



Regulating the protection and rights of transgender students in public schools

Protecting and recognizing the legal rights of transgender students is, in some respects quite simple; but in other respects is quite complicated with nuances that do not fall easily into the legal principles prohibiting sex discrimination with which we are all familiar. Let's look at the simple issues. I suggest that everyone would agree that school districts cannot exclude a transgender student from school or any school program or activity simply because the student is transgender. But what about rules associated with the use of bathrooms, locker rooms and showers? The rules associated with allowing students with a particular anatomy to use the bathrooms, locker rooms and showers intended for use by students with the opposite anatomy can be more complicated.

One of the reasons for the increased complication is that other students have certain rights with regard to the privacy of their unclothed bodies. Those rights may be violated if individuals of the opposite sex may view their partially or fully unclothed bodies. The Ninth Circuit long ago recognized, "[s]hielding one's unclothed figure from the view of strangers, particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." See *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Rosario v. United States*, 538 F. Supp. 2d 480, 497-98 (D.P.R. 2008); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122, 1132 (S.D. W. Va. 1982).

Another set of legal concepts that complicates this area of the law relates to the rights of parents to control the upbringing of their children. Parents may have a right to say "no" to a requirement that their children use the same bathrooms, locker rooms and showers with children of the opposite sex. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); and *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). None of these cases deal with the specific rules pertaining to bathrooms, locker rooms or showers at public school, but each of them acknowledges the rights of parents to direct the education

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and upbringing of their children in general. As transgender bathroom, shower and locker room use in public schools is litigated in the future, it is probable that the rights of parents will be taken into account.

Recognizing these complications, can a public school, for example, prohibit a student who has a male anatomy, for example, from changing in the girls' locker room after gym class if the student's "gender identity" is female?



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Title IX prohibits discrimination on the basis of sex in federally funded education programs and activities. See 20 U.S.C. § 1681 et seq. However, the law is unsettled with respect to whether transgender students may state a valid discrimination claim under Title IX or similar state statutes when schools prohibit them from using restrooms that match their “gender identity.” In order to avoid losing federal funding or potential liability under Title IX, schools should not adopt policies that prohibit transgender students from using restrooms and locker rooms that match their gender identity. This article provides an overview of whether transgender students are afforded any protections under discrimination statutes or case law.

Title IX provides “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program. . . .” 20 U.S.C. § 1681(a). In evaluating Title IX claims, courts rely on cases interpreting Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment. See *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007). The courts in *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982), refused to extend sex discrimination under Title VII to include discrimination against transgender individuals.

However, several years later, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court concluded that sex discrimination encompasses discrimination based on sexual stereotypes. *Id.* at 250. Courts have found that under *Price Waterhouse*, “sex,” as used in Title VII, not only encompasses an individual’s biological status as male or female but also gender identity. See *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); see also *Glenn v. Brumby*, 663 F.3d 1312, 1318 n. 5 (11th Cir. 2011) (quoting *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004)

(“[S]ince the decision in *Price Waterhouse*, federal courts have recognized with near-total uniformity that ‘the approach in *Sommers*, and *Ulane* . . . has been eviscerated’ by *Price Waterhouse*’s holding.”). The court in *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), found that discrimination on the basis of gender identity is “literally” discrimination on the basis of sex. *Id.* at 308. Thus, the case law suggests that sex discrimination under Title IX could be interpreted to encompass discrimination on the basis of gender identity.

In April of 2014, the U.S. Department of Education, Office for Civil Rights (OCR) published guidance, concluding that Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity. See OCR, *Questions and Answers on Title IX and Sexual Violence*, at p. 5, B-1, B-2 (2014). However, the publication does not have the full force and effect of federal law or regulation and is instead labeled by OCR as a “significant guidance document.” *Id.* at p. i n. 1.

