

A look at accommodating transgender students

Sara C. Clark, interim chief legal counsel

The number of children who openly identify as transgender in U.S. public schools has increased. While districts across the country strive to provide a welcoming and supportive environment for transgender students who attend their schools, many struggle with how best to do that. While this is an ever-evolving area of the law, let's look at common issues and suggestions districts may want to consider when accommodating transgender students in their schools.

General legal framework

At the federal level, there are no explicit legal protections for transgender students. Title IX addresses discrimination on the basis of sex, but does not specifically prohibit discrimination on the basis of gender identity or gender expression. Title IX is starting to be invoked, however, to address bullying or harassment of transgender individuals as a form of sex discrimination (see "Bullying and harassment," page 8).

Seventeen states and the District of Columbia have laws that provide some sort of protection for individuals on the basis of gender identity or expression. Ohio is not one of the 17 states. However, even in states like Ohio where there is no statutory guidance on the rights of transgender students, districts are encouraged to educate themselves on the issues facing transgender students and begin the process of making decisions as to how those issues will be addressed if and when they arise.

Common issues for school districts

Privacy — Communications and records that are maintained by the district and relate to a student's preferred gender

identity are personally identifiable information under the Family Educational Rights and Privacy Act (FERPA) and should not be disclosed without an eligible student or parent/guardian's consent. In some cases, a student may want school staff and students to know, and in other cases, the student may not want this information to be widely known. School staff should take care to follow the student's wishes and not inadvertently disclose information that is intended to be kept private or protected from disclosure.

Transgender issues are widely misunderstood and can lead to an unwarranted fear on the part of the school community.

Official student records — Frequently, transgender students will change their name to one that more closely aligns with their gender identity. The question then becomes whether the district is required to change the student's name in education records and other documents the district maintains.

Under FERPA, students are permitted to review their educational records and change "inaccurate" information. In 1991, the Family Policy Compliance Office (FPCO) issued guidance on the issue of allowing transgender alumni to change their name or gender on district records. The compliance office found that FERPA neither prevents

nor compels the district to change the official record because there was no "inaccuracy" in the record. Instead, FPCO suggested that the decision of whether to amend the students' education records was a "substantive decision" that was best left to districts.

In Ohio, there is a legal obligation to maintain true and accurate records for any person subject to the district's personal information system, which would include students. As a result, districts appear to be required under state law to use the student's legal sex, legal name and appropriate corresponding pronouns (for example, he or she) on their official district records. However, districts could distinguish between official records and day-to-day references to the student. For example, teachers, staff and classmates could use a student's chosen name and preferred pronoun in daily use for such things as school IDs, class rosters and other items.

Restrooms — One of the most common issues that a district faces is which restroom facility a transgender student will be permitted to use. The issue of bathroom selection recently was the subject of litigation for a school district in Maine. In the recent case of *Doe v. RSU 26*, Me.S.Ct. No. 12-582 (Jan. 30, 2014), the Maine Supreme Judicial Court was asked to consider if a Maine school discriminated against a transgender girl when it permitted her to use a unisex, non-communal bathroom, but denied her access to the communal girls' bathroom out of concern for her well-being. The court, relying on language in the Maine Human Rights Act that prohibited discrimination on

the basis of a person's gender identity or expression, found that the district had engaged in discrimination by denying the student use of the girls' restroom facilities and treating her differently than her peers due to her transgender status.

In 2013, the Colorado Department of Regulatory Affairs Division of Civil Rights found that an elementary school had violated Colorado state law by refusing to provide a transgender girl access to a bathroom consistent with her gender identity. The ruling rejected the school's argument that by providing the student with access to both the boys' and gender-neutral bathroom, it had satisfied its obligation to provide services to the student. The opinion held that "(r)elegating the (student) to a set of restrooms which no other student is likely to use, even if permitted to do so, would prove disruptive to her learning environment and overtly demonstrate her separateness from the other students. Despite having access to other restrooms, by not permitting the (student) to use the girls' restroom, the (district) creates an environment rife with harassment and inapposite to a nurturing school atmosphere."

These two decisions applied and relied on state-specific statutes that are not applicable in Ohio. However, the issue of bathroom selection is still a problem for Ohio's transgender students. Transgender support organizations consistently recommend transgender students be allowed to use the restroom that corresponds to their gender identity, and many districts have successfully implemented such a plan. Other schools have offered an accessible all-gender single stall restroom for use by any student who desires additional privacy, regardless of the underlying reason. The issue requires districts to consider the needs of their transgender students while also doing their best to ensure the safety and comfort of all students.

Transgender athletes — In November, the Ohio High School Athletic Association (OHSAA) released a policy on transgender student participation in

interscholastic sports. Under its policy, a transgender female who is taking medically prescribed hormone treatment related to gender transition may *participate* on a boy's team at any time. However, before a transgender female may *compete* in a girl's sport or on a girl's team, the transgender female must either have completed a minimum of one year of hormone treatment related to gender transition or demonstrate to the OHSAA commissioner's office by way of sound medical evidence that she does not possess physical or physiological advantages over genetic females of the same age group.

A transgender male who has not yet begun medically prescribed testosterone treatment for purposes of gender transition may compete on a boy's team. If, however, the transgender male student athlete is taking medically prescribed testosterone treatment, medical evidence must be submitted to the OHSAA commissioner's office that certifies that the muscle mass developed as a result of this testosterone treatment does not exceed the muscle mass that is typical of an adolescent genetic boy; the student has not started any hormone treatment (or that the testosterone treatment does not cause hormone levels to exceed normal levels); and the student's hormone levels are monitored by a licensed physician every three to six months. A transgender student may seek review of his or her eligibility for participation through an appeal procedure set forth in the OHSAA policy. A copy of the policy is available online at www.ohsaa.org/eligibility/transgenderpolicy.pdf.

Dress codes — Districts that have established dress codes also may question a transgender student's right to dress in accordance with his or her gender identity. Interestingly, one of the leading cases in this area was decided not on the basis of state laws providing protection for gender identity, but rather under more traditional theories.

In Massachusetts, a transgender female student began to express her female

gender identity by wearing girls' clothing and accessories. The district informed the student that she would not be permitted to attend school if she continued to wear female clothing. The student sued the district, alleging a violation of her right to freedom of expression. The court agreed with the student and determined that the student's dress constituted symbolic speech that was protected under the First Amendment (*Doe v. Yunitis*).

Districts may accommodate transgender students by allowing them to dress in accordance with their asserted gender identity, consistent with any applicable requirements in the dress code or school

Transgender terminology

Although the definitions vary in statutes, case law and policies across the country, the National Center for Transgender Equality offers the following definitions for frequently used transgender terminology:

- **Gender identity** — An individual's internal sense of being male or female. Since gender identity is an emotional, rather than a physical characteristic, one's gender identity is not necessarily visible to others.
- **Transgender person** — Refers to a person whose gender identity does not match his or her assigned sex at birth. A person's status as transgender does not depend on whether that person has undergone (or intends to undergo) any medical treatment for gender reassignment.
- **Transgender female** — A person whose assigned sex at birth is male, but identifies and lives as a female.
- **Transgender male** — A person whose assigned sex at birth is female, but identifies and lives as a male.
- **Cisgender** — A person whose gender identity is the same as his or her assigned sex at birth.