

Translating the Law of Transgender Students Into Practical Application



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BACKGROUND

- **“Transgender”** -- Individual whose gender identity and/or gender expression differs from the sex they were assigned at birth
- According to a 2011 UCLA study, an estimated **700,000** people in the United States are transgender.

BACKGROUND

- “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”
- Ilona M. Turner, “Sex Stereotyping Per Se: Transgender Employees and Title VII,” 95 *Cal. L. Rev.* 561, 563 (2007)

The Emergence of Gender Identity as a Protected Class:

*Federal and State Law
Considerations*

GENDER IDENTITY AS PROTECTED CLASS (Federal)

- Franki Valli and the Four Seasons sang:

**“He said walk like a man
Talk like a man
Walk like a man my son”**

- In 1963, this was deemed simply to be fatherly advice

GENDER IDENTITY AS PROTECTED CLASS (Federal)

- **Today, such advice could get you sued.**

GENDER IDENTITY AS PROTECTED CLASS (Federal)

- Harassing a transgender plaintiff because he presented and defined himself as a woman constitutes sex discrimination because “the perpetrator’s actions stem from the fact that he believed that the victim was a man who ‘failed to act like one.’”
- Schwenk v. Hartford, 204 F.3d 1187, 1198-1203 (9th Cir. 2000)

GENDER IDENTITY AS PROTECTED CLASS (Federal)

- “[D]iscrimination against a transgender individual because of her **gender-nonconformity** is sex discrimination, whether it’s described as being on the basis of sex or gender.”
- Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011)

GENDER IDENTITY AS PROTECTED CLASS (Federal)

- “Gender identity” is **NOT** a “disability” for purposes of either Section 504 of the Rehabilitation Act or the Americans with Disabilities Act.

GENDER IDENTITY AS PROTECTED CLASS (Federal)

- **But note:**
- The DSM-V, however, recognizes “**gender dysphoria**,” a condition defined as “the distress that may accompany the incongruence between one’s experienced and expressed gender and one’s assigned gender.”

GENDER IDENTITY AS PROTECTED CLASS (Federal)

- Consequently, **gender dysphoria** may qualify individuals for the protections of Section 504 and the ADA.
- Similarly, it may form the basis for a diagnosis of Emotional Disturbance under the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§1400, et seq. [“IDEA”]

GENDER IDENTITY AS PROTECTED CLASS (Connecticut)

- In 2011, Connecticut officially recognized “gender identity” as a protected class in Connecticut.
- **Public Act 11-55**

GENDER IDENTITY AS PROTECTED CLASS (Connecticut)

▪ What Does That Mean?

–It is **illegal** to discriminate against people on the basis of their gender identity or expression with respect to:

- Employment;
- Housing;
- **Education;**
- Access to Places of Public Accommodation.

GENDER IDENTITY AS PROTECTED CLASS (Connecticut)

- An individual's "gender-related identity can be shown by providing evidence *including, but not limited to:*
- **medical history**
- **care or treatment of the gender-related identity**

GENDER IDENTITY AS PROTECTED CLASS (Connecticut)

- **consistent and uniform assertion of the gender-related identity**
- **or any other evidence that the gender-related identity is sincerely held, part of a person's core identity or not being asserted for an improper purpose.”**
- **Conn. Gen. Stat. §46a-51(21)**

GENDER IDENTITY AS PROTECTED CLASS (Connecticut)

- In other words, just about *anything*.

GENDER IDENTITY AS PROTECTED CLASS (Connecticut)

- Religious corporations, entities, associations, educational institutions and societies are exempt from this law in “matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established by such corporation, entity, association, educational institution or society.” Id.
- Conn. Gen. Stat. § 46a-81aa

GENDER IDENTITY AS PROTECTED CLASS (Connecticut)

- It is unclear whether this exemption for religious organizations also applies to students, but it is a reasonable assumption that it does.

GENDER IDENTITY AS PROTECTED CLASS (Connecticut)

- Transgender individuals are **not** considered disabled under the Connecticut human rights' statutes because "gender identity disorder" is no longer classified as a mental disorder in the DSM-V;
- It is, however, **likely that** a person suffering from **gender dysphoria would be protected** under Connecticut's disability protection laws.