Even if discrimination of transgender students is prohibited under federal, state or local law, it is less clear whether anti-discrimination laws are violated when transgender students are prohibited from using restrooms or locker rooms consistent with their gender identity. In *Johnston v. Univ. of Pittsburgh*, No. 3:13-213, 2015 WL 1497753 (W.D. Pa. March 31, 2015), a transgender male student brought an action against the University of Pittsburgh after being expelled for refusing to stop using male bathrooms and locker rooms, alleging discrimination under Title IX and the Equal Protection Clause of the 14th Amendment. *Id.* at *1. The court found that the student failed to state an Equal Protection claim, reasoning, in part, that transgender status was not a suspect classification. *Id.* at *8-10. The court further reasoned that the university’s policy of segregating its bathrooms and locker rooms on the basis of sex was substan-

tially related to a sufficiently important government interest in ensuring the privacy of its students. *Id.* at *8.

The court also found that the policy separating the bathrooms by birth sex did not violate Title IX, reasoning that sex discrimination does not include discrimination against transgender individuals. *Id.* at *12-19. The court relied on, among other things, *Sommers*, even though, as previously discussed, the holding in *Sommers* was essentially eviscerated by *Price Waterhouse's* holding. See *Glenn*, 663 F.3d at 1318 n. 5 (quoting *City of Salem*, 378 F.3d at 573). Thus, the court's holding in *Johnston* arguably is inconsistent with holdings by various circuit courts that have found that sex discrimination could be interpreted to encompass discrimination on the basis of gender identity.

The court also held that the student failed to state Title IX sex stereotyping claim because the student did not behave in a manner inconsistent with any preconceived notions of gender stereotypes and the university permitted him to live in conformity with his male gender identity in all material respects aside from its policy regarding bathroom and locker room usage. *Id.* at *16-18.

On April 24, 2015, the student filed an appeal in the Third Circuit. See *Johnston v. Univ. of Pittsburgh*, No. 15-2022 (3d Cir. April 24, 2015). Thus, it is yet to be seen whether the Third Circuit will agree with the district court's holdings. We cannot say, at this point in time, with any degree of certainty whether it is more likely than not that public schools have the right to segregate the use of bathrooms, locker rooms and showers according to actual anatomy and not according to gender identity. See, e.g., *Kastl v. Maricopa County Community College District*, 325 F. App'x 492, 493 (9th Cir. 2009), *Etsity v. Utah Transit Auth.*, 502 F.3d 1215, 1222-1225 (10th Cir. 2007).

In contrast to the district court in *Johnston* relying on cases like *Sommers*

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in determining that sex discrimination under Title IX does not encompass discrimination based on transgender status, the Eastern District Court of Virginia in *G.G. v. Gloucester Cnty Sch. Bd.*, Civil No. 4:15cv54, __F. Supp. 3d __, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015), relied on the Department of Education regulations, which, according to the court, precluded a transgender student's Title IX claim. *Id.* at *6. G.G., a transgender male student, argued that his school's bathroom policy that excluded him from using the men's restroom constituted sex discrimination under Title IX and moved for a preliminary injunction in order to allow him to use the men's restroom. *Id.* at *1-5.

By way of background, G.G. was born anatomically a female and was diagnosed with gender dysphoria in April 2014, around age 15. *Id.* at *1. Consequently, as per G.G.'s psychologist's recommendation, he began living in accordance with his male gender identity. *Id.* Initially, G.G. agreed to use a restroom in the nurse's office, but after the 2014-15 school year began, he found it stigmatizing to use a separate restroom and requested to use the men's restroom. *Id.* at *2. Shortly thereafter, the principal agreed to G.G.'s request. *Id.* However, the school board began to receive complaints regarding G.G.'s use of the men's restroom. *Id.* As a result, on Dec. 9, 2014, the school board adopted the restroom policy providing that students must use restrooms that correspond to their biological genders and that students with gender identity issues shall be provided an alternative appropriate facility.

