

Transgender Students, the Courts, and OCR

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Sources of the Law

▶ Constitution



▶ Statutes

▶ Regulations

Title IX of the Educational Amendments of 1972

- "No 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 or activity receiving federal financial assistance."
- Title IX applies if any department in a school receives federal funding, the law applies to the entire school
 - In response to Grove City ruling, Congress passed the Civil Rights Restoration Act of 1987
- Today, institutions receiving any form of federal assistance must be in compliance with Title IX

▶ Court Decisions



▶ Agency Action



Title IX: Statutory Language



“No 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 or activity receiving Federal financial assistance. . . .”

20 U.S.C. § 1681(a) (1972)

Title IX: Regulations

“[I]n providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) Deny any person such aid, benefit, or service;
- (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;
- ...
- (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity”

34 C.F.R. § 106.31(b) (1980)



Title IX: Regulations

“A [school] 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 provided for students of the other sex.”

34 C.F.R. § 106.33 (1980)



What has been the Federal Government's Position?

- ▶ 2001 Revised Guidance re: Sexual Harassment:
 - Student-on-student harassment based on sexual orientation can be sexual harassment and/or gender-based harassment under Title IX, if it is “sufficiently serious to deny or limit a student’s ability to participate in or benefit from the program”
 - Student-on-student sex-stereotyping can be gender-based harassment under Title IX if it meets the same standard
- ▶ Dear Colleague Letter, Oct. 26, 2010:
 - Example: gay student bullied for “effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices” considered Title IX sex discrimination
- ▶ Dear Colleague Letter, Apr. 4, 2011:
 - Reiterates prohibition on gender-based harassment, which includes hostility based on sex-stereotyping
- ▶ Arcadia Resolution Agreement, July 24, 2013:
 - Agreed to “treat the Student the same as other male students in all respects,” policy implementation, and expert consultant
- ▶ 2014 Questions and Answers on Title IX and Sexual Violence:
 - OCR’s first mention of “transgender,” “gender identity,” and “gender-nonconforming” – in the context of prohibitions on sexual violence and student-on-student harassment
- ▶ Letter from OCR, Jan. 7, 2015:
 - States that Title IX prohibits discrimination on the basis of “gender identity and failure to conform to stereotypical notions of masculinity or femininity,” citing Title VII case law as support
 - First mention of bathroom use – treatment consistent with identity

OCR “Dear Colleague” Letter

▶ May 13, 2016 ◀

- ▶ Sex discrimination encompasses discrimination based on a student’s gender identity, including transgender status.
- ▶ To receive federal funds, cannot “exclude, separate, deny benefits to, or otherwise treat differently” transgender students
 - ▶ “a school must not treat a transgender student differently from the way it treats other students of the same gender identity”
- ▶ Considered to be “significant guidance”
= “does not add requirements . . . but provides . . . examples to inform recipients about how the Departments [of Justice and Education] evaluate whether [schools] are complying with their legal obligations”

OCR “Dear Colleague” Letter

▶ May 13, 2016 ◀

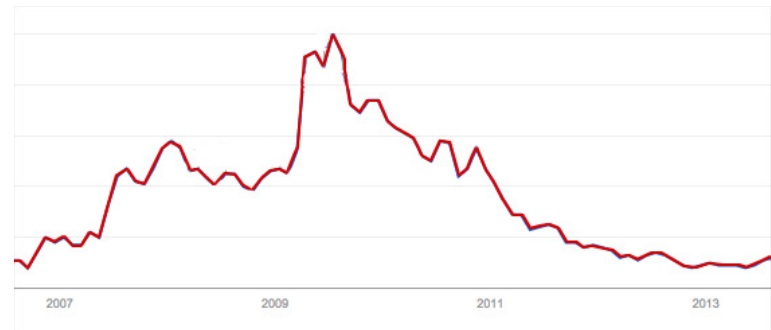
- ▶ Requiring identification documents reflecting gender identity may violate Title IX, if practical effect is limiting equal access
- ▶ Obligation to transgender students cannot be impacted by community members’ objections, discomfort, or concern
- ▶ Obligations to transgender students include:
 - ▶ Prompt action on harassment
 - ▶ Treatment of students consistent with gender identity
 - ▶ Use of preferred pronoun and name
 - ▶ Access to activities/facilities consistent with gender identity
 - ▶ NOT requiring use of single-occupancy facilities
 - ▶ Protecting privacy of records & personally identifiable information

On the restroom issue, this area of the law is in its infancy

- It's Uncharted



- It's Volatile



Most of the transgender student court cases that have **EVER** been filed, are still in progress and not finally decided.

Court Cases With Decisions

Seven and counting . . .

