

*Education/Constitutional Law*

## Addressing the Needs of Transgender Students in Schools



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Transgender students and how to address their unique educational needs in a school setting is a topic that has been in the forefront of the news of late. This can be credited to the U.S. Department of Education’s Office of Civil Rights (“OCR”) December 2014 opinion letter “Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities.”<sup>1</sup> OCR reinterpreted the definition of “sex” for the purpose of sex discrimination to implicitly include the gender expressed by an individual under Title IX of the Education Amendments of 1972.

### Interpreting Title IX

Title IX states that, “no person 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.”<sup>2</sup> In a May 13, 2016 “Dear Colleague Letter,” OCR and the Department of Justice (“DOJ”) jointly expressed that they treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.<sup>3</sup> The same day, OCR and DOJ simultaneously issued an advisory memorandum highlighting state and city policies consistent with their interpretation, drawing positive attention to New York.<sup>4</sup>

On July 20, 2015, prior to OCR’s latest “Dear Colleague Letter,” the New York State Education Department’s (“NYSED”) newly announced Commissioner released Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students, aimed at ensuring that transgender and gender nonconforming (“GNC”) students have “a safe and harassment-free” school environment.<sup>5</sup> NYSED’s guidance was released with the purpose of promoting an “educational environment that is safe and free

from discrimination . . . and to facilitate compliance with local, state and federal laws concerning bullying, harassment, discrimination and student privacy.” NYSED’s document addressed a variety of topics, including terminology associated with transgender and gender non-conforming issues, restroom and changing room use, and it provided guidance and model examples of ways in which school administrators and staff can address these issues.

It appears to be a well-settled mandate that school districts are obligated to prevent discrimination and harassment of students based on sex, gender identity and gender expression in the school setting.<sup>6</sup> NYSED’s guidance memo was intended to facilitate compliance with the law by providing additional information, definitions and scenarios to assist school districts in creating a “culture in which transgender and GNC students feel safe, supported and fully included...”<sup>7</sup>

### **Important Definitions**

In this article, we use the following definitions:

**Gender expression:** Manner in which a person represents or expresses gender to others, usually through behavior, clothing, hairstyles, activities, voice or mannerisms.

**Gender identity:** A person’s gender-related identity, appearance or behavior, regardless of that person’s assigned sex at birth.

**Gender nonconforming:** Term describing a person whose gender expression does not meet the stereotypic expectations associated with his or her assigned sex at birth. GNC individuals may identify as male, female, some combination of both, or neither.

**Gender transition:** Process by which a person socially and/or physically aligns their gender expression more closely to his or her true gender identity and away from the gender identity associated with his or her assigned sex at birth.

**Transgender:** Description of a person whose gender identity does not correspond to his or her assigned sex at birth. For example, a transgender male is a youth who identifies as male, but was assigned the sex of female birth.

### **Gender Identity in Schools**

NYSED recommends that schools should accept the student’s assertion of gender identity and treat that student in accordance with such assertion. In many cases, the student will be able to determine his or her gender identity, unless the student is too young to do so, in which case, the parent would affirm the student’s gender identity.

Confirmation of a student’s gender identity may also be set forth in a letter from a health care provider, school staff member familiar with the student, other family member, relative, friend, coach or member of the clergy, or through photographs at family or public events. NYSED cautions that school districts “should adopt a flexible approach in this area given that

transgender students may not feel comfortable or safe being their authentic selves in all contexts.”<sup>8</sup>

Further, a school district may not require documentation when the school district has no reason to believe that a student’s expression of gender identity is “anything other than a sincerely held belief.” Finally, because the issue of gender transition can occur over time and is dependent on the unique circumstances of each student, NYSED cautions that “there is no medical or mental health diagnosis or treatment requirement that any student must meet in order to have his/her...gender identity recognized and respected by a school.”<sup>9</sup>

Since transgender and GNC students may or may not be comfortable informing other students of their transgender status, schools are encouraged to be flexible in determining whether to identify the student as transgender or GNC. The same is true for informing the student’s parents. These decisions must be made on a case-by-case basis, balancing “the goal of supporting the student with the requirement that parents be kept informed about their children.”<sup>10</sup>

The primary concern, however, always should be the student’s health and safety. Therefore, before discussing a student’s gender identity or status with the student’s parent, school personnel should first discuss the student’s preferred gender nonconformity with the student before communicating with the parent.

### **Addressing Student Records**

According to NYSED, name and pronoun use related to a student should be addressed first in an attempt to create a safe and supportive environment for the student. The school should implement a plan for use of the chosen name and pronoun with the student, after ascertaining the student’s preference, and communicate such to staff, students and parents. This raises questions concerning which name the school is to use in a student’s records.

Under the Family Educational Rights and Privacy Act (“FERPA”), certain student education records may not be released.<sup>11</sup> When transgender or GNC students use a chosen name rather than their birth name, records containing the student’s birth name should be kept in a separate, confidential file and school staff should use the student’s chosen name.

