

Transgender Students: Participation in School Sports, Access to Facilities

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The Controversy

The development of fair, practical and legally sufficient policies regarding the inclusion of transgender athletes in sports activities is one of the latest civil rights challenges facing sport governing bodies and educational institutions. Even before the debates erupted during 2016 concerning the enactment of state legislation limiting transgender rights, many school districts across the country had for years been in the process of taking proactive measures to protect such students against discrimination, make the school environment safer and more welcoming to them, and reduce the harassment that has resulted in transgender students often being the target of hate crimes and suffering one of the highest suicide rates of any demographic group.

Statistics compiled by the FBI's National Incident-Based Reporting System (NIBRS) reveal that more than 20 percent of hate crimes over the last decade were based on sexual orientation and gender identity, second only to race as the motivating factor, and the July 2016 issue of the New England Journal of Medicine attributed the suicide-attempt rate among transgender individuals of just over 40 percent (compared to 4.6 percent among the cisgender population) to the substantial levels of discrimination, rejection, harassment and violence suffered by the group.

The controversy over providing equal protection under the law to transgender students with regard to their participation in school programs such as athletics and their access to school facilities such as restrooms, locker rooms and shower rooms is – obviously – about far more than merely the legal dispute it would appear to be on the surface. It is a political issue involving fear of those who are different from oneself, the oft-manifested tendency of a majority group to ostracize any minority group that deviates from what are viewed as behavioral norms, deeply-rooted resistance by many persons to social change, an inability by some to accepting evolving gender roles in society, federalism questions regarding the authority of the U.S. Department of Education and its Office for Civil Rights relative to that of state legislatures and local school governance organizations, and the polarization of viewpoints across the citizenry with regard to the moral and ethical obligation to protect those among us who may be the most vulnerable to harassment and violence simply because of who they are.

The following are the key issues for which district policies need to be developed and implemented, the sources of law governing those policy topics, several recent court case decisions regarding transgender rights, and a recommendation for school and athletic administrators.

Transgender Issues Regarding Which School Policies Need To Be Developed

The following are transgender issues with which school and athletic administrators need to be familiar, for which school policies should be developed and implemented, and regarding which district and athletic leaders need to ensure all school personnel receive in-service training.

- Terminology regarding LGBTQ categories and distinctions
- Appropriate pronoun usage for addressing transgender students
- Sources of law establishing the legal rights of transgender students
- The rights of transgender students regarding participation in school athletics programs
- The rights of transgender students regarding participation in physical education courses
- The rights of transgender students regarding participation in extracurricular activities
- Access by transgender students to restrooms, locker rooms and shower rooms
- Housing and other issues during sports and extracurricular activity road trips
- Dress codes and their applicability to transgender students and student-athletes
- Fact versus fiction and an understanding of blatantly false transgender stereotypes
- Transgender student privacy rights per FERPA and HIPAA
- Strategies for communicating transgender policies to all school district constituents

The details regarding each of these topics far exceed the scope of this article, but are available in three excellent resources – a 24-page publication from the National Association of School Boards titled *Transgender Students In Schools: FAQs & Answers* (www.nsba.org), a 25-page policy guidance from the U.S. Department of Education titled *Examples of Policies & Emerging Practices for Supporting Transgender Students* (www2.ed.gov), and a 57-page publication from the National Center for Lesbian Rights titled *On The Team: Equal Opportunity for Transgender Student-Athletes* (www.nclrights.org).

Sources Of Law Regarding Transgender Students

The following are the key sources of federal and state law providing protections from discrimination for transgender students; the clear trend is an evolution of legal standards nationwide towards increasing the safeguards for LGBTQ individuals against mistreatment based on sexual orientation or gender identity.