Relevant Federal and State Civil Rights Enforcement Agencies

- Connecticut Commission on Human Rights and Opportunities [“CHRO”]
- State Department of Education [“SDE”]
- United States Equal Employment Opportunity Commission [“EEOC”]

Relevant Federal and State Civil Rights Enforcement Agencies

- The United States Department of Justice has reversed its prior position and no longer considers transgender employees to be covered under the Civil Rights Act of 1964, more commonly known as Title VII.
- On February 22, 2017, the United States Department of Education gave notice that it was rescinding its prior position with respect to transgender students and Title IX, specifically as it pertains to the use of school bathrooms and locker rooms.

The Law And Public Schools

Applicability of Gender Identity Protection Laws in the Public School Setting

APPLICABILITY TO PUBLIC SCHOOLS (Federal)

- **The Costs of Federal Funding**
- Section 504 of the Rehabilitation Act Prohibits Disability Discrimination
- Title IX – Prohibits Gender Discrimination

APPLICABILITY TO PUBLIC SCHOOLS (Section 504 & IDEA)

- As noted, gender **dysphoria** is a psychological impairment that can manifest itself as anxiety or depression.

APPLICABILITY TO PUBLIC SCHOOLS (Section 504)

- Therefore, students who may be experiencing **gender dysphoria** to such a marked degree as to interfere with his or her ability to access his or her education are entitled to the procedural rights and protections that are provided under Section 504, and, in some cases, under the IDEA.

APPLICABILITY TO PUBLIC SCHOOLS (Title IX)

- The United States Department of Education's Office for Civil Rights ["OCR"] is charged with enforcing federal anti-discrimination laws that apply to public schools, including Title IX (as well as Title VI – which prohibits race-based discrimination -- and Section 504).

APPLICABILITY TO PUBLIC SCHOOLS (Title IX)

▪ OCR ARRIVING AT SCHOOL DISTRICT



APPLICABILITY TO PUBLIC SCHOOLS (Title IX)

- OCR previously announced that it considered Title IX applicable to transgender students on the ground that gender, or gender stereotyping, is directly implicated.

APPLICABILITY TO PUBLIC SCHOOLS (Title IX)

▪ **BUT . . .**

- OCR has executed a **kinda, sorta**, about face, on the one hand stating that Title IX does not apply to transgender students, but also saying that it will investigate discrimination or harassment against transgender students.

APPLICABILITY TO PUBLIC SCHOOLS (Connecticut)

▪ CONNECTICUT LAW

- “[E]ach . . . child shall have . . . an equal opportunity to participate in the activities, programs and courses of study offered in such public schools . . . without discrimination on account of race, color, sex, **gender identity or expression**, religion, national origin or sexual orientation.”
- Conn. Gen. Stat. §10-15c(a)

APPLICABILITY TO PUBLIC SCHOOLS (Connecticut)

It shall be a discriminatory practice . . . for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of . . . **gender identity or expression.**

Conn. Gen. Stat. § 46a-58(a)

APPLICABILITY TO PUBLIC SCHOOLS (Connecticut)

- In CHRO v. Board of Education of the Town of Cheshire, 270 Conn. 665 (2004), the Connecticut Supreme Court found that Conn. Gen. Stat. §10-15c and §46a-58 prohibit racial discrimination against students in public schools.

APPLICABILITY TO PUBLIC SCHOOLS (Connecticut)

- The Connecticut Supreme Court held that §46a-58(a) gives the commission the power . . . to ***broaden its coverage so as to reach additional forms of discrimination.***
- Cheshire, 270 Conn. at 711-12 (emphasis added)

The Duty to Accommodate:

*How to Ensure that Your
School District Protects the
Rights of Transgender
Students*

THE DUTY TO ACCOMMODATE

- Issues to consider:
 - Bathroom and locker room access;
 - Name and gender designation changes on student records;
 - Student dress codes;
 - Bullying;
 - Student privacy issues;
 - Employee issues.

Sources of Guidance

- Case law
- The CHRO's "Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws" – available at: http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf
- Guidance from OCR, the DOJ, the EEOC, and other government enforcement agencies.

Bathroom and Locker Room Use:

*An Area Of Rapidly
Developing Case Law*

Key Cases

- Doe v. Reg'l Sch. Unit 26, 2014 Me. 1186 A.3d 600 (Me. 2014)
- Whitaker v. Kenosha Unified School District No. 1 Board of Education, No. 16-3522 (7th Cir. May 30, 2017)

Case Study: Doe v. Regional School Unit 26

- The Plaintiff, “Susan Doe,” was a transgender girl who attended public school in Maine;
- She was born a biological male, but began to express a female gender identity as early as age two, and by the third grade she started dressing as a girl, and teachers and students referred to her as “she.”

