

A top-down view of a desk with a laptop, glasses, and a pen. The laptop is on the left, the glasses are in the upper right, and the pen is in the lower right. The background is a light, neutral color.

Current State of Transgender Student and Employee Rights May 11, 2023

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Agenda



- Legal Background
- Policies
- Names and Pronouns
- Apparel and Appearance
- School Records
- Participation in Sports
- Access to Sex-Segregated Facilities
- Overnight Trips
- Resistance from Staff

Definitions

- **Assigned Sex** refers to the sex (male or female) that is assigned to a child at birth on the birth certificate. Also referred to as sex or biological sex.
- **Gender** refers to the behavioral, cultural, or psychological traits commonly associated with a sex.
- **Cisgender** refers to a person whose gender identity is consistent with the sex the person was assigned at birth.
- **Gender non-conformity** is a broader term that describes any person whose behaviors or gender expression fail to conform to generally expected gender expressions. Gender non-conforming people can include transgender people but can also describe anyone who fails to conform to another's gender expectations.
- **Gender dysphoria** is the medical term recognized by the American Psychiatric Association to describe individuals who experience severe distress caused by the "marked difference between the individual's expressed/experienced gender and the gender others would assign him or her, and it must continue for at least six months." "[G]ender nonconformity itself is not a mental disorder." Rather, the critical element of gender dysphoria is the "presence of clinically significant distress associated with the condition." Not all transgender people experience gender dysphoria.
- **Gender Binary:** the system in which gender is strictly placed in one of two categories: male or female. This term is especially relevant regarding the bathroom system historically used throughout the United States.
- **Gender Identity:** an individual's concept of self in relation to gender, which can be male, female, both, or neither. It is important to remember that every person, whether or not they are transgender, has a gender identity. For some, their gender identity does not fit neatly into a male or female category may use non-binary, agender or bigender.

Definitions

- **Gender Expression:** similar to gender identity but focuses more on the external appearance of one's gender rather than their internal concept of gender. How a person represents or expresses gender identity to others, often through behavior, clothing, hairstyles, voice, mannerisms, or physical characteristics.
- **LGBTQ+** is a common abbreviation that refers to the lesbian, gay, bisexual, transgender and queer plus community.
- **Transgender:** a person whose gender identity or gender expression is different from their assigned sex at birth. Transgender boys were designated female at birth but identify as boys; transgender girls were designated male but identify as girls.
 - **Transgender female:** Someone who identifies as a female but was assigned the sex of male at birth. Also known as MTF or “male-to-female.”
 - **Transgender male:** Someone who identifies as male but was assigned the sex of female at birth. Also known as FTM or “female-to-male.”
- **Sexual orientation**, it bears underscoring, is distinct from gender identity. Sexual orientation describes a person’s romantic or sexual attraction to people of a specific gender or genders, usually defined as lesbian, gay, bisexual, heterosexual or asexual.
- **Gender Transition** - Transgender individuals often engage in some form of gender transition so that their external gender expression aligns with their internal gender identity. An important stage in the transition is social transition, which means that the transgender person experiences living full-time as the transitioned gender. This transition often “includes coming out to partners, family, friends, and community members (e.g., at school, work, other settings).” Gender transition may ultimately include surgical or medical transition.

Federal Law

- Title VII; *Bostock v. Clayton County* (U.S. 2020)
- Title IX of the Education Amendments Act of 1972
- Fourteenth Amendment, Equal Protection Clause
- First Amendment
 - Protected Speech
 - Religious Freedom
 - Freedom of Association

State Law

- Title VII only applies if an employer has fifteen or more employees. Some state laws extend antidiscrimination protection to workplaces with fewer than 15 employees. Ex. CA (5 or more employees); CO (just 1 employee).
- 22 states and Washington D.C. explicitly prohibit discrimination based on sexual orientation and gender identity.
- 19 states: No explicit law prohibiting discrimination based on sexual orientation and/or gender identity.
- Six states and Washington, D.C. have enacted public accommodations laws that prohibit discrimination based on sexual orientation and apply explicitly to schools.
- Another twelve states' public accommodations laws prohibit discrimination based on sexual orientation and could be interpreted to apply to schools.

Policies

- Districts have a model policy that: (1) prohibits discrimination, harassment, dating violence, and retaliation against students; and (2) outlines remedial steps to report, investigate, and respond to concerns. Ex. FFH(LOCAL).
- The policy prohibits various forms of discrimination, including discrimination on the basis of sex, gender, or “any other basis prohibited by law.” The policy does not speak directly or solely about the rights of transgender students.
- Additionally, the OCR has resources to provide policy guidance and resolution agreements regarding Title IX requirements related to the rights of “students who are lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary and individuals who identify their sexual orientation or gender identity in other ways.”

