Accommodating Transgender Students and Staff:
Uncertain Requirements, Best Practices and Options to Consider

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For nearly three decades, John has represented public school districts, colleges and universities, as well as other non-profits and businesses in the education sector. He helps clients navigate the complexities of federal and state constitutions, statutes and regulations in order to promote their institutional goals, while ensuring compliance and minimizing risks, and he also handles OCR investigations and major litigation matters.
An Emerging Issue:

- An increasing number of people are openly living with a gender identity different than the one assigned to them at birth.
- There remains some uncertainty about whether and the extent to which gender identity is a protected category under federal civil rights laws.
- As a result, there is continued uncertainty about what a school’s obligations are under the law in order to accommodate students who identify with a gender different than their biological assignment.
Do you know the difference between gender identity, sexual orientation, gender nonconformity and gender transition?
Terminology

- **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.

- **Gender nonconformity** refers to one’s gender expression, gender characteristics, or gender identity that does not conform to gender stereotypes.
Terminology (cont.)...

- **Gender stereotypes** refers to stereotypical notions of masculinity and femininity, including expectations of how boys or girls represent or communicate one’s gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics.

- **Gender transition** refers to the experience by which a transgender person goes from living and identifying as one’s assigned sex to living and identifying as the sex consistent with one’s gender identity. A gender transition often includes a social transition, during which an individual begins to live and identify as the sex consistent with the individual’s gender identity, with or without certain medical treatments or procedures.
Terminology (cont.)…

- **Transgender** describes an individual whose gender identity is different from the individual’s assigned sex. Transgender boy and transgender male refer to an individual assigned the female sex at birth who has a male gender identity. An individual can express or assert a transgender gender identity in a variety of ways, which may but do not always include specific medical treatments or procedures. Medical treatments or procedures are not considered a prerequisite for one’s recognition as transgender.

What we do know about the law …

First principles:

- Title IX of the Education Amendments Act of 1972 ("Title IX") prohibits discrimination of basis of sex in the administration of any educational program receiving federal funds. 20 U.S.C. § 1681.

What we do know about the law …

Implications:


- Decisions under Title VII often inform the courts interpretations of Title IX. See *Olmsted L.C. ex rel. Zimring*, 527 U.S. 581, 617 n.1 (1999).
What we do know about the law …

Extensions:

The United States Department of Education Office for Civil Rights (“OCR”) has provided the following guidance:

- “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.” Questions and Answers on Title IX and Sexual Violence, B-1 and B-2 (Apr. 2014)
What we know about the law...

Extensions (cont.):

- And, OCR investigates such complaints and has found violations and/or entered into resolution agreements consistent with this interpretation. See e.g., Resolution Agree; between OCR and Downey Unified School District (October 14, 2014).
What we know about the law…

Extensions (cont.):

While the U.S. Supreme Court has not directly addressed the question of discrimination on the basis of gender identity under Title IX and or Title VII, lower federal courts have at times disagreed with OCR for example:

- The Plaintiff has appealed.
What we know about the law....

Extensions (cont.):

Department of Education’s Title IX Guidance Letter:

- Issued December 1, 2014
- States that “under Title IX, a [school] must generally treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.”
Recent legal developments:

- *Grimm v. Gloucester County School Board* (E.D. Va., 2015)
  - High school student presented and identified as male and was not permitted to use male restroom
  - Student brought suit, citing to Department of Education’s recent Title IX guidance letter
  - Court favored school board, reasoning Department of Education could not create “de facto a new regulation through the use of a mere letter and guidance document”
  - The case is being appealed
What we know about the law…

Extensions (cont.):

- OCR’s legal contributions via resolutions and settlement approval
  - Arcadia Resolution
  - Downey Resolution
  - Palatine Settlement
What we know about the law...

Extensions (cont.):

- **The Arcadia Resolution (2013)**
  - **Facts:** Complaint alleged that the District prohibited a female student, who consistently identified as a male, from accessing male restrooms and locker rooms and the male student cabin during a school-sponsored overnight academic camp.
  - **Terms of the Resolution:**
    - The student was to be provided access to male facilities.
    - The District will “treat the Student the same as any other male student in all respects.”
    - The District was ordered to revise all of its policies, procedures, etc. to specifically include gender-based discrimination as a form of sex discrimination and state that this includes gender identity.
What we know about the law...

