Dawn L. v. Greater Johnstown School District*, 586 F. Supp. 2d 332, 383 (W.D. Pa. 2008). If the school is not subject to Title IX, are there other federal statutes, or state or municipal laws, that prohibit discrimination based on "sex" and that could be interpreted as requiring the recognition of transgender rights?

- *When can a student change his or her records?*

Schools may receive requests from students or alumni to change the gender identification on a student's educational records. For schools that receive funds under programs administered by the U.S. Department of Education, the Federal Educational Rights and Privacy Act (FERPA) provides the framework for the disclosure of and correction to educational records.

Generally, FERPA prohibits the disclosure of student records unless authorized by a parent or student over the age of 18. FERPA also provides a right to seek to amend school records when those records are "inaccurate, misleading or in violation of a student's right to privacy." A former student who has transitioned to a new gender identity may wish to change the gender identity or the name listed on his or her educational records. This request could originate from a desire for future employers to not know about the transition, or simply to have the gender reference reflect the former student's current gender identity.

Several issues arise when confronted with a request to change gender identity in school records. First, what are the records intended to reflect, and are they accurate? Do the educational records reflect the student's gender identity at the time the student was at the institution or continuing information about the student?

Second, if educational records are accurate, may they still violate a right to privacy if they would, by implication, convey that the student transitioned to a different gender identity?

FERPA does not provide a private cause of action. As a result, an institution's liability is limited to a potential loss of federal funding, and not damages. For schools where FERPA does not apply, following FERPA's interpretation can inform best practices.

- *What about housing or overnight accommodations on field trips?*

If the school recognizes gender identity, how does it respect the privacy of nontransgender students? With respect to housing or roommates, could a school recognize gender and biological sex differences but still segregate students based on biological sex for certain activities? And, as discussed above, the FHA may provide additional requirements even for those schools that are not traditionally subject to Title IX. Although it is beyond the scope of this article, residential schools will also need to determine how to address employment issues related to dorm advisers and other residential positions.

- *What about athletics?*

The issue of athletic participation is usually governed by an association or other group's rules. The Pennsylvania Interscholastic Athletic Association, Inc. (PIAA) has a bylaw regarding "mixed gender participation" in interscholastic athletics. Article XVI, Section 4 of the PIAA's bylaws classifies sports "by gender" and generally limits mixed-gender participation within a sport.

The bylaws, at least indirectly, address the rights of transgender students, noting that when "a student's gender is questioned or uncertain," PIAA will accept the decision of a school's principal "as to the student's gender," (available at <http://www.piaa.org/assets/web/documents/Handbook%20-%20Section%20I%20-%20Constitution%20and%20By-laws.pdf>).

A potential way to address questions of gender is to treat individuals uniformly based on the gender marker listed on the student's birth certificate. Initially, this may have been a way to treat students solely according to biological sex. Now, however, it may be a viable approach that promotes uniformity and puts control into the hands of the student and his or her family. In states like Pennsylvania, there is a simple procedure for changing the gender marker on a birth certificate. It may not satisfy everyone, but it promotes uniformity, uses state issued documents, and avoids administrators from needing to make case-by-case determinations regarding a student's gender.

### **Conclusion**

Given the increased attention surrounding transgender rights, the question is not if, but when, a school will need to navigate these issues. When developing policies, schools should:

- Be proactive. Develop clear policies and apply them consistently.
- Educate staff and the school community regarding those policies and transgender issues.
- Make the policies part of the student handbook. This creates and manages expectations, and the handbook may form a contract between the school and the student.
- Keep abreast of legislation and legal developments. What is current today may not be tomorrow.

Schools that act proactively and develop thoughtful policies, instead of reactive responses, will be able to act confidently when issues regarding transgender students arise.