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Transgender Student Legal Update (Jan. 22, 2019)

This update includes important information about Guidelines adopted by the Pennsylvania Human Relations Commission on August 2, 2018 and the Third Circuit Decision in *Doe v. Boyertown Area School District* of July 26, 2018.

*For many years, PSBA has urged its members to work with transgender students and their families to meet the needs of individual students and to provide all students with a safe and supportive school environment. **As Pennsylvania courts and state agencies continue to support the legal positions raised by transgender students, it is urgent that public school districts in Pennsylvania make legally informed decisions regarding transgender students' rights.***

Terminology

*Denotes definitions taken from PHRC Guidelines

**Denotes definitions taken from Third Circuit Opinion in *Doe v. Boyertown Area School District*

- ****Sex** – the anatomical and physiological process that lead to or denote male or female. Typically, sex is determined at birth based on the appearance of external genitalia.
- ****Gender** – a broader societal construct that encompasses how a society defines what male or female is within a certain cultural context. A person's gender identity is their subjective, deep-core sense of self as being a particular gender.
- ***Sex Assigned at Birth** – The assignment and classification of individuals at birth, including but not limited to male, female, or intersex and the related physical differences between the sexes, such as pregnancy.
- ***Sexual Orientation** – An inherent or immutable enduring emotional, romantic, or sexual attraction to other people, including but not limited to: heterosexual, homosexual, and bisexual.
- ***Gender Identity** – One's innermost concept of self as male, female, a blend of both or neither. How individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.
- ***Gender Expression** – External appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.
- ***Gender Transition/**Social Gender Transition** – The process by which some people strive to more closely align their internal knowledge of gender with its outward appearance. Some people socially transition, whereby they might begin dressing, using names and pronouns and/or be socially recognized as another

gender. Others undergo physical transitions in which they modify their bodies through medical interventions. An important part of this transition is having others perceive the person as the gender the person most strongly identifies with. It can assist with the treatment of "gender dysphoria."

- **Transgender** – *PHRC: An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation.
** THIRD CIRCUIT: A person whose gender identity does not align with the sex that person was determined to have at birth. A transgender boy is therefore a person who has a lasting, persistent male gender identity, though that person's sex was determined to be female at birth. A transgender girl is a person who has a lasting, persistent female gender identity though that person's sex was determined to be male at birth.
- ****Cisgender** – Refers to a person who identifies with the sex that person was determined to have at birth.
- **Gender Expansive** - is term broadly applicable to individuals whose gender identity and gender expression presents outside of gender norms for their society or context.
- **Gender Dysphoria** - is a formal DSM -5 diagnosis in which, for at least a six-month period, an individual exhibits strong, persistent cross-gender identification as established through a variety of behaviors **and** persistent discomfort with his or her sex assigned at birth or sense of feeling inappropriate in the gender role of his or her assigned sex at birth.

I. *Doe v. Boyertown Area School District*, 897 F.3d 518 (3rd Cir. 2018)

NOTES:

- This case is precedential and applicable to all Pennsylvania public school entities;
- This was a revised panel opinion issued July 26, 2018, replacing an opinion issued June 18, 2018;
- Plaintiffs filed a Petition for *Certiorari* to the United States Supreme Court on Nov. 21, 2018, which is pending at this writing.

Summary

The Third Circuit Court of Appeals affirmed the decision to deny an injunction sought by cisgender plaintiffs. The plaintiffs wanted to prohibit Boyertown from continuing its practice of permitting transgender students to use the boys' and girls' locker rooms and restrooms aligned with their gender identity. Terminology used by the court is denoted in the terminology section above with a double asterisk (**). The Court found that "... under the circumstances here, the presence of transgender students in the locker and restrooms is no more offensive to constitutional or Pennsylvania-law privacy interests than the presence of the other students who are not transgender. Nor does their presence infringe on the plaintiffs' rights under Title IX."