- ▶ *Doe v. Regional School Unit 26* (Maine - state court)
- ▶ *Johnston v. University of Pittsburgh* (Pennsylvania)
- ▶ *G.G. v. Gloucester County School Board* (Virginia)
- ▶ *Texas v. United States* (Texas)
- ▶ *Carcaño v. McCrory* (North Carolina)
- ▶ *Whitaker v. Kenosha Unified School District* (Wisconsin)
- ▶ *BOE of Highlands Sch. Dist. v. U.S. Dept. of Ed.* (Ohio)

Doe v. Regional School Unit 26, 86 A.3d 600 (Me. 2014)



- ▶ *Decided under Maine state law.
- ▶ School had originally allowed transgender girl to use girls' restroom.
- ▶ Permission revoked after a male student's grandfather instructed him to follow the transgender girl into girls' bathroom.
- ▶ Supreme Court of Maine held that this revocation violated transgender student's rights under Maine Human Rights Act.
- ▶ Under Maine statutory law, unlike Missouri's or Title IX, "sexual orientation" is expressly protected, and this expressly includes "gender identity or expression."

Johnston v. University of Pittsburgh, 97 F.Supp.3d 657 (W.D. Pa. 2015)

- ▶ Transgender male student at state university not allowed to use male restroom facilities and expelled for refusing to stop using them.
- ▶ Student's claims under Title IX and Equal Protection Clause dismissed by U.S. District Court.
- ▶ Case was settled by agreement while the appeal was pending; University's website now says that all students may use restroom that corresponds to gender identity.



G.G. ex rel. Grimm v. Gloucester County School Board, 822 F.3d. 709 (4th Cir. 2016)



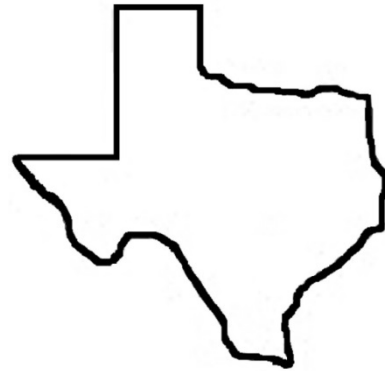
- ▶ High school student, transgender male, not allowed to use boys' restroom, sues in federal court.
- ▶ District court dismisses claim, holding that school didn't have to allow use of gender-identity restroom.

G.G. v. Gloucester (4th Cir. 2016) (continued)

- ▶ Court of Appeals for 4th Circuit **REVERSED**, held that the district had violated Title IX, and ordered injunction requiring school to allow use of identified-with restroom.
- ▶ Supreme Court **STAYED** the 4th Circuit's decision (136 S.Ct. 2442), pending the filing of a petition for writ of certiorari in Supreme Court.
- ▶ Petition for writ filed August 29, 2016.
- ▶ In the meantime, school does not have to allow use of identified-with bathroom.

Texas v. United States, 2016 WL 4426495 (N.D. Tex. 8/21/2016)

- ▶ 13 states, state agencies, state officials, school districts are plaintiffs.
- ▶ United States, Departments of Education, Justice, and Labor, plus EEOC and other federal officials are defendants.
- ▶ Plaintiffs allege that “Dear Colleague” letter overstepped the Feds’ authority by engaging in “rulemaking” without going through the notice and comment process.
- ▶ Court entered NATIONWIDE preliminary injunction against defendants on 8/21/16 preventing enforcement of the “Dear Colleague” letter, including the interpretation of “sex” to include gender identity.
- ▶ Judge emphasizes that his decision isn’t about the wisdom of the policy of the Dear Colleague letter, but about the process.



Carcaño v. McCrory, 2016 WL 4508192 (M.D.N.C. 8/26/16)

- ▶ Transgender students at University of North Carolina sued the Governor and other state officials, plus the university, over House Bill 2.
- ▶ District Court entered preliminary injunction in favor of student plaintiffs, requiring that they be allowed to use restroom of gender identity.
- ▶ Decision based solely on Title IX, and follows *G.G. v. Gloucester* decision by Fourth Circuit, which is still the law in that Circuit in spite of the Supreme Court's stay.



Whitaker v. Kenosha Unified School District, 2016 WL 5239829 (E.D. Wisc. Sept. 22, 2016)

- ▶ Federal court issued preliminary injunction requiring school district to allow transgender male to use boys' restroom.
- ▶ Decided under Title IX and the Equal Protection Clause
- ▶ School had no written policy but did not allow plaintiff to use boys' restroom and had instructed security guards to notify administrators if they saw a student using the "wrong" restroom.
- ▶ Plaintiff refused to use private restrooms because they were far from his classes and he felt stigmatized; Plaintiff avoided drinking liquids.
- ▶ Injunction reached only the restroom issue, deferring issues re: roommate for summer orchestra camp, running for prom king, and requiring transgender students to wear color-coded wristbands.

