

# Treatment of Transgender Status: A Primer

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Practice Area: County and Municipal Governance & Government Law

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State legislatures, schools, courts, and federal agencies have all entered into the ongoing and national debate regarding transgender access and rights. If your local government entity has not, it is time to consider not whether to enter the fray, but what actions to take to ensure the entity remains in compliance with all state and federal discrimination laws.

## Treatment of Transgender Status Under Title VII

A historical backdrop shows the trajectory of transgender issues. As early as 1989, the Supreme Court of the United States ruled that “sex stereotyping” may constitute a form of discrimination within the category of sex discrimination under Title VII.<sup>1</sup> Twenty years later, the Equal Employment Opportunity Commission (“EEOC”) stated that discrimination based on transgender status (also referred to as claims of discrimination based on gender identity) is sex discrimination in violation of Title VII.<sup>2</sup> As to the question of transgender employee access to restrooms, the EEOC has held that denying an employee equal access to a common restroom corresponding to the employee’s gender identity is sex discrimination.<sup>3</sup> The EEOC also made clear that access to facilities should not be conditioned on any medical procedure, as nothing in Title VII requires any medical procedure a prerequisite for equal opportunity.<sup>4</sup>

In Wisconsin, the law is less than clear. Recently the Seventh Circuit struck down Wisconsin’s “Inmate Sex Change Prevention Act,” which barred prison doctors from providing transgender inmates medically necessary hormone therapy or sex reassignment surgery while in state custody.<sup>5</sup> The Seventh Circuit found the law to be unconstitutional under the Eighth Amendment’s prohibition on cruel and unusual punishment. Although decided under an Eighth Amendment analysis rather than Title VII, the decision is telling as to the direction the pendulum is currently swinging with regard to transgender rights.

On the legislative side of the equation, on March 23, 2016, North Carolina controversially passed the “single sex, multiple occupancy act,” becoming the first state in the nation to pass a wide-ranging bill barring transgender people from bathrooms and locker rooms that do not match the gender on their birth certificates.<sup>6</sup> Additionally, North Carolina’s law prohibits cities, counties, and school districts from passing their own antidiscrimination laws which would circumvent the state law. The law requires public agencies to allow individuals to use *only* public restrooms that corresponded to the individual’s biological sex at birth. A similar bill introduced in Fall 2015 in the Wisconsin legislature pertaining to restrooms in schools failed to pass out of the Assembly.

## Schools = Ground Zero For Transgender Disputes Under Title IX

Schools have become identified as “ground zero” for clashes over transgender rights.<sup>7</sup> Nowhere is this more evident than the positions taken by the Departments of Education and Justice (“DOE” and “DOJ,” respectively). In November 2015, the DOE Office of Civil Rights (“OCR”) issued a letter of findings to a Chicago-area school district demanding that the school district give unfettered locker room access to a transgender student for the facilities of the gender in which the student identified. The OCR gave the school district only 30 days to resolve the matter or risk forfeiting Title IX funding. The school district reached a settlement with OCR prior to having its federal funding rescinded.<sup>8</sup>

Only a few months later on May 13, 2016, the DOE and DOJ released a new directive, a “Dear Colleague” Letter, charging school districts with ensuring equality for transgender students in all school activities, in the application of all school rules, in the manner in which students are addressed in school, and with respect to documentation (or lack thereof) for confirming a student’s transition, among other guidance.<sup>9</sup> While the new federal guidelines do not have the force of law, schools risk loss of federal funding for noncompliance.<sup>10</sup>

Additionally, only one month prior to the DOJ and DOE’s Letter, the United States Court of Appeals for the Fourth Circuit ruled in favor of a transgender student, marking the first time that a federal appellate court ruled that Title IX extends to protect the rights of transgender students to use the bathroom that corresponds with the student’s gender identity.<sup>11</sup> In the wake of the court battles and administrative proclamations, without any clearly applicable law, educators continue to seek guidance on how to comply with Title IX.

### **What Does This Mean for You?**

This area of the law has become especially volatile in recent months and that trend looks to continue through the rest of 2016 – especially in light of the upcoming presidential election. State and federal agencies and various courts across the country have been aggressive in their efforts to ensure that transgender employees, students, and the public has a whole can use public restrooms that correspond with their gender identities. Recent legal developments regarding transgender rights are instructive as to how local governments in Wisconsin should address issues under both Title VII and Title IX, including restroom issues and confidentiality and privacy concerns.