Facts

The Court noted with approval that in implementing its practice, Boyertown adopted a protocol which:

- Required individual transgender students to meet with trained and licensed counselors who often consulted with additional counselors, building principals and school administrators;
- Once given permission, required the student to use only the facilities aligned with their gender identity and not to use those matching their sex assigned at birth. (Like all students, they could also use, but are not required to use, several single-user facilities.)

The Court also found Boyertown’s facilities adaptations to be a positive aspect in how they handled issues of student privacy:

- “Gang showers” were replaced with single-user showers with privacy curtains;
- Students must change for gym class, but need not use the girls’ or boys’ locker rooms;
- Students may change privately in single-user facilities, private shower stalls, or the team locker rooms;
- NOTE: Although not cited as one of Boyertown’s modifications, some public school entities have extended the stall doors in restroom areas to make them more private.

Legal Analysis

Constitutional Right to Privacy

The Court acknowledged that a person has a constitutionally protected privacy interest in his or her partially clothed body but held that it does not “protect” cisgender students from sharing restrooms and locker rooms with transgender students using facilities aligned with their gender identity. The constitutional right to privacy is not absolute: Only unjustified invasions of privacy by the government are actionable. Here, Boyertown students are **not** required to disrobe in front of any other students. Further, privacy is not the norm in school locker rooms and restrooms. These are spaces in which others are commonly in various stages of undress. The Court agreed with other cases that there is no greater risk of an invasion of privacy from a transgender student than from an “over curious” student who decides to sneak glances at classmates of the same biological sex. The Court found that policies which exclude transgender students from using facilities aligned with their gender identities are seriously dangerous to the health and well-being of transgender individuals who have a suicide rate nine times higher than the general population. It held “the School District’s policy served a ‘compelling state interest in **not discriminating** against transgender students’ and was narrowly tailored to that interest.”

Discrimination/Title IX

The Court agreed with Boyertown that “barring transgender students from restrooms that align with their gender identity would itself pose a potential” Title IX sex discrimination violation. Further, it is not okay to **require** them to use single-user facilities that are open to all students. It would be a stigmatizing action which “... would very publicly brand all transgender students with a scarlet ‘T,’ and they should not have to endure that as the price of attending their public school. ... requiring transgender students to use single user or birth-sex-aligned facilities is its own form of discrimination.” The Court also rejected the concept that the cisgender plaintiffs were being subjected to a sexually discriminatory hostile environment. Boyertown’s policy is gender-neutral. All students may use the bathrooms and locker rooms that align with their gender identity. There is no evidence that the transgender students using the restrooms and locker rooms aligned with their gender

identity behaved in an inappropriate, harassing or invasive manner. They simply used the facilities the same way other students use these facilities. Given Boyertown's facility modifications and access provided to team locker rooms, it is even more evident that there was no hostile environment discrimination in this matter.

Full Third Circuit Opinion in Boyertown:

<http://www2.ca3.uscourts.gov/opinarch/173113ppan.pdf>

II. Pennsylvania Human Relations Commission (PHRC) Guidance – Aug. 2, 2018

- **This Guidance is applicable to all public school entities in Pennsylvania (as well as to employers, all other public accommodations, and in housing discrimination)**

Summary

Public school entities are subject to the Pennsylvania Human Relations Act (PHRA) which prohibits discrimination on the basis of sex. Using the definitions denoted by a single asterisk (*) in the terminology section above, PHRC has explained that in investigating the facts of individual complaints, it will generally accept, investigate and adjudicate cases under its jurisdiction pursuant to this guidance. PHRC indicates that where sex is a class protected from discrimination under the PHRA, this includes a **prohibition of discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity and gender expression**. PHRC does not include examples in the Guidance itself of how specific factual scenarios might be evaluated, however it expressed its intention to comply with the requirement that the provisions of the PHRA shall be construed liberally. PHRC also gives us indications how it will handle these cases in its response to comments on the proposed guidelines:

