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## **Pennsylvania School Boards Association**

### **Transgender Students Legal Update (October 11, 2019)**

**This update includes important information about the U.S. Supreme Court's denial of certiorari on appeal from the U.S. Third Circuit Court of Appeals in *Doe v. Boyertown Area School District*.**

*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. **It is essential that public school districts in Pennsylvania stay informed about the evolving legal landscape in the area of transgender students' rights, and be aware of the trend in favor of supporting those students that has been emerging from court decisions and state agency guidelines.***

#### **Bottom Line up Front:**

As discussed in more detail below, the state of the law regarding the rights of transgender students and what public schools may or must do to accommodate their needs continues to evolve and remains unsettled. Matters such as using names and pronouns consistent with gender identity when addressing or referring to transgender students, and prospectively in school records have not been as controversial as have matters such as the use of restrooms and locker rooms aligned with gender identity rather than with biological sex determined at birth.

At this point in time, in numerous lawsuits in Pennsylvania and other states, the trend has been that courts have been ruling in favor of transgender students challenging public school policies or practices that deny them the use of restrooms and locker rooms consistent with their gender identity. PSBA is aware of no cases in the nation in which such policies or practices have been successfully defended against legal challenge. And, in cases where cisgender students have sued to challenge school policies or practices that allow transgender students to use the facilities aligned with their gender identity,

courts have consistently rejected those challenges and upheld such policies or practices. Again, PSBA is aware of no cases in the nation in which such policies or practices have been successfully challenged in court.

In the meantime, in August 2018, the Pennsylvania Human Relations Commission (PHRC) issued non-regulatory guidance declaring that in its enforcement of the Pennsylvania Human Relations Act's prohibition of discrimination based on sex, the PHRC will apply the term "sex" to encompass discrimination on the basis of sexual orientation, gender identity and gender expression.

Consequently, it appears public schools that choose to fully accommodate transgender students are on fairly safe legal ground, whereas public schools insisting on limiting them to bathrooms and locker rooms aligned with biological or birth sex are not---they are more likely to lose in court if sued, and at risk of PHRC enforcement action.

Despite this trend, the law remains unsettled because there is not yet judicial precedent controlling throughout Pennsylvania mandating that schools fully accommodate transgender students in this way. For that reason, PSBA is not yet recommending a specific policy approach. Adopting policy without a clear legal mandate to do so, on a sensitive subject that is highly controversial in many communities, may needlessly generate controversy and shine an unwanted spotlight on an extremely vulnerable population of students who often are the targets of severe harassment and bullying, in addition to inviting lawsuits.

Until legal requirements are more definitive, PSBA urges schools to continue work with transgender students and their families discreetly on an individual case by case basis, to respectfully and creatively find ways to address their needs, while also taking measures to ensure that enhanced individual privacy options are available to all students. Finally, it is critical to have policies and procedures in place to protect all students from harassment and bullying, keeping in mind that transgender and other LGBT students are particularly vulnerable and frequently singled out for abuse.

### **Terminology**

The following are terms frequently used in court decisions and other discussions of LGBT and sex discrimination issues, although definitions can vary somewhat. These are provided to assist in understanding what is discussed in this update. A single asterisk ( \* ) indicates a definition provided in Guidelines issued in August 2018 by the Pennsylvania Human Relations Commission. A double asterisk ( \*\* ) indicates a definition used by the Third Circuit in its opinion in *Doe v. Boyertown Area School District*.

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- **\*\*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*, 837 F.3d 518 (3rd Cir. 2018), petition for certiorari denied, 2019 WL 2257330, May 28, 2019.**

**Summary**

On May 28, 2019, the U.S. Supreme Court denied a petition for certiorari seeking to appeal the decision of the U.S. Court of Appeals for the Third Circuit Court of Appeals that upheld the practice of the Boyertown Area School District of accommodating transgender students by allowing them to use locker rooms and restrooms consistent with their gender identity. The Third Circuit decision affirmed the ruling of the U.S. District Court for the Eastern District of Pa. denying an injunction sought by four cisgender students who brought suit against the school district claiming that the school district's practices violated their constitutional right to privacy and discriminated against them on the basis of sex in violation of Title IX.