Id. at *2. Subsequently, G.G. was informed that he could no longer use the men's restroom and would be disciplined if he did. *Id.* at *3. After the school adopted the policy, G.G. began receiving hormone treatments that made him more masculine. *Id.* at *3. He alleged that using the women's restroom is not possible because girls and women react negatively due to his masculine appearance, asking him to leave, and the use of the women's restroom would cause him severe psychological distress. *Id.* at *3.

Following the adoption of the restroom policy, the school made certain physical improvements to the restrooms, such as installing three unisex single-stall restrooms; but G.G. refused to use the single-stall restrooms, alleging that using them would isolate him and remind him that the school community knows the restrooms were installed for him. *Id.* at *3-4.

The court dismissed G.G.'s Title IX claim and denied his motion for preliminary injunction. *Id.* at *1. The court stated that G.G.'s Title IX claim did not rest on whether gender discrimination fits within the definition under Title IX, and instead, the claim is precluded by Section 106.33 of the Department of Education regulations, which provides:

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities of the other sex. *Id.* at *6-7 (quoting 34 C.F.R. § 106.33).

The court reasoned that because Sec-

tion 106.33 expressly allowed schools to maintain separate bathrooms based on sex, the school board did not violate Title IX by limiting G.G. to use the bathroom consistent with his birth sex. *Id.* at *6-*9. It should be noted that the court did not find it necessary to decide on whether “sex” in Section 106.33 also includes “gender identity.” *Id.* at *7. Specific regulations dealing with how school districts treat students based on gender have been relied upon by the courts to trump general arguments of equality and nondiscrimination. See *Williams v. School Dist. of Bethlehem, Pa.*, 998 F.2d 168, 171 (3rd Cir. 1993).

The court mentioned that the OCR issued a letter dated Jan. 7, 2015, that clarified its stance on the treatment of transgen-

der students, asserting that when a school elects to separate or treat students differently on the basis of sex (i.e., in sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams and single-sex classes), a school must treat transgender students consistent with their gender identity. *Id.* at *7-8. The court would not defer to OCR’s interpretation. *Id.* at *8-9.

The court also found that G.G. was not entitled to a preliminary injunction because the balance of hardships did not weight in his favor. *Id.* at *15. In deciding on the injunction, the court stated that it “must consider G.G.’s claims of stigma and distress against the privacy interest of the other students protected by separate restroom.” *Id.* at *13. The court found in-

sufficient evidence to prove hardships suffered by G.G. and found that allowing him to use the male restroom would endanger the privacy of other students. *Id.* at *11-12.

G.G. has filed an appeal in the U.S. Court of Appeals for the Fourth Circuit. See the related article by Frances Hubbard, “Gloucester transgender student filed appeal in lawsuit, asks for new jury,” in *Daily Press* on Oct. 21, 2015, available at <http://www.dailypress.com/news/gloucester-county/dp-nws-mid-gloucester-transgender-appeal-20151021-story.html>.

Although federal courts have not yet found in favor of transgender students who have been prohibited from using restrooms or locker rooms that match their gender identity, the Maine Supreme Judi-



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cial Court held in *Doe v. Regional School Unit 26*, 86 A.3d 600 (Me. 2014), that the school discriminated against a transgender student under the Maine Human Rights Act (MHRA) by prohibiting the student from using the girls' bathroom and requiring her to use a unisex staff bathroom. *Id.* at 606. Unlike the PHRA, the MHRA includes gender identity as a protected class. *Id.* at 605 n. 8. Contrary to how the court in *G.G.* interpreted Section 106.33 of the Title IX regulations that allow schools to maintain separate bathrooms based on sex, the Maine Supreme Judicial Court found that Section 6501 of Title 20-A of the Maine Revised Statutes, entitled "Sanitary Facilities," which requires schools to provide children with "clean toilets" separated according to sex, does not dictate the use of the bathrooms in a way that discriminates against students in violation of the MHRA. *Id.* at 606. The court reasoned that Section 6501 "does not purport to establish guidelines for the use of school bathrooms. Nor does it address how schools should monitor which students use which bathroom, and it certainly offers no guidance concerning how gender identity relates to the use of sex-separated facilities." *Id.* at 605.