Extensions (cont.):

- **The Downey Resolution** (2014)
  - **Facts:** The complaint alleged facts spanning many years, including that the student—a biological male with a female gender identity—was not permitted to wear makeup in elementary school, even though other girls were, and was consistently subject to peer harassment due to her transgender status.
  - **Terms of the Resolution**
    - The District was ordered to remove all disciplinary action on Student’s record related to her nonconforming gender identity.
    - The District was ordered to revise its policy and complaint procedures related to sexual and gender-based harassment complaints.
    - The District “will continue to treat the Student the same as other female students in all respects.”
What we know about the law…

Extensions (cont.):

OCR’s Palatine Letter and Settlement (2015)

- **Facts**: A student who identified as female brought suit because she was not permitted to change in the female locker room for athletic events or gym class but was given her own locker room, which was down a 75-foot hallway away from the gym
  - The OCR issued a letter on November 2, 2015, finding that the school district violated Title IX

- **Terms of the settlement**
  - The School must provide the student access to all female facilities
  - The District must install sufficient privacy curtains within the girls’ locker rooms
  - Provide reasonable alternatives for any student requesting additional privacy
What we know about the law…

Extensions (cont.):

- Factors the OCR considered were:
  - The facilities were not comparable
  - The student was often late to class because of the distance of the private locker room, which she found embarrassing
  - The student would have changed in private if she had been permitted to use the girls’ locker room; and
  - Gym was a mandatory class to graduation, and the district allowed the student to play on female sports teams
Does your state law offer some form of protection for transgender persons?
What some states & districts are doing...

Example of Minnesota State High School League

- At the end of 2014, approved a policy that allowed transgender students to play on the sports teams consistent with the gender they identify with
- The policy permits transgender students to appeal a school district's decision not to let them play on a team if they can provide
  - Evidence of their gender identity, and
  - A “written statement from an appropriate health-care professional”
What some states & districts are doing...

- In March 2014, **Shorewood School District** became the first Milwaukee area district to implement a policy related to transgender students.
- The policy requires teachers to use a student’s preferred name and pronoun.
- Additionally, the policy allows students to use bathrooms and play on sports teams consistent with their gender identity.
- Gender neutral bathrooms are also available.
What some states & districts are doing…

- **St. Paul** has adopted a similar policy to Shorewood
- The policy also includes instructions to teachers to not separate students by gender unless there is a compelling reason to do so
What some states & districts are doing...

- **New York State** issued the *Dignity for all Students Act of 2012*
  - The Act requires schools to protect students from discrimination based on gender, including gender identity and gender expression

- **Hamburg School District** adopted a policy allowing students to use bathrooms and locker rooms consistent with their identified gender in December, 2015
What some states & districts are doing...

- **Seattle Public Schools** enacted a *Nondiscrimination and Affirmative Action: Transgender and Gender Nonconforming Students Procedure* in February, 2015

- Students are given the right to be addressed by a name/pronoun that is consistent with their gender identity

- The District is required to change a student’s official records to reflect a change in legal name or gender upon receipt of documentation

- The policy states that students should be provided access to a restroom facility consistent with their gender identity, if consistently asserted
Best Practices in terms of accommodations…

Staff:

Dress and appearance:

- Apply dress codes to employees transitioning to a different gender in the same way that they are applied to employees of that gender.
Best Practices in terms of accommodations…

Staff (cont.):

Restrooms:
- All employees to use restrooms that match the employee’s gender identify (May consider single-use restrooms for all employees as an alternative to gender-specific facilities, but do not require anyone to use those facilities.)
Best Practices in terms of accommodations…

Staff (cont.):

Names and Pronouns:
Use the preferred name and gender pronoun of the employee.
Best Practices in terms of accommodations…

Students:

- Dress and appearance
- Restrooms
- Names and Pronouns

For all three, accommodations generally should be handled as they would be for an employee.
Best Practices in terms of accommodations…

**Students (cont.):**

**Locker Rooms:**
If student wants to use locker room corresponding to his or her gender identity consider:

a) Private areas with a public area;
b) Separate schedules;
c) Use of a nearby private area.
Best Practices in terms of accommodations…

Students (cont.):

Athletic teams:

- Generally permit students to participate in activities in accordance with the students' gender identity.
- Possible exception where a particular case raises questions about fairness of competition.
Best Practices in terms of accommodations...

Students (cont.):

- Student records and name changes
  - Some students may wish to have their names changed in the school records to reflect the gender they identify with
  - Some districts already have policies in place that allow for this in certain situations
    - *E.g.*, if the student has legally changed his/her name
      - Seattle public schools district (from earlier slide)
    - Be mindful of potential tension between minors and their parents regarding legal name changes
Practical Options to Consider…

1) Have someone sensitive talk to the people involved and find out what they want.
2) Tailor accommodations on a case-by-case basis where possible.
3) Manage the reactions of others.
4) Recognize that failure to provide accommodations and manage reactions could lead to litigation or an OCR complaint.
5) Think about the public relations angles and manage communications.
6) Consider the additional options that may exist for religiously affiliated institutions.
Questions?

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