The unanimous three-judge panel of the Court of Appeals issued a decision on July 26, 2018 agreeing with the District Court that there was no likelihood that the plaintiff students could succeed on their claims, and further agreeing 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." An important consideration in both the District Court and Court of Appeals rulings was that the school district took measures to ensure that there were individual private restrooms and changing areas available to any student who was uncomfortable or wanted enhanced privacy. Among other measures:

- "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.

Also significant was that in implementing its practice, the school district followed a protocol which:

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- 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.)

PROCEDURAL NOTES:

- The July 26, 2018 Court of Appeals opinion is a revised version replacing an opinion the panel originally issued June 18, 2018.
- The full Court of Appeals denied the plaintiff's petition for rehearing before the full court ("en banc"), with four judges dissenting.
- The revised opinion retreats somewhat from conclusions that the school district would have violated Title IX if it failed to accommodate the transgender students as it had been doing.
- The decision is precedential and controlling in all lower federal courts within the Third Circuit (Pennsylvania, New Jersey, Delaware and The Virgin Islands).
- Plaintiffs filed a Petition for *Certiorari* to the United States Supreme Court on Nov. 21, 2018, which was denied on May 28, 2019.
- The Supreme Court's refusal to hear the Plaintiffs' appeal leaves the Third Circuit's July 26, 2018 opinion undisturbed, and the case returns to the U.S. District Court for further proceedings.
- If the plaintiffs choose to go forward with the case the District Court would next rule upon the school district's motion to dismiss, followed by discovery if the motion to dismiss is not granted. If the case is dismissed, the plaintiffs could appeal again to the Third Circuit.
- However, on September 25, 2019, the plaintiffs announced that they were dropping the lawsuit and would not proceed further, ending the case.

**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>

or

[https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1600&context=thirdcircuit\\_2018](https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1600&context=thirdcircuit_2018)

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

- **The PHRC 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 many forms of discrimination, including discrimination on the basis of sex. In the Guidance, the PHRC expresses its interpretation that whenever the PHRA prohibits discrimination on the basis of sex, that includes **discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity,**

**gender transition, gender identity and gender expression.** The Guidance itself does not have the force of law in the way a statute or regulation would, but the Guidelines explain that the PHRC intends to accept, investigate and adjudicate cases under its jurisdiction alleging discrimination on the basis of sex using this broad understanding of the term "sex". The Guidance does not include examples of how specific factual scenarios might be evaluated, but in a separate document responding to comments submitted during a public comment process, there are clues in the PHRC responses addressing a number of specific concerns raised in the comments:

- **Privacy:** In response to concerns about the privacy rights of other students when transgender students' are allowed use of bathrooms/locker rooms aligned with their gender identity, PHRC cites the Third Circuit's *Doe v. Boyertown Area School District* decision concluding that this would not violate recognized privacy rights under the U.S. Constitution, and that on balance the discomfort felt by cisgender students cannot compare to the harm caused to transgender students on this point.
- **Definition of "sex":** In response to assertions 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, pointing to federal case law dating back to 1989.
- **Increased Assaults/Safety Concerns:** PHRC responds that 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.
- **Need for Sex Change Surgery:** PHRC responds that protection under the PHRA and the Guidance is not dependent upon gender reassignment surgery and exists whether or not such surgery has occurred.

NOTE: In February 2019, construing a state law similar in pertinent respects consistently with the PHRC guidance, the Supreme Court of Missouri ruled that discrimination on the basis of sexual orientation and gender identity constituted "sex" discrimination in violation of the Missouri Human Rights Act.

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>

PHRC Comment Response Document:

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

### **III. Legal Basis for Claims in Transgender Students' Lawsuits and Administrative Complaints**

#### **A. Title IX Generally**

- *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.
- *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 expressly 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 to which this heightened scrutiny is applied. 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. Pennsylvania Lawsuits by Cisgender Students Challenging Policies Allowing Transgender Students to Use Bathroom and Locker Rooms Consistent with Gender Identity**

In Pennsylvania, the decision of the Third Circuit in *Boyertown* (discussed above) 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 address most issues typically raised by cisgender students.