- 14th Amendment Equal Protection Clause: Guarantees equal protection under the law and prohibits discrimination based on arbitrary criteria, including – increasingly – prohibitions against inequities rooted in sexual orientation or gender identity.
- Title IX of the Education Amendments of 1972: Broadbased, anti-gender-discrimination law increasingly being used to provide legal recourse for LGBTQ students.
- U.S. Department of Education OCR & Department of Justice Civil Rights Division Dear Colleague Letter – May 13, 2016: Clarification that students must be allowed to participate in school activities and use facilities consistent with their gender identity.
- U.S. Department of Education Policy Guidance – May 2016: Provides examples of model policies and best practices for protecting and supporting transgender students in schools and sports programs.
- Matthew Shepard Hate Crimes Prevention Act: The HCPA criminalizes acts of violence motivated by factors such as sexual orientation or gender identity.
- Student Non-Discrimination Act: SNDA has been introduced in Congress, but not yet enacted; it would prohibit discrimination in schools based on sexual orientation or gender identity. Its passage is supported by the NASSP, AFT, NEA, NASP and dozens of other educational and medical organizations.
- State Laws Prohibiting Discrimination in Schools Based on Sexual Orientation or Gender Identity: As of January 1, 2017, 14 jurisdictions had enacted such legislation (CA, CO, CT, IA, IL, MA, ME, MN, NJ, NY, OR, VT, WA, DC) and bills are pending in numerous other states.
- State Laws Prohibiting Bullying Students Based on Sexual Orientation or Gender Identity: As of January 1, 2017, 19 jurisdictions have enacted such legislation (AR, CA, CO, CT, IA, IL, MA, MD, ME, MN, NC, NJ, NV, NY, OR, RI, VT, WA, DC) and bills are pending in numerous other states. All 50 states have broad-based anti-bullying statutes designed to protect students.
- School District Policies Prohibiting Discrimination Based on Sexual Orientation or Gender Identity: Hundreds of districts have such policies; for a complete listing, consult www.transgenderlaw.org/#schools.
- Student Privacy Laws Regarding Sexual Orientation or Gender Identity Status: FERPA and HIPAA protect students against involuntary release of information in educational and medical records, including transgender status.

State of Texas v. U.S.A. (U.S. District Court Texas – August 2016): In a suit filed by a coalition of the attorneys general of 11 states, a federal judge blocked implementation of the May 2016 Title IX DCL requiring schools to provide access for transgender students to facilities such as restrooms consistent with their gender identity pending resolution of issues concerning the validity of the DCL as a source of law and whether the definition of sex in Title IX should be interpreted as gender identity or anatomical gender at birth. The U.S.A. has filed an appeal of the ruling with the U.S. Court of Appeals for the Fifth Circuit and the U.S. Supreme Court's decision in the G.G. case will likely impact the ongoing viability of the ruling in the *State of Texas* case.

Carcano v. McCrory (U.S. District Court North Carolina – August 2016): In a ruling issued just five days after the decision in the *State of Texas* case, a federal judge in North Carolina, using the May 2016 DCL and relying on its interpretation of the word sex in Title IX to be gender identity, issued an injunction blocking implementation of North Carolina's law known as HB2 which effectively would prohibit anyone in the state from using any restroom or facility inconsistent with their anatomical gender at birth. As with the *State of Texas* case, the U.S. Supreme Court's decision in the G.G. case will likely impact the ongoing viability of the ruling in the Carcano case.

In the last two years, dozens of similar lawsuits have been filed across the country, most challenging the enactment of policies designed to protect transgender students, with their resolution now on hold pending the Supreme Court's ruling in the G.G. case.

Recommendation

School and athletics administrators should research and familiarize themselves with the requirements included in any applicable state statute, state association policy or board of education regulations and develop district-wide and sports program-specific policies addressing all of the transgender issues discussed above.

The most useful template for such a policy – one that could be revised and edited into a structure consistent with any state or local legal mandates – is a model high school policy addressing transgender sports participation and facility use that was issued in 2016 by the National Center for Lesbian Rights and which is titled All 50: The Transgender-Inclusive High School Sports & Activities Policy & Education Project. It is available at www.nclrights.org.