

Transgender Students



THE NEXT FOUR YEARS

NCGS § 115C-407.15(a)(2)



- Bullying or harassing behavior includes, but is not limited to, acts reasonably perceived as being motivated by any actual or perceived differentiating characteristic, such as race, color, religion, ancestry, national origin, gender, socioeconomic status, academic status, gender status, physical appearance, sexual orientation, or mental, physical, development, or sensory disability, or by association with a person who has or is perceived to have one or more of these characteristics.

Definitions



- Transgender is an umbrella term used to describe people whose gender identity (sense of themselves as male or female) or gender expression differs from that usually associated with their birth sex. Many transgender people live part-time or full-time as members of the other gender. Broadly speaking, anyone whose identity, appearance, or behavior falls outside of conventional gender norms can be described as transgender. However, not everyone whose appearance or behavior is gender-atypical will identify as a transgender person.

-American Psychological Association

Definitions cont'd



- Gender Identity refers to one's internal sense of gender, which may be different from one's assigned sex, and which is consistently and uniformly asserted, or for which there is other evidence that the gender identity is sincerely held as part of the student's core identity.

Title IX



- Prohibits discrimination under any educational program or activity receiving Federal financial assistance. This includes claims of discrimination based on sex and/or gender. Enforced by the Office of Civil Rights.

Title VII – Civil Rights Act of 1964



- This is the Employment Discrimination Law and is enforced by the EEOC – Equal Employment Opportunity Commission.
- Usually Title IX and Title VII claims of discrimination based on sex, sexual orientation and/or gender identity are analyzed very similarly.

2012- Arcadia Unified School District OCR Case



- Beginning in 5th grade, a female student began asserting male gender identity and consistently asserted male gender identity for the remainder of elementary school and middle school.
- The student consistently and uniformly identified and presented as a male in school and all other aspects of life (according to the OCR investigation, many of his classmates didn't know he was transgendered)
- In a voluntary resolution agreement with OCR, the school district reversed its position and allowed the student to use sex-specific facilities at school and on school-sponsored trips and to otherwise treat the student as a boy in all respects

2014- Downy Unified School District OCR Case



- Student assigned male sex at birth identified as female as early as pre-Kindergarten; diagnosed as Gender Dysphoria prior to entering school
- From K-5th grade, the student however had not made a gender transition at school.
- During 5th grade, student alleges she was disciplined because of her gender nonconformance and gender identity
 - Staff confiscated her makeup
 - Made student apologize to male students who were uncomfortable when she put on makeup
 - Discouraged her from discussing her gender identity with friends and discontinued her participation in group counseling sessions for fear that she may discuss her gender identity

Downy Cont'd



- Further alleges peer harassment
- Alleges that district failed to support her transition in 5th grade:
 - Continued to refer to her as her male name
 - Yearbook used her male name
- After student transferred to new middle school was allowed to use female restrooms and facilities (without incident)

Downy Cont'd



Resolution Agreement with OCR:

- Continue to treat student as a female in regards to all programs and facility use; student may request private facilities
- At parent request, develop Student Success Plan (SSP) to ensure a safe and equitable process for student at school
- Include the SSP in its policy manual
- Massive professional development
- Incorporate instruction on gender identity, gender-based discrimination and examples of prohibited conduct
- School climate surveys

Johnston v. University of Pittsburgh

3/31/2015



- Transgender male sued University of Pittsburgh after not being allowed to use male facilities.
- Court determined that Equal Protection Claims based on gender receive intermediate scrutiny but that since transgender is not a suspect class, this particular case would receive the lower scrutiny of the rationale basis standard
- Court balanced the University's need to ensure privacy of all students and upheld the Defendant's ban on Plaintiff using male locker rooms and bathroom

Johnston cont'd



- The Court also noted that if the court applied intermediate scrutiny it would have come to the same conclusion because the University's interest in protecting all student's privacy was an important governmental interest.
- Court also dismissed Title IX claims, citing that the prohibition on facility use is not a valid sex stereotyping claim.
- Court focused on the fact that University allowed plaintiff to enroll in male weight training class; used his male name; updated student records to reflect the name change; and treated him as male in all other respects.

Johnston Cont'd



- School system must really undertake a balancing test and may be able to prohibit the use of facilities if there is an actual, real and legitimate safety concern.
- Fear or apprehension of a possible safety concern will likely not be enough.