Local governments should begin the process (if they have not done so already) of developing policies to set the parameters and processes that will be followed when a transgender employee (or in the case of school districts, a student) seeks guidance and clarity. Local governments should further ensure that non-discrimination and equal employment opportunity policies are legally compliant. Policies should address how the entity will ascertain an individual’s gender identity; what proof, if any, will be required; the manner in which an individual should be addressed and allowed to change his/her name; dress codes; records; in the case of students, physical education class, and school-sponsored and WIAA-sanctioned sports; and of course, as to all employees and/or students, restroom, locker room, and shower facilities.

If your local government has a prior policy in place regarding transgender individuals and gender identity, you should consider revising the policy to ensure it does not run afoul of Title VII or Title IX. Ultimately, local governments should be prepared to respond to a request from an employee or a student seeking direction as to processes and procedures. Now is the time to prepare for the inevitable and ensure that you have laid the framework to quickly and fairly respond.

### **Compliance Recommendations**

#### *Employment Provisions*

- Confidentiality and Privacy

An employee’s or student’s transition should be treated with confidentiality and privacy.

Any medical information provided should remain confidential.

Local governments should take care not to spread information about a transitioning employee/student, but rather allow the individual employee/student to discuss his/her transition with others. Other employees/students should only be given general information about the individual's transition.

Issues that arise should be discussed confidentially with the employee/student.

- Dress and Appearance

Local governments should consider eliminating, gender-specific dress and appearance rules. Dress codes should be enforced consistently for all employees/students. Dress codes should not be used to prevent a transgender individual for living in the role consistent with his/her gender identity.

- Names and Pronouns

Employers/School districts should use the name and pronouns appropriate to the gender the individual is presenting. Employers/School districts should use the correct name and pronouns in communications with others regarding the transitioning individual.

- Restrooms – Employees

Should employers have questions regarding an employee request to access facilities of the gender in which the employee identifies, contact legal counsel, as the law in this area remains unsettled, despite EEOC's guidance.

- Requirement of Medical Documentation

Transitioning employees and students should not be required to have undergone or to provide medical documentation of any particular medical procedure (including gender reassignment surgery).

- Workplace Assignments and Duties

To the extent specific assignments or duties are differentiated by gender, employers should treat employees as the gender in which s/he identifies for purposes of all job assignments and duties.

- Recordkeeping

An employee's official personnel file or a student's record should reflect the employee's or student's legal name. Where an employee or student has yet to officially change his/her name, the employee/student may request to be referred to by his/her preferred name, but official records should continue to reflect the legal name.

Adopt a policy with respect to official records that requires legal documentation to change information in the official record. As to day-to-day matters, the policy should reflect the practice of utilizing and reinforcing use of a chosen name.

- Sick and Medical Leave

Employees receiving treatment as part of their transition should be allowed to utilize sick leave benefits. Employees who qualify for FMLA may also be entitled to take medical leave for transition-related needs of their families.

- Hiring

Managers and supervisors should be sensitive to the possibility that applicants have transitioned. The name and gender on the application may correspond with the person's current usage; however, background checks may disclose a previous name that indicates a different gender. Hiring managers should inquire whether the applicant was previously known by a different name, and confirm with the applicant the name and gender to be used.

- Insurance Benefits

Transitioning employees who already have insurance benefits should be allowed to continue their participation; new employees should be allowed to elect participation, based on preferred names and genders.

- Honoring Expressed Gender Identity

Upon notification by an employee or a student or his or her parent/guardian, a local government should allow the individual to assert the expressed gender identity.

As to students, school districts should exercise caution in contacting parents/guardians without first discussing such contact with the student, as appropriate depending on the age of the student, in light of concerns that a student may not have already addressed the matter with his/her parents/guardians.

It is important for entities to have an official process in place for responding to a notification of transgender status. The process should involve discussion and evaluation among administrators and supervisors with the background and expertise necessary to appropriately evaluate the situation and the local government's response.

- Addressing Complaints, Generally

As with any other issue with which you or others may personally disagree (*e.g.*, religion, politics, etc.), local governments are professional and expected to give others the utmost respect and courtesy.

Local governments must be mindful of their obligations to protect the privacy interests of all employees or students within the parameters of state and federal discrimination law.

- Addressing Complaints as to Restroom Use

Options:

1. Identify individual-user options and make individual-user facilities available to all individuals who seek additional privacy.

2. Retrofit your facilities with options that ensure individual privacy in all facilities.

- Policy Requirements

Local governments should review existing policies, procedures, and practices to ensure equality for all individuals and compliance with the available legal guidance to date.