In administrative enforcement proceedings under Title IX, the OCR found in favor of a transgender female student at an Illinois high school who sought unrestricted access to the girls' locker room. See the related article by Melissa Silverberg (Eric Peterson contributed), "Dist. 211 setting up private changing room for transgender student," in *Daily Herald* on Oct. 12, 2015 (updated Oct. 15, 2015), available at <http://www.dailyherald.com/article/20151012/news/151019750/>. The OCR concluded that the school discriminated against the student in denying her access to the girls' locker room for gym class and competitive sports and issued an order to allow her access to the girls' locker room. *Id.* However, the school has



refused to comply with the OCR order, and as a result, the school is at risk of losing \$6 million in federal funding. *Id.* OCR must now determine whether it is necessary to initiate litigation to revoke funding or another punishment. *Id.* In the meantime, the school plans to provide the student with a private area to change to protect the privacy rights of all students and feels that it would be compromising other students' privacy if they complied with the OCR order. *Id.*

In light of OCR's position that prohibiting transgender students from using locker rooms or restrooms that are consistent with their gender identity is discriminatory and given that this issue has yet to be reviewed by any U.S. Courts of Appeals, what steps should schools take to avoid any potential liability?

To date, no agency of the Commonwealth of Pennsylvania has issued any sort of guidance with respect to this particular issue. It is worth noting, however, that the Code of Professional Practice and Conduct for Educators promulgated by the Pennsylvania Professional Standards and Practices Commission includes a sec-

tion entitled "Civil Rights" that prohibits professional educators from discriminating against students or fellow educators on various bases, including sex or sexual orientation, and declares such discrimination to be an independent basis for professional discipline. See 22 Pa. Code § 235.8.

It also is instructive to review New York guidelines, which address transgender students' use of restrooms and provide examples of ways in which schools can respond to certain scenarios. The NYS Education Department's *Transgender Student Guidelines* (2015) are available at http://www.p12.nysed.gov/dignityact/documents/Trans_GNCGuidanceFINAL.pdf. The guidelines refer to the portion of the Statement of Interest of the United States filed in *G.G.* that asserted OCR's view that prohibiting students from using restrooms that match their gender identity is sex discrimination. *Id.* (citing Statement of Interest, *G.G.*, Case No. 4:15cv54, at 1-2). The guidelines take into consideration that transgender students may not feel comfortable in a gender-segregated space and provide that "[a]lternative accommodations, such as a single 'unisex'

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bathroom or private changing space, should be made available to students who request them, but should never be forced upon students, nor presented as the only option." *Id.*

It is recommended that schools consult with counsel if they are uncertain with whether to permit transgender students to use restrooms and locker rooms that match their gender identity. In addition, schools should consult with transgender students to find out their preference with respect to restrooms or locker rooms. If a transgender student is uncomfortable using gender-segregated restrooms or locker rooms, the school should provide alternative accommodations, such as a unisex bathroom. To alleviate privacy concerns of non-transgender students, schools might also consider offering unisex bathrooms or curtained-off areas for use of any student who is uncomfortable sharing bathrooms or locker rooms with a student having opposite gender anatomy.

Finally, it is important that these issues be thoroughly thought out in advance, rather than on an ad hoc basis. It is strongly recommended that the school board ensure that written guidance that defines the rules is developed and provided to administrators, staff, parents and students so that all have a consistent awareness of how such issues should be handled, and that related policies be reviewed to determine whether amendments are needed to align with the district's adopted approach.

Editor's Note: There have been one or more advocacy groups that have distributed proposed policies which are in the style, formatting and numbering of the PSBA Policy Services policies. PSBA has issued a cease and desist letter to said entities. However, PSBA wants its membership to be careful to ensure that it knows whether a draft policy was written by PSBA or by an advocacy or interest group. **B**