The EEOC's Take (Obama Administration)



Identified several ways in which discrimination against a transgender person may be sex discrimination:

- Refusing to allow a transgender individual to wear the clothing associated with the gender she/he identifies with
- Refusing to allow a transgender individual to use the restroom appropriate for the gender she/he identifies with

OCR

(Obama Administration)



- Allow transgender students to use facilities that correspond with their sincerely held gender identity.
- Being very aggressive in these investigations
- OCR is certainly going to take the position that the transgender student should be able to use all facilities (including restrooms and locker rooms) that corresponds with the gender of which they identify
- Trump Administration has basically instructed OCR not to investigate such claims and withdrew previous guidance on this topic that was issued under the Obama Administration. However, it is my understanding that OCR is still investigating these claims but they are not doing so as aggressively as they were under the Obama Administration. Additionally, in October of 2018 the Trump Administration drafted policies for the Department of Education and other agencies that enforce civil rights that eliminate the concept of a student being transgender which potentially makes it next to impossible for transgender students to raise complaints about treatment based on their gender identities. To my knowledge these policies have not gone into effect.
- OCR's actions in its enforcement measures as well as involvement in litigation provides a glimpse of how OCR will treat gender based discrimination in the school/student context

How do you know if a Student's Gender Identity is "Sincerely Held"?



- The presumption is typically in the student's favor
- Arrange for the student to speak with the school counselor
- Speak with the student yourself
- Have a parent/student conference
- Speak with teachers
 - How has the student presented him/herself in the past?
 - Noticed any changes?
 - Attendance/grade issues

Issues to Consider



- Bathrooms
- Overnight trips
- Sex-Segregated Athletics/Extra-curricular (NCHSAA rule is the “birth certificate” rule)
- Physical Education/Health Classes
- ROTC Uniforms
- Student name/identification – NC DPI Powerschool updated: call name (preferred name) vs. legal name now default for non-legal documents such as a report cards and grade books. Legal name still used for student ID, NC transcript, ECATS, diploma. **PREFERRED NAME CAN BE CHANGED AT STUDENT’S REQUEST - parent consent not needed.**
- Student Records
- Dress Codes – ideally gender neutral and should be enforced equally against transgender and non-transgender students.

Best Practices for Administration



- Keep an open mind
- Remind staff to keep an open mind
- Educate yourself
- Remember that the parent may have a lot of anxiety
- Don't make judgments or assumptions
- Ask questions
- Consider medical information; refer parents to counseling if necessary
- Consider the safety/privacy of the student as well as the safety and privacy of all students in the school

Best Practices Cont'd



- Consider the best interest of the student and all students
- Consider the age and maturity of the student
- Consider where the student is within the “process”
- Consider privacy issues
- Give the family options
- Refer to the student using preferred name and gender pronouns
- Make the student (and family) feel safe and welcome in the school
- Assign a counselor and someone the student may report bullying or harassing behavior
- Make decisions through the team
- Document the process and the district’s important interest in making decisions

Do's and Do Not's



- Do address the student by the preferred name
- Do change records to reflect preferred name (to the extent possible)
- Do maintain the student's privacy
- Do not “out” the student
- Do not allow harassment
- Do not treat the student negatively because of the way s/he looks or acts

Amendment of School Records



- FERPA right to request amendment of inaccurate or misleading information
- If a student is able to obtain a new birth certificate with a new name and gender, then the school system may be under an obligation to not only change the name and gender designation going forward but to go back and make changes to historical records; but that is only in the case of new birth certificate

School Records cont'd



- If no new birth certificate is obtained, then school system is only under an obligation to change the gender designation and/or name going forward
- Would need to provide some medical documentation that the student has either completed the sex reassignment surgery or that they have received some medical treatment (hormone therapy) that documents that they have a genuine and sincere belief of a transgender identity
- This really needs to be approached on a case by case basis.

Gavin Grimm v. Gloucester County School Board



- Gavin's claims center around a Title IX violation and an Equal Protection Claim.
- The District Court basically ruled in Gavin's favor in 2018 and held "allegations of gender stereotyping are cognizable Title VII Sex Discrimination Claims and, by extension, cognizable Title IX Sex Discrimination Claims." Additionally, the Court found that "claims of discrimination on the basis of transgender status are per se actionable under Title IX.
- Ultimately the Supreme Court declined to hear the case allowing the lower court decisions in support of transgender students to stand.
- Allow use of bathrooms, locker rooms consistent with gender identity. Do not require (can offer) use of a separate restroom.
- Private areas are private – shower curtains, privacy dividers.