- **Privacy:** Concerns about transgender students' use of bathrooms/locker rooms aligned with their gender identity. PHRC does not know of any recognized privacy rights implicated here and cited *Doe v. Boyertown Area School District* on this point.
- **Definition of "sex":** Arguments that the definition of sex can only be the biological sex assigned at birth and that PHRC is expanding this improperly. PHRC notes that the understanding of the definition of "sex" in the anti-discrimination laws has evolved over many years beyond "sex assigned at birth" to include sex stereotyping and same-sex harassment and that it is the provisions of our laws and not the original intent that govern this definition.
- **Increased Assaults/Safety Concerns:** There is no authority or data to support that there will be an increase in sexual assaults if cisgender women and children must share restrooms with transgender women.
- **Surgery Prerequisite Position:** A transgender person need not first undergo gender reassignment surgery to be protected under the law and this Guidance.

PHRC Full Guidance (a separate guidance applies to post-secondary institutions):

<https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf>

Comment and Response Document:

<https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/FINAL%20Comment%20Response%20Document%20Sex%20Discrimination%20Guidance%20APPROVED.pdf>

III. Transgender Students' Bases for Lawsuits and Administrative Complaints

A. Title IX Generally

1. *Prohibitions and remedies:* Title IX prohibits discrimination in government programs on the basis of sex. Public schools are subject to Title IX and complaints may be investigated by the U. S. Department of Education Office for Civil Rights (OCR). In addition, individuals may file private lawsuits claiming violations of Title IX. In private lawsuits, remedies for successful plaintiffs can include injunctive relief, compensatory damages, attorneys' fees and costs. Title IX regulations permit but do not require designation of sex-segregated facilities such as girls' and boys' bathrooms and locker rooms.
2. *What is the definition of "sex," for purposes of Title IX coverage?* Title IX does not define the word "sex." Some cases have focused closely on this issue with one party claiming that transgender students are not protected based under Title IX because they are biologically a particular sex and it is not sex discrimination to require a "biological female" to use the girls' restroom. Others argue that it is discrimination based on sex because the student's gender identity is male, and he is prohibited from using the boys' restroom. However, these disputes over the definition of the word "sex," while relevant, are less the focus of some recent court decisions. Instead, parties are increasingly relying on cases identifying different ways to prove sex discrimination that have evolved in the courts, often in employment discrimination cases.

B. Pennsylvania Human Relations Act

This state law prohibits discrimination on the basis of sex (as well as numerous other protected classes) in employment, housing and places of public accommodation. "Public Accommodation" includes kindergartens, primary and secondary schools, high schools, academies, colleges and university, extension courses and all educational institutions under the supervision of this Commonwealth," among other things. 43 P.S. §954. PHRC enforces this law and its August 2018 guidance, discussed above, establishes its parameters for accepting, investigating and adjudicating claims of discrimination based on sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity and gender expression.

C. Sexual Stereotyping Basis for Sex Discrimination Claims (Applicable to Title IX and PHRA claims)

In 1989, the U.S. Supreme Court recognized that making employment decisions based on sexual stereotyping could violate Title VII's prohibition against sex discrimination. Although her partners in her local office strongly supported the plaintiff's being made a partner in a nationwide accounting firm, others successfully argued consideration of her for partner should be put on hold. In part, this was based on comments that she was sometimes "overly aggressive, unduly harsh, difficult to work with and impatient with staff." She was described as "macho"; as overcompensating for being a woman; as being unladylike because she used profanity; as needing a charm school course; and as being somewhat masculine. When her partnership was put on hold, she was told that to improve her chances she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry." The Court found there was sufficient evidence to support the plaintiff's claim that her gender played a role in the adverse employment decision because she was expected to behave differently from the candidates who were granted partnership, all men, in order to be promoted. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

While the federal and Pennsylvania anti-discrimination laws do not protect individuals from discrimination based on sexual orientation, sex stereotyping arguments have been used successfully by homosexual plaintiffs to pursue sex discrimination cases based on arguments that their failure to live up to gender stereotypes resulted in an adverse employment action. *Prowel v. Wise Business Forms, Inc.*, 579 F. 3d 285 (3rd Cir. 2009).