Further, educational records such as attendance records, transcripts and Individual Educational Programs, should be updated to reflect the student’s chosen name and gender identity. School nurses are cautioned to use the student’s birth name “only when necessary to ensure that the student receives appropriate care and to enable the school nurse to coordinate care for the student with other health care providers . . . and to file insurance claims.”<sup>12</sup>

NYSED also recommends that school districts review all gender-based policies, rules and practices (such as dress codes or access to restrooms), which may have the effect of “marginalizing, stigmatizing, stereotyping and excluding students” and revise or eliminate such policies as necessary.<sup>13</sup>

## **Access to Bathrooms**

Challenging issues which have so far arisen from the NYSED and OCR guidance documents relate to the use of restrooms, changing facilities and participation in extracurricular activities.

With regard to restrooms, a school may not prohibit a student from using the restroom that matches the student's gender identity.<sup>14</sup>

A school may provide a single unisex or gender neutral bathroom or private changing space for the transgender or GNC student, but may not require that the student be limited to a unisex room.<sup>15</sup> An alternative is to allow transgender and GNC students to use the restroom matching their gender identity and create a private single bathroom or changing area within a communal area.

This issue of access to bathrooms appears to be contentious nationwide. In just one recent example, the Fourth Circuit Court of Appeals struck down a school district's policy to provide private bathrooms in lieu of allowing GNC students to access the restroom in accord with their gender.<sup>16</sup> This issue may soon be heard by the U.S. Supreme Court as Judge Niemeyer requested the parties to seek review in his dissent, writing, "the momentous nature of the issue deserves an open road to the Supreme Court to seek the Court's controlling construction of Title IX for national application."<sup>17</sup>

## **Participation in Sports**

Finally, with regard to athletics and interscholastic sports, at the New York State Public High School Athletic Association's ("NYSPHSAA") Central Committee meeting held in July 2015, guidelines were adopted for participation by transgender students in high school athletics.

According to NYSPHSAA's "Transgender Guidelines," when a student wishes to participate in interscholastic athletics consistent with the gender which he/she identifies, the student and his or her parent/guardian must notify the Superintendent.<sup>18</sup>

The home school of the student is responsible for determining the eligibility of the student, consistent with his/her gender identity. The student must submit documentation to the Superintendent from the student's parent/guardian, guidance counselor, or medical professional indicating the student-athlete's gender identity for the purpose of trying out for an interscholastic sports team. The student must, of course, meet other eligibility criteria to participate. A student's gender identity should be the gender identity used for school registration and other purposes.

The sports team which corresponds to the student's gender identity shall remain for the duration of the student's participation in interscholastic athletics. The guidelines allow the school district's Athletic Director to notify NYSPHSAA if accommodations are required. Any disputes regarding a school district's eligibility determination for transgender students must be resolved through an appeal to the Commissioner of Education.

It may appear that many of these steps are similar to offering a student an accommodation. Transgender and GNC issues should not be thought of as a disability or special education, however. The Americans with Disabilities Act expressly excludes “gender identity disorders not resulting from physical impairments” from its definition of disability.<sup>19</sup>

The overarching thrust of the various guidance memos is that transgender students have the right to feel comfortable in their daily lives and should not be isolated or forced to use facilities inconsistent with their gender expression. An important recommendation from the NYSED guidance document is that school districts provide training and information sessions for school staff, parents and residents in order to help ensure that all students are provided with a safe and supportive school environment free from discrimination and harassment.

The question that is still unanswered is the extent to which the President, the U.S. Attorney General and OCR will be successful in mandating that schools in other states open their bathrooms and locker rooms to students based on a student’s gender expression to avoid a discrimination claim. In New York, however, this issue appears to have already been resolved by the State Education Department.

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1. U.S. Dep’t of Educ., Office of Civil Rights, Questions and Answers on Title IX and SingleSex Elementary and Secondary Classes and Extracurricular Activities (Dec. 1, 2014).
2. 20 U.S.C. §§ 1681-1688; 34 C.F.R §106; 28 C.F.R § 54.
3. U.S. Dep’t of Justice, Civil Rights Division and U.S. Dep’t of Educ., Office of Civil Rights, Dear Colleague Letter: Transgender Students (May 13, 2016).
4. U.S. Dep’t of Educ., Examples of Policies and Emerging Practices for Supporting Transgender Students (May 13, 2016).
5. New York State Educ. Dep’t., Guidance to School Districts for Creating a Safe and Supportive School Environment For Transgender and Gender Nonconforming Students (July 2015).
6. Pursuant to federal and New York State law, including Title IX of the Education Amendments of 1972, Education Law §3201-a, the Dignity for All Students Act and guidance from the United States Departments of Education and Justice.
7. July 2015 NYSED Guidance to School Districts at 2.
8. Id. at 6.
9. Id. at 7.
10. Id. at 5.
11. 20 U.S.C. § 1232g; 34 C.F.R § 99.
12. July 2015 NYSED Guidance to School Districts, at 9.
13. Id.
14. Id. at 9-10; see also Statement of Interest of the United States, Grimm v. Gloucester County School Board, Case No. 4:15cv54 at 1 (E. D. Va. June 29, 2015).
15. Id.
16. G.G. v. Gloucester City. Sch. Bd., No. 15-2056, 2016 WL 3080263 (4th Cir. May 31, 2016).
17. Id. at \*1.
18. New York State Public High School Athletic Association, Transgender Guidelines, available at <http://goo.gl/wErByp> (last viewed May 31, 2016).
19. 28 C.F.R § 35.104(5)(i).