Sexual Orientation Under Title VII



- The Second Circuit (New York, Vermont and Connecticut) and the Seventh Circuit (Illinois, Indiana and Wisconsin) have held that Title VII prohibits discrimination on the basis of sexual orientation as discrimination because of sex – overruling prior circuit precedent.
- Eleventh Circuit (Alabama, Georgia and Florida) have held just the opposite that this is nonactionable.
- My prediction is that discrimination based on sexual orientation will be viewed as unlawful discrimination based on Title VII and accordingly under Title IX when applied in the educational setting.
- Additionally, the EEOC is finding discrimination on the basis of transgender status and sexual orientation as discrimination on the basis of sex in violation of Title VII.

Reading the Tea Leaves



- So this tells us that the majority of district courts and even the EEOC are finding that it is illegal to discriminate based on sex, sexual orientation and gender identity in the workplace under Title VII. The only agency that may be lagging behind is the Office of Civil Rights that enforces and investigates Title IX claims. However, in the Gavin Grimm case the District Court of Virginia has clearly stated that this type of discrimination is actionable under Title IX and under an Equal Protection Claim.

School Counselors and Support of Gay, Lesbian, Bisexual and Transgender Students



- Same sex displays of affection. Same sex displays of affection should be treated the same as opposite sex displays of affection.
- National Day of Silence/Gay Awareness Day – A substantial disruption is the only way to not allow such an observance but this is on very shaky First Amendment grounds. You would need to allow it if you allow other similar activities such as prayer around the pole.
- Gay Student Alliance – has to be student initiated, no outside organizers. Same rules and expectations apply to any other student initiated club.
- Student records/FERPA – parents have rights to notes. Don't write down anything or email anything you wouldn't want a parent to see/know.
- Student dress – allow clothing according to gender identity and orientation in the yearbook/annual as the yearbook is not an official school record and not a FERPA educational record.

Bostock v. Clayton County
Supreme Court of the United States Decided June 15, 2020



- Was a landmark United States Supreme Court civil rights case in which the Court held that Title VII of the Civil Rights Act of 1964 protects employees against discrimination because they are gay or transgender.



- The lower courts followed past precedent that Title VII did not cover employment discrimination protection based on sexual orientation.



- On June 15, 2020, the Court ruled that discrimination on the basis of sexual orientation or gender identity is necessarily also discrimination “because of sex” as prohibited by Title VII. According to Justice Neil Gorsuch’s majority opinion, that is so because employers discriminating against gay or transgender employees accept a certain conduct (e.g., attraction to women) in employees of one sex but not in employees of the other sex.



- Title VII, which covers equal employment opportunities states that it is illegal to discriminate in any hiring or employment practices based on an “individual’s race, color, religion, sex, or national origin”.



- Until *Bostock*, whether the Civil Rights Act gave federal protection against employment discrimination to the class of LGBT people was in dispute.



- The EEOC has used past case law and its evaluation of discrimination cases brought before it to establish that LGBT discrimination is unlawful under the context of the Civil Rights Act. In 2012, the EEOC ruled in *Macy v. Holder* that discrimination on the basis of gender identity is a form of sex stereotyping, and thus prohibited in employment as a form of discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964. In 2015, the EEOC ruled in *Baldwin v. Foxx* that discrimination on the basis of sexual orientation is also prohibited in employment under Title VII, on the exact same basis as in *Macy*.



- Gorsuch wrote: An employer who fired an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids. Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. But the limits of the drafters' imagination supply no reason to ignore the law's demands. Only the written word is the law, and all persons are entitled to its benefit.



- Gorsuch’s decision also alluded to concerns that the judgment may set a sweeping precedent that would force gender equality on traditional practices. “They say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today but none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”



- Justice Brett Kavanaugh wrote a separate dissent, arguing that the Court could not add sexual orientation or gender identity to Title VII due to the separation of powers, leaving this responsibility to Congress. I believe that it was Congress's role, not this Court's, to amend Title VII.



- American Civil Liberties Union (ACLU) lawyer Joshua Block said that “[a]ll of the Trump administration’s actions [‘curtailing protections for transgender Americans’] have been built around this assertion that Title VII [of the Civil Rights Act] and Title IX [of the Education Amendments of 1972] provide no protections to LGBTQ people...[i]t’s an Achilles’ heel that’s been built into every single thing they’ve done.”
- Teacher/Faculty Rights to “object” to pronouns – I do not know the answer. Teacher might have First Amendment protections, especially if a sincerely held religious belief.