Transgender students throughout the United States have successfully pursued Title IX claims alleging that they are being subjected to discriminatory sexual stereotyping.

D. Hostile Environment Sex Discrimination

Title IX sex discrimination claims may encompass a sexual harassment hostile environment claim, which requires the plaintiff to prove several elements to prevail.

- In a Title IX case, the discriminatory harassment complained of must be based on the student's sex. (Liability may be attributed to a school district if it has **not** put into place a widely disseminated policy prohibiting discriminatory harassment and implementing an effective complaint procedure.);
- The behavior complained of must be unwelcome to the plaintiff;
- The behavior complained of must be so severe, pervasive and **objectively** offensive that it undermines and detracts from the plaintiff's educational experience, thus denying him or her equal access to an educational institution's resources and opportunities.

These cases are very fact-driven and require consideration of the totality of the circumstances including things such as the ages of the alleged harasser and victim and nature and number of incidents. A violation will not be based on simple acts of name-calling and teasing among students in school, even where it is arguably gender-based. However, a pattern of this kind of behavior over a period of time could become a violation.

In the U.S., some transgender students have successfully shown that requiring them to use facilities based on sex assigned at birth rather than gender identity constitutes hostile environment sex discrimination.

E. U.S. Constitutional Claims of Equal Protection Violations



Equal Protection Clause cases arise when the government takes action that affects identifiable classes of people differently. Courts must consider whether the classifications were permissible in connection with the purpose of the government action. There are three different levels of review used by the courts, depending on the classification used.

- Lowest level – rational basis

Generally, a court will look at whether the government had a rational basis for taking action based on a particular classification to carry out a legitimate governmental purpose. For example, citizens must be 18 years old to vote and those under 18 may not vote. The rational basis for this age cutoff might be that by 18, students have typically completed all or most of their secondary education and are mature enough to become informed voters.

- Highest level – strict scrutiny

When classifications are based on peoples' race or national origin, they are subject to the most serious level of review, "strict scrutiny" and the government must prove that the reasons for the racial classification are:

- clearly identified; and
- unquestionably legitimate; and
- narrowly tailored to further compelling government interests.

For example, this strict scrutiny level of review has applied to university programs seeking to increase diversity by considering an applicant's race as one of many "plus" factors in admissions if the applicant's race would increase diversity.

- Middle level – heightened or intermediate level of scrutiny

Under certain circumstances, government action involving minority or politically powerless groups of individuals will be subjected to something between a rational basis standard and a strict scrutiny standard. Sex is one classification which is entitled to this heightened scrutiny. To fall under this standard, the class affected must be able to show a history of discrimination impacted it; that the classification frequently has no bearing on their contributions to society or ability to perform; and that the class exhibits obvious and immutable or distinguishing characteristics that define them as a discrete group. When government makes decisions, or takes action affecting groups entitled to an intermediate level of scrutiny, it must show the classification:

- serves important governmental objectives; and
- uses the least discriminatory means to achieve the objective.

For example, this standard applied when women sought admission to Virginia's only single-sex college, Virginia Military Institute.

In Equal Protection disputes brought by transgender students, there is generally disagreement over the level of review to apply as between the rational basis and heightened scrutiny standards. Thus far, courts have found that the heightened scrutiny review applies either because decisions relating to transgender students' use of sex segregated facilities are based on sex or because transgender individuals' meet the factors necessary to entitle them as a class to enjoy this heightened level of review. In other words, these lower courts

generally agree that when school districts or other governmental entities make decisions or take actions which limit a transgender student's rights, they must be prepared to show this serves important governmental objectives or uses the least discriminatory means to achieve the objective.