While local governments are not required to develop policies, best practices suggest local governments begin to put into place, at the very least, an official internal process for responding to employees or students who indicate an intent to transition.

### *As to Students*

- Restroom – Students

Options:

1. Develop a policy to conform to the guidance issued by the DOJ and DOE.
2. Develop internal processes for addressing transitioning students on a case-by-case basis, including discussion as to facility use.

- Participation in Athletics

Allow participation consistent with WIAA policy. Be cautious of the DOE and DOJ

guidance in implementation of WIAA policy.

- Other School Activities

Policies should be applied equally to all students. Schools may not distinguish students on the basis of sex, including gender identity, in any school activities or the application of a school rule and may not exclude students from participating in activities for appearing or behaving in a manner inconsistent with traditional gender stereotypes (e.g., yearbook photographs, school dances, graduation, etc.).

- FERPA Concerns

School districts must treat a student's birth name and sex assigned at birth as personally identifiable information that is protected from disclosure.

Birth name and sex assigned at birth should be protected from disclosure and thus may not be designated as "directory information" under FERPA. School Districts must protect that information from others at the school who do not have a legitimate educational interest in the student.

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<sup>1</sup> *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), superseded by statute on other grounds, *Burrage v. U.S.*, 134 S.Ct. 881, 187 L.E.2d 715.

<sup>2</sup> *Macy v. Dep't. of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 12, 2012).

<sup>3</sup> *Lusardi v. Dep't. of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015)

<sup>4</sup> *Id.*; see also Office of Personnel Management guidance which identifies several other areas that provide protection for transgender individuals: confidential nature of transgender status; the elimination of gender-specific dress rules; use of requested names and pronouns; equal access to restrooms; prohibition on requiring medical documentation; treating transgender individuals consistently with respect to workplace assignments; maintaining records; allowing for the use of sick leave and medical leave for transition-related needs; being sensitive to name and gender usage in hiring; and continuity of insurance benefits.

<sup>5</sup> *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).

<sup>6</sup> Similar bills have percolated across the nation, but all have either failed or been vetoed prior to passage. In April, Mississippi passed a law defining man and woman as a matter of law as way of attempting to define this legal issue: "Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."

<sup>7</sup> Wong, Alia, *The K-12 Binary: Schools are becoming ground zero for clashes over transgender rights*, *The Atlantic*, July 9, 2015.

<sup>8</sup> On May 4, 2016, a group of parents responded, filing a federal lawsuit in the District of Illinois seeking to invalidate the Palatine agreement. The plaintiffs claim that the privacy rights of the other students in the locker room are not protected by the agreement, and that the agreement violates Title IX, the Administrative Procedure Act, the students' fundamental rights to privacy, the Illinois and Federal Religious Freedom Restoration Acts, and the First Amendment Free Exercise of Religion Clause. This case is in the Seventh Circuit, meaning that a decision by the Court would govern Wisconsin school districts. See *Students and Parents for Privacy, et al. v. U.S. Dep't. of Ed.*, Case No.: 1:16-cv-04945 (N.D. Ill., filed May 4, 2016).

<sup>9</sup> The Letter addressed the following areas: (1) schools should honor student's expressed gender identity; (2) schools should use names and pronouns consistent with expressed gender identity; (3) schools are prohibited from requiring medical documentation; (4) schools are required to provide unfettered access to restrooms/locker rooms/changing facilities; (5) schools may provide individual user options for all students; (6) school may continue to use sex-segregated athletic teams but must allow equal participation; (7) schools must ensure equal application of all school policies, including discipline, dress codes, and school activities; (8) schools must ensure confidentiality in gender for student records purposes; and (9) schools are limited from disclosing gender status to other school personnel except in cases of legitimate educational interest.

<sup>10</sup> As of May 25, 2016, Wisconsin has joined 10 other states in suing the federal government over the DOE's and DOJ's guidance. The state has indicated that the guidance conflicts with both federal and state law in that Wisconsin law does not prohibit discrimination based on gender identity. Additionally, Wisconsin legislators have indicated their intent to reintroduce a bathroom bill which would require school boards to designate school restrooms and locker rooms for use by one gender exclusively, with "reasonable accommodations" for a transgender student to use a single-occupancy changing room or restroom.

<sup>11</sup> *G.G. v Gloucester County Sch. Bd.*, No. 15-2056 (4th Cir., Apr. 19, 2016), *rehearing en banc denied by G.G. v. Gloucester County Sch Bd.*, F.3d (4th Cir., May 31, 2016).

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