#### **V. Pennsylvania Lawsuits by Transgender Students Challenging Policies Requiring Use of Bathrooms/Locker Rooms Consistent with Sex Determined at Birth**

PSBA is aware of two lawsuits to date in Pennsylvania in which transgender students sued in federal court to challenge policies prohibiting them from using bathrooms and locker rooms consistent with their gender identity, and instead requiring the use of bathrooms/locker rooms consistent with sex determined at birth. In both cases the U.S. District court ruled in favor of the transgender students at early stages of the litigation, denying the school district's motion to dismiss and concluding that the transgender students had adequately state claims on which they could prevail based on Title IX and the Equal Protection Clause of the U.S. Constitution. The Third Circuit has not yet ruled on this kind of claim.

- ***Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 284 (W.D. Pa. 2017)**

Several transgender students sued Pine-Richland School District in the U.S. District Court for the Western District of Pa., challenging the school board's adoption of a requirement that students use either the facilities that correspond to their biological sex or unisex facilities. The students alleged violation of Title IX and the Equal Protection Clause of the United States Constitution. In February 2017, the court issued a preliminary injunction against the school district and in favor of the students, holding they are likely to succeed on the claim that forcing them to use restrooms which either are single-user or those corresponding with their biological sex violates their right to Equal Protection under the law as guaranteed by the Fourteenth Amendment. In July 2017, this case was settled, with the school board voting to rescind the policy. The students received monetary settlements and legal fees and the district agreed to update its anti-discrimination policy to include gender identity.

- ***A.H. by Handling v. Minersville Area Sch. Dist., 2019 WL 4875331 (M.D. PA 2019)***

The Court denied Minersville’s motion for summary judgment and partially granted an elementary school student’s (A.H.), motion for summary judgment in this case involving a claim Minersville Elementary School prohibited A.H. from using girls’ restrooms at school, and at school sponsored events, in violation of Title IX’s prohibitions against sex discrimination and the Equal Protection Clause of the U.S. Constitution. A.H. was born a biological boy but identifies as female and she lives “every aspect of her life” as a girl. She is diagnosed with Gender Dysphoria. During kindergarten, A.H.’s mother notified the school of A.H.’s diagnosis and A.H. transitioned to wearing girl’s clothing, had her gender and name changed on her birth certificate and the faculty used her chosen female name. In kindergarten, A.H. used the unisex bathroom attached to her classroom.

School officials, A.H.’s treating psychologist and A.H.’s mother met prior to her first grade year to discuss A.H.’s needs in first grade. There is disagreement on what they decided as to her restroom use, with Minersville contending she was to use single user “unisex” restrooms and her mother contending she wanted A.H. to be able to use the girls’ restrooms. Apparently, A.H. used the single user restrooms in first grade until May 2016, when the U.S. Department of Education issued a guidance letter indicating it interpreted Title IX as requiring schools to permit transgender students to use facilities aligned with their gender identity. When the guidance letter came out, A.H. was immediately permitted to use the restroom she preferred (girl’s or unisex) while at school. This has continued to be her experience in elementary school even after the May 2016 guidance was withdrawn in February 2017.

The Court found that there is a material dispute of fact as to whether Minersville discriminated against A.H., with regard to her restroom access on school premises in first grade, prior to May 2016. “Here, there is no evidence that A.H. ever attempted to use the girls’ bathroom in first grade, and the record evidence places in dispute whether A.H. ever requested to use the bathroom at school that aligned with her gender identity, whether A.H. even wanted to use the girls’ bathroom at school or was more comfortable using the unisex bathroom, and whether she would have been subject to any discipline if she used, or attempted to use, the girls’ bathroom. .... [A]lthough A.H. ‘was to use the unisex’, there was nobody monitoring her use ... [and] any student could use the unisex bathrooms.” The Court noted that a policy requiring a transgender student to use single-user restrooms and prohibiting the use of restrooms aligned with their gender identity

constitutes discrimination based on sex. This is because discrimination based on gender nonconformance/sex stereotyping has been found to constitute discrimination based on sex since the U.S. Supreme Court decided *Price Waterhouse v. Hopkins* in 1989.

Turning to A.H.'s Equal Protection claims relating to her use of in school girls' rooms prior to May 2016, the Court again found this cannot be resolved through summary judgment because of the material dispute of facts. However, it indicated Minersville cannot prevail on an Equal Protection claim by raising the need to protect the privacy of other students, endorsing other courts' findings that, "A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time."