Apparel and Appearance

- Courts have found that wearing gender-nonconforming clothing may be protected by the First Amendment as free speech, by the Fourteenth Amendment with regard to equal protection, and by Title IX.
- Transgender and gender-nonconforming students should be permitted to wear clothing that aligns with their gender identity.
- Transgender and gender-nonconforming students are still subject to the established student dress code for the student's preferred gender attire. The dress code must be applied fairly to all students.

School Records

- In general, a student's legal name is used on permanent records, especially when required by state or federal laws and regulations.
- At least one federal circuit court has found that a school district's refusal to change a transgender student's records to reflect his male gender identity violated Title IX and the Equal Protection Clause.
- If a student provides documentation of a legal name or gender change, then the official student record must be changed to reflect the change.

Names and Pronouns

- In contrast to permanent school records, teachers and other school district employees often informally address students by, and have non-permanent school records that reflect, preferred names or nicknames that are not a student's legal first name. A school district should apply this practice equally with transgender students.
- OCR and DOJ's 2021 guidance cites a failure to address a transgender student by the student's chosen name and pronouns as an example of sex-based discrimination within the agencies' enforcement authority under Title IX.
- School districts should use the preferred name and gender of the transgender student unless specifically prohibited by law.

Participation in Sports

- 19 states have adopted statutes prohibiting transgender females from participating in female sports.
- Many of these statutes have been challenged in state and federal courts, mostly on the grounds that they violate the 14th Amendment's Equal Protection Clause, Title IX or the state's constitution.
- *B.P.J. v. West Virginia Board of Education, April 2023*; Supreme Court refuses, for now, to enforce West Virginia ban on transgender students' participation in school sports
- April 2023, DOE Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams
- Federal lawsuits are pending in Idaho and Tennessee.
- Title IX Proposed Regulations: Under the proposed regulation, schools would not be permitted to adopt or apply a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity. Instead, the approach would allow schools flexibility to develop team eligibility criteria that serve important educational objectives, such as ensuring fairness in competition or preventing sports-related injury.

Access to Sex-Segregated Facilities

- Most federal courts have found in favor of a student's right to use facilities corresponding to student's gender identity.
- Courts have typically rejected claims brought by cisgender students under various theories that sought to prevent transgender access to facilities.
- On a practical level, consider:
 - student and parental input, age, awareness of student's gender identity among peers, availability of gender-neutral facilities, potential disruption to learning environment (if request granted or denied), safety risks to transgender student, etc.

Access to Sex-Segregated Facilities

- The *Boyertown* decision, from the Third Circuit, the *Grimm* decision from the Fourth Circuit, the *Dodds* decision from the Sixth Circuit, *Whitaker* from the Seventh, and *Parents for Privacy* from the Ninth, affirmed the transgender students' rights to use bathrooms of their gender identity. None of the school districts involved have reported any threats to cisgender students' bodily privacy or concerns about cisgender students' safety
- Exception: The *Adams* decision from the Eleventh Circuit, in a 7-4 *en banc* decision, ruled that student privacy interests were best served by the existing bathroom policies and that Title IX refers to biological sex.

Overnight Trips

- Similar to sex-segregated facilities, the law is not settled on how to handle sleeping arrangements for overnight field trips.
- Does your district have a policy on overnight trips/roommates? Consider developing one that is sex-neutral.
- Options:
 - Students pick their own roommates with parental permission, plus organizer/admin oversight based on known safety/disruption risks.
 - All students must be accompanied by a parent.
 - All students must stay by themselves.
 - Transgender student stays by him/herself, by agreement.

Resistance from Staff

- *Damiano v. Grants Pass Sch. Dist.* (Ore. 2023): Teacher and administrator claimed First Amendment retaliation based on firing after they campaigned against school district transgender policies.
- *Kluge v. Brownsburg Comm. Sch.* (7th Cir. 2023): Teacher objected to using preferred pronouns and brought First Amendment religious expression claim when school district stopped letting him use student last names as an accommodation.
- *Pamela Ricard v. U.S.D. 475* (D. Kan. 2022): Teacher brought free speech, free exercise of religion, and due process claims related to policy preventing her from mentioning students' preferred pronouns to students' parents.

KEY TAKE-AWAYS



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