Case Study: Doe v. Regional School Unit 26

- Starting in the third grade, with the encouragement of school staff, Susan began using the single-stall bathroom for girls;
- Shortly before she entered fifth grade Susan was diagnosed with gender dysphoria;
- A “Section 504” plan was developed by school officials and Susan’s mother, to help Susan succeed in school in light of her gender dysphoria diagnosis;

Case Study: Doe v. Regional School Unit 26

- The 504 team decided that teachers and students should refer to the student as “Susan,” and that allowing Susan to use a communal girls’ bathroom was the best practice;
- The team also decided that Susan should use a unisex bathroom if her use of the girls communal bathroom ever became an issue;

Case Study: Doe v. Regional School Unit 26

- A male student, acting on his grandfather’s instructions, followed her into the girls’ bathroom and demanded that he too be permitted to use the girls’ bathroom;
- School officials, over Susan’s parents’ objections, terminated her use of the girls’ communal bathroom and required her to use a single-stall, unisex staff bathroom;

Case Study: Doe v. Regional School Unit 26

- Susan’s parents sued the school district, claiming that the school district’s refusal to let Susan use the girls’ communal bathroom violated a Maine statute prohibiting discrimination on the basis of sexual orientation – **Note: The Maine statute did not specifically prohibit discrimination on the basis of gender identity.**

Case Study: Doe v. Regional School Unit 26

- The Maine Supreme Court held that the school district's decision to require Susan to use the unisex, staff bathroom was **illegal**.

Case Study: Doe v. Regional School Unit 26

–The Court found that the evidence showed that Susan’s gender identity was sincerely held and that she was treated differently from other students solely because of her status as a transgender girl, which constituted discrimination on the basis of sexual orientation.

Case Study: Whitaker v. Kenosha Unified School District No. 1 Board of Education

–The plaintiff was a 17-year-old senior in Kenosha, Wisconsin named “Ashton” or “Ash.” Born a biological female, Ash began to openly identify as a boy as a freshman, cutting his hair, wearing masculine clothing, and using male pronouns when referring to himself. As a sophomore, Ash asked his teachers and classmates to refer to him as a male. In the summer prior to his senior year, Ash started hormone replacement, and in his senior year legally changed his name to “Ashton.”

Case Study: Whitaker v. Kenosha Unified School District No. 1 Board of Education

- When Ashton asked to use the boys' bathroom at the high school, however, the Kenosha school district refused, citing unspecified, and apparently unwritten, "policies." The district instead required him to use either the girls' bathroom or a gender-neutral bathroom in the main office, which was a significant distance from his classrooms and which Ash thought would stigmatize him.

Case Study: Whitaker v. Kenosha Unified School District No. 1 Board of Education

- Consequently, Ash drastically limited his water intake to avoid having to use the bathroom, which exacerbated a medical condition that renders him susceptible to fainting and seizures if dehydrated. Already diagnosed with **Gender Dysphoria**, he also began experiencing migraines, depression and anxiety and was contemplating suicide.

Case Study: Whitaker v. Kenosha Unified School District No. 1 Board of Education

- The Seventh Circuit held that requiring Ash to use a bathroom that did not comport with his gender identity essentially punished him for his gender non-conformity in violation of Title IX. Furthermore, it exposed Ash to different rules and sanctions than non-transgender students – who in using the bathrooms of their biological gender also were using the bathrooms of the gender with which they identified – again violating Title IX.

Case Study: Whitaker v. Kenosha Unified School District No. 1 Board of Education

- The Seventh Circuit further held that the school district's actions violated the Fourteenth Amendment to the United States Constitution's Equal Protection Clause. The court deemed Kenosha's policy to be a sex-based classification subject to "heightened scrutiny." Thus, Kenosha was required to prove that its policy served "important governmental objectives," and that it was "substantially related to the achievement of those objectives."

Case Study: Whitaker v. Kenosha Unified School District No. 1 Board of Education

- The court made short shrift of Kenosha’s “important governmental objectives” of protecting student bathroom privacy, noting that a transgender student’s presence in a bathroom posed no more of a risk to privacy rights than “an overly curious student of the same biological sex who decides to sneak glances at his or her classmates.”