Because the facts are in dispute whether Minersville had and enforced a policy which required A.H. to use the unisex bathroom and prohibited her use of the girls' room prior to May 2016, the Court denied summary judgment on this issue under both Title IX and the Equal Protection Clause.

The court found the facts regarding A.H.'s restroom usage on field trips are undisputed. Minersville unilaterally required A.H. to use a men's room on a kindergarten field trip, which A.H.'s mother challenged upon learning about this. Minersville contended that it had A.H. use the men's room in private after all the boys came out and so it met A.H.'s needs. At the end of first grade, Minersville notified A.H.'s parents that it intended to require A.H. to use a single user restroom on a field trip, which her mother handled by chaperoning the trip and taking A.H. to the women's room, without incident. While A.H. has consistently used the girls' restroom on school premise since May 2016, the stated field trip policy that she use single user or men's restrooms remains unaltered, unless her mother chaperones the trip. The Court agreed that this discriminates against A.H. on the basis of gender non-conformity and sex stereotyping. It explained, "... all students except for A.H. can use the restroom corresponding with his/her gender identity. The District has singled-out A.H. and subjected her to intentionally discriminatory treatment where it has purposely excluded her, or attempted to exclude her, from using restrooms on field-trips that all similarly situated students and classmates are permitted to use."

Regarding her Equal Protection claims, the Court further found that as to the field trip issue, Minersville failed to offer any important government objectives as to why A.H. could not use the girls' rooms at public facilities. It

discredited Minersville's assertion that students on a field trip represent the district and that there were safety and privacy issues, for both A.H. and other students, associated with having a biological male use a girls' room while in a public facility. Minersville witnesses acknowledged they did not offer guidance on how other students' use of the restroom facilities would be handled on field trips. Their mere hypothesis about the potential negative impact of A.H. using a women's room on a field trip is insufficient to support treating her differently from her classmates. The Court noted by the time of the kindergarten field trip, A.H. presented as female and wore girl's clothing, making it more likely she would be endangered by being required to use the men's room. The Court granted summary judgment to A.H. and denied summary judgment for Minersville on this field trip issue pursuant to Title IX and the Equal Protection Clause.

The Court noted that plaintiffs have long had a private cause of actions for damages under Title IX and found that the parties dispute the extent to which A.H. experienced any physical or emotional distress in connection with Minersville's actions or inactions relating to her bathroom use and this would be a matter for a factfinder to decide.

The Court rejected A.H.'s request for broad injunctive relief which would uniformly require Minersville to afford all transgender students the right to use facilities aligned with their gender identity, finding there is no evidence of record regarding other transgender students in the district. It also found that it could not yet enter injunctive relief as to use of restrooms on school premises since she had not yet prevailed on this claim and deferred a ruling on this. However it granted an injunction to A.H. herself that she must be permitted to use bathrooms corresponding to her gender identity when on school field trips, whether or not her mother is present.

## **VI. U.S. Department of Education Position**

### *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.

## **VII. 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>

NOTE: An amended birth certificate should not be thought of as a prerequisite to other accommodations for transgender students.

- 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>

### **VIII. Litigation in Other States**

VIRGINIA. *Grimm v. Gloucester County School Board*, No. 15-54, 2019 WL 3774118 (E.D. Va. Aug. 9, 2019), appeal filed, No. 19-1952 (4th Cir. filed Sept. 3, 2019). The district court granted a former student, who is transgender, a permanent injunction, ordering the school district to amend his student records to reflect his male status. The court also granted the former student's motion for summary judgment, while denying the school board's motion for summary judgment. The district court held that the school board's policy prohibiting the former student, while he was a high school student, from using the boys' bathroom and locker room violated both Title IX and Fourteenth Amendment equal protection Clause. Furthermore, it held that the board violated the former student's rights under Title IX and the Fourteenth Amendment's Equal Protection Clause by refusing to update his transcript to reflect his male status.

NOTE: The National School Boards Association (NSBA) Office of General Counsel maintains a chart tracking litigation nationwide relating to transgender students, which usually can be found on the NSBA website at <https://www.nsba.org>. The NSBA website is being reconfigured at this time and a publicly accessible direct link to the chart is not currently available. A direct link to the chart will be added here when it becomes available. Members of the NSBA Council of School Attorneys can find the chart by logging into the COSA Community and Research Database at <http://community.nsba.org/cosa/home>, and searching with the terms "transgender litigation".