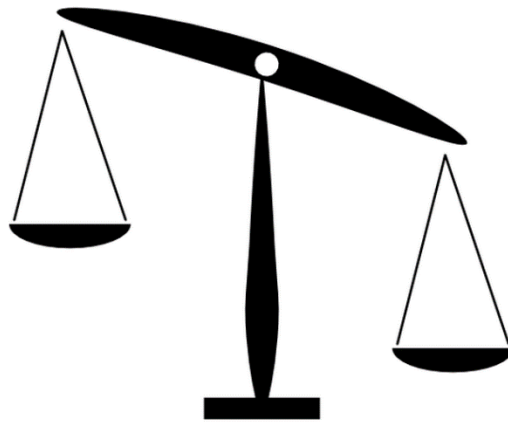


Bd. of Ed. of Highland Sch. Dist. v. U.S. Dept. of Ed., 2016 WL 5372349 (S.D. Ohio Sept. 26, 2016)

- ▶ School district sued Feds after OCR found them in violation of Title IX because they denied transgender girl's request to use girls' restroom.
- ▶ OCR issued Letter of Impending Enforcement Action (to stop the District's federal funding).
- ▶ Jane Doe and her parents intervened in the case.
- ▶ Court dismisses District's action for lack of jurisdiction.
- ▶ Court grants Jane Doe's request for injunction, requiring District to allow her to use girls' restroom (rejecting reasoning of *Texas v. U.S.* and agreeing with reasoning of *G.G. v. Gloucester*).
- ▶ Court rejects as "speculative" District's stated concern about privacy interests of other students; focuses on fact that there are individual stalls to be used, rejects argument that "zone of privacy" starts at the bathroom door; cites experience of other districts with "gender identity" policy and lack of incidents.
- ▶ Injunction limited to bathroom issue.

Arguments of the Parties

- ▶ Civil rights issue vs. privacy issue
- ▶ “Interpretation” of law vs. process of “rulemaking”
- ▶ Federal mandate vs. concerns of community



Community Preference

- ▶ In Civil Rights Act and other discrimination cases, customer or community preference generally cannot justify employer/public accommodation discrimination.
- ▶ Examples:
 - *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010) (holding that employer abiding by patients' wishes for only white nurses was actionable discrimination)



- *Katzenbach v. McClung*, 379 U.S. 294 (1964) (requiring BBQ restaurant to serve black customers despite proof that it would lose white customers)
- *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir.1981) (rejecting employer's argument that because South American customers strongly preferred to work with men, male sex was a bona fide qualification of the job)

But...this is different, right?

Remember that the Title IX regulations say separate is ok if “comparable” . . .

. . . this is distinct from *Brown v. Board of Education* which held that “separate but equal” was not sufficient for race.

- ▶ Several circuits find a “constitutionally protected privacy interest” in individuals’ partially clothed bodies. *See Doe v. Luzerne Cty.*, 660 F.3d 169, 176 (3d Cir. 2011).
- ▶ “[W]hile all forced observations or inspections of the naked body implicate a privacy concern, it is generally considered a greater invasion to have one’s naked body viewed by a member of the opposite sex.” *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994).

So, what should school districts do?

Risks	Litigation by transgender student or parents	Litigation by non-transgender student and/or parent groups	Threat of lost funding	Segregation concerns	Privacy concerns
Gender Identity Policy		X			X
Biological Sex Policy	X		X	X	
No Written Policy	X	X	X	?	

Options and Considerations:

- ▶ MSBA has two model policies, one allowing gender identity restroom access and one disallowing; some districts have adopted these or modified versions.
- ▶ Also possible to defer enacting a written policy at this time and wait for settled law.
 - Caveat: Non-restroom issues should be addressed.
- ▶ Many districts are still using the nurse's restroom option.
 - All districts **SHOULD** make a private restroom *available* upon request.
 - But remember, the Feds expressly prohibit *requiring* use of private facility.
- ▶ Remember to be mindful of needs of individual kids.
- ▶ **KEEP MONITORING THE ISSUE**, this area of law is changing every day!

It's Not All About The Bathroom/Locker Room Issue; And It's Not All Controversial

- ▶ Harassment
- ▶ Student's name/preferred pronoun
- ▶ Dress code
- ▶ Privacy
- ▶ Student records
- ▶ Generally not a disability, unless resulting from a physical impairment



Schools Have General Obligations to All Students Apart from the Transgender Issue

- ▶ Missouri's anti-bullying statute protects all students, including those who identify as transgender
 - Investigate all complaints equally
 - Make determinations based on the facts
 - Impose consequences based on established policies

- ▶ Student's preferred name
 - Official records should reflect what is on the birth certificate
 - Consider how the district would respond to similar requests from non-transgender students, i.e., “Jack” for John or “Sue” for Susan

Schools Have General Obligations to All Students Apart from the Transgender Issue

- ▶ Look carefully at male/female dress code requirements.
- ▶ Restrictive codes based on traditional gender norms may violate the law or lead to litigation.



Schools Have General Obligations to All Students Apart from the Transgender Issue

- ▶ To the extent practical, information about a student's transgender status should be protected as private.
- ▶ Similarly, federal and state law continues to apply to a transgender student's records.



Where does OCR fit into all of this?

- ▶ OCR is part of the federal Department of Education; their position is that a district must allow transgender students to use restroom of gender identity
- ▶ They are responsible for enforcement of Title IX, and have been pressuring individual school districts to abide by their position
- ▶ Resolution agreements in districts in California (the highly publicized Arcadia Unified School District matter) and South Carolina
- ▶ OCR's ultimate enforcement weapon is the threat of a school district losing federal funding
- ▶ This enforcement hammer has been taken away, at least for now, by the injunction in *Texas v. U.S.*



Unanswered Questions

- ▶ Are there any questions which have not been answered to this point?





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Thank You!