Bathroom and Locker Room Usage -- Suggestions

- No clear guidance yet from Connecticut courts, but the CHRO's **“Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws”** advises:

Bathroom and Locker Room Usage -- Suggestions

- Allow students to use bathroom consistent with **their clearly established** gender identity (and remember what the statute requires for “clearly established”).

Bathroom and Locker Room Usage -- Suggestions

- Do **not segregate** transgender students by forcing them to use special bathrooms or locker room, or the bathroom or locker room of their biological sex;

Bathroom and Locker Room Usage -- Suggestions

Work to accommodate non-transgender students who object to sharing bathroom with transgender student;

- Allow such student to use unisex bathroom if available;

Bathroom and Locker Room Usage -- Suggestions

Be extremely careful before “outing” transgender student to others;

- Ask transgender student and parents how they would like bathroom or locker room issues addressed with other students and staff.

ATHLETICS

- The CIAC defers to the determination of the student and his or her local school regarding gender identification.
- Consequently, **school districts are responsible** for determining a student's eligibility to participate in a CIAC gender-specific sports team based on the gender identification of that student

ATHLETICS

- Therefore, by submitting a roster to the CIAC, the school district verifies that the students listed on a gender specific sports team are entitled to participate on that team due to their **bona fide gender identity**.

ATHLETICS

- Students should not be permitted to try out for – or practice with – gender-specific sports teams that are different from their publicly identified gender identity.
- Students are **not** allowed to try out simultaneously for CIAC sports teams of both genders.

ATHLETICS

- Students **are not entitled to transfer** from one gender-specific team to a team of a different gender during a sports season.
- The CIAC's position is that generally, after the issue of gender identity has been determined by the student and the school district, **that determination shall remain the same throughout the remainder of the student's high school sports eligibility.**

NAME AND GENDER IDENTIFICATION CHANGE REQUESTS

- The CHRO advises that schools should grant name change and gender identification change requests “with **or without** accompanying documentation confirming that the assigned birth sex does not accurately reflect the student’s gender identity.”

DRESS CODES

- The CHRO advises that students must have the right to dress in accordance with their gender identity.

Parent-Student Conflicts

- The CHRO suggests districts attempt to reconcile parent-student disagreements over transgender issues. Ultimately, until the student reaches the age of 18 or becomes a legally emancipated minor by court order, the parents have the legal right to make determinations pertaining to the student.

HARASSMENT/BULLYING

- Federal law prohibits gender-based harassment of teacher-student and student-student harassment.
- Connecticut law heavily regulates bullying in the public school setting.

HARASSMENT (Deliberate Indifference)

- School districts can be held liable under Title IX for failing to address bias-driven harassment under the legal theory of **“Deliberate indifference.”**

HARASSMENT (Deliberate Indifference)

- Deliberate indifference is found when an individual with the power to take action to stop bias-driven harassment either fails to do so, **either by inaction or insufficient intervention.**
- Courts will often look to the result of the intervention to determine whether it constitutes indifference.

HARASSMENT (Deliberate Indifference)

- Title IX does not provide for individual liability.
- Section 504 **DOES**

HARASSMENT -- Emergence of the CHRO?

- Recently, CHRO representatives have publicly announced a renewed focus on civil rights in schools, seeking to be an agency that parents will turn to when their child is harassed or bullied and they are dissatisfied with the school's response.

Bullying -- Emergence of the CHRO?

- Few reported CHRO cases to date on bullying, but if CHRO does take an aggressive approach to student claims, the remedies sought could include:
 - Cease and desist orders?
 - Policy revisions?
 - Staff trainings?
 - Tuition?
 - Counselling?
 - Emotional distress?

Practical Tips for Superintendents and Other Administrators

- Know your Board's student policies (and employment policies). Policies are your road map when a new, novel issue arises;
- Amend your non-discrimination policies to address gender identity concerns;
- Consider staff training on gender identity issues. Document your school's non-discrimination and inclusion efforts; this can be critical if you ever need to confront a claim of discrimination;
- Make sure students (and staff) know how to report an incident, including permitting anonymous reports.

WHEN IN DOUBT – CONSULT WITH YOUR LEGAL COUNSEL!!!

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