F. Americans with Disabilities Act/Section 504/PHRA

When a student diagnosed with gender dysphoria, a recognized disability, seeks reasonable accommodations, he or she might have a viable discrimination claim against a school district under the ADA or Section 504 if a school district fails to accommodate him or her.

IV. Claims by Cisgender Students

In Pennsylvania, the decision of the Third Circuit in *Boyertown* rejected cisgender plaintiffs' claims of a violation of their constitutional right to bodily privacy and hostile environment sex discrimination by virtue of the district's allowing transgender students to use the facilities aligned with their gender identity. This decision is broad enough to capture most issues typically raised by cisgender students.

V. U.S. Department of Education

Feb. 22, 2017 Guidance from U.S. Departments of Justice and Education

Citing the need to give guidance to the U.S. Supreme Court in the *G.G.* case from Virginia (discussed below), the Trump administration issued a two-page Dear Colleague letter withdrawing the Obama administration's May 13, 2016, statements of guidance and policy on transgender students as well as a similar policy letter on the topic issued by the Department of Education on Jan. 7, 2015. The letter states, "These guidance documents take the position that the prohibitions on discrimination 'on the basis of sex' in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process." Citing a need for local school districts and states to take a primary role in decisions regarding educational policy, the significant amount of litigation engendered on both sides of this issue, and the fact that there was an injunction in place against enforcement of the Obama administration guidance, the Trump administration withdrew and rescinded the Obama administration guidance. "The Departments thus will not rely on the views expressed within them."

The letter emphasizes that students have the right to continued protection from discrimination, bullying and harassment. "All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms." However, it does not further suggest an interpretation of existing law or add to existing law in any way.

VI. Pennsylvania Policy matters affecting transgender students

A. Birth Certificates, Aug. 8, 2016 – Policy permitting birth certificate to be amended to reflect different gender.

<http://www.transequality.org/sites/default/files/docs/PA-BC-Policy.pdf>

B. PIMS Gender Reporting – Pennsylvania Department of Education Pennsylvania Information Management System (PIMS) Manual, Ver 1.3, Vol. 1, p. 19 on reporting student gender:

A student or parent/guardian may request a change of the student’s listed gender, first name or middle name on their records. If this request occurs, the local education agency may report the student’s preferred information using the following guidelines:

- The change must first be made in PASecureID.
- The PIMS data (first name, gender, and date of birth) must match what is reported in PASecureID.
- The student’s name and gender information reported in prior school years will not be updated.
- The student’s PASecureID will not be changed.

<https://www.education.pa.gov/Documents/Teachers-Administrators/PIMS/PIMS%20Manuals/2018-2019%20PIMS%20Manual%20Vol%201.pdf>

VII. PSBA Policies and Legal Conclusions on the Current State of the Law

PSBA Policy Services writes and issues legally compliant policies for school districts to use. The law on transgender students continues to evolve. PSBA concludes that:

- Policies or practices prohibiting transgender students from using facilities aligned with their gender identity and any policies limiting transgender students’ rights to be free from sex or disability discrimination will almost certainly be struck down. No successful arguments to the contrary have been made in the United States to date;
- Public school entities may, but are not yet required by state or federal law or regulation or by the courts to adopt policies prohibiting discrimination against transgender students;
- While PSBA cannot yet state a policy is legally required, public schools are urged to:
 - develop procedures to work with transgender students to meet their medical and legal needs; and
 - to work with cisgender and transgender students with privacy concerns, *e.g.* by providing them with single-user or partitioned changing or toileting areas if they are uncomfortable changing or toileting in open locker areas.

We urge public school entities to be sensitive to the needs of transgender students, a vulnerable community who need protection and support and to be aware that the legal landscape presently favors the legal positions of transgender students, recognizing their right to be free from gender stereotyping and to be afforded Equal Protection of the law.

