

## **Charting Unchartered Territory: Accommodating Transgender Students in Public Schools**

### **I. INTRODUCTION**

A decade ago, very few children in public schools around the country openly identified as transgender. Recently, however, the number of transgender students has increased dramatically<sup>1</sup> and that increase has required more and more schools to grapple with the myriad of issues – from use of gender segregated facilities, to dress codes, to student record and privacy issues – that are associated with accommodating transgender students in the public school context. This is, as the Chief Justice of the Maine Supreme Judicial Court recently observed in her concurring opinion in *Doe v. RSU 26*,<sup>2</sup> “uncharted territory,”<sup>3</sup> not only because societal views of transgender issues are evolving, but also because law relating to the level of protection to be afforded to transgender individuals issues is in flux. Whereas historically, both legislatures and courts consistently refused to extend legal protection to transgender individuals in any context,<sup>4</sup> that trend seems to

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<sup>1</sup> See, e.g. Note, *The Rise of the Transgendered Child: Overcoming Societal Stigma, Institutional Discrimination, and Individual Bias to Enact and Enforce Nondiscriminatory Dress Code Policies*, 84 U. Colo. L. Rev. 497, 499 (Spring 2013) (noting that while there is not good data on the number of transgender children in the United States, visibility of this sector of society is on the rise).

<sup>2</sup> 2014 ME 11.

<sup>3</sup> *Id.* at ¶ 25.

<sup>4</sup> See e.g., *Somers v. BudgetMarketing*, 667 F.2d 748 (8th Cir. 1982) (holding it was not discrimination when a biologically male transsexual employee was terminated because she insisted on using the women's restroom because the law does not protect employees discriminated against because of their transsexuality); *Johnson v. FreshMark*, 98 Fed.Appx. 461 (6th Cir. 2004) (holding that Title VII does not prohibit discrimination based on an individual's status as transsexual when an employer required a transsexual female employee to use the men's restroom and terminated the employee when she continued to use the female restroom); *Kastl v. Maricopa County Community College District*, No. CV-02-1531-PHX-SRB, 2006 WL 2460636 (D. Ariz. 2006) (dismissing a faculty member's Title VII and Title IX claims of discrimination when the employee was not permitted to use the women's restroom until she provided proof that she had completed sex reassignment surgery). Courts have also consistently held that biological sex, not gender identity is an appropriate basis on which to segregate bathrooms. See *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977) (“we decline on behalf of Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.”); *Etsitty v. Utah Transit Authority* No. 2:04CV616 DS, 2005 WL 1505610 (June 24, 2005) (holding that a transsexual employee could not make a discrimination claim based on “failure to conform to sex stereotypes” when her employer prohibited her from using the women's restroom, because Title VII does not go so far as to permit “any male employee to dress as a woman, appear and act

be changing. Thus, the State of California recently enacted the School Success and Opportunity Act,<sup>5</sup> which, among other things, mandates that “[a] pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”<sup>6</sup> In Maine, the state’s Supreme Judicial Court issued its decision in the *RSU 26* case, holding that the defendant school district violated the Maine Human Rights Act by refusing to permit a transgender student to use the bathroom of the gender with which she identified. In Colorado, the Division of Civil Rights for the state’s Department of Regulatory Affairs came to a similar result under that state’s human rights law.<sup>7</sup>

Currently, 16 states<sup>8</sup> and the District of Columbia, as well as scores of cities and counties<sup>9</sup> across the country, have laws prohibiting discrimination on the basis of gender identity or expression. In most of those states, courts have yet to define the obligations of public schools to accommodate transgender students, but it is likely that if faced with the issue, they will reach a similar result to that reached in Maine. Even in those jurisdictions where there is no specific guidance – either by legislation or judicial decision – on the rights of transgender students, the trend seems to be moving toward recognizing that schools have duties to accommodate the needs of these students under a variety of legal theories. Thus, for example, in one case decided by a

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as a woman, and use the women’s restrooms, showers and locker rooms.”); *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2005 WL 1502899 (E.D. Wash. 2005) (stating that until the law explicitly imposes on an employer the obligation to allow a male undergoing a sex change to become a female to use the female restroom, the court will not require the employer to do so).

<sup>5</sup> Cal. Educ. Code § 221.5.

<sup>6</sup> *Id.* at §221.5(f).

<sup>7</sup> Mathis, Charge No. P20130034X (Colo. Dep’t of Regulatory Affairs, Div. of Civil Rights, June 17, 2013, available at <http://www.transgenderlegal.org/media/uploads/doc-529.pdf> (hereafter referred to as “Mathis”).

<sup>8</sup> Those states are: Nevada, Connecticut, Massachusetts, Colorado, Iowa, Oregon, Vermont, New Jersey, Washington, Hawaii, Illinois, Maine, California, New Mexico, Rhode Island, and Minnesota.

<sup>9</sup> For a list of cities and counties with such nondiscrimination laws updated as of February, 2012, see Transgender Law & Policy Institute, Non-Discrimination Laws that Include Gender Identity and Expression, available at <https://www.transgenderlaw.org/ndlaws/index.htm>.

superior court in Massachusetts, a transgender student was successful in pursuing a claim for violation of her right to freedom of expression<sup>10</sup> when her school refused to allow her to dress in a manner consistent with her gender identity. In another case out of New York, the court held that a school violated the state disability discrimination law in refusing to accommodate a transgender student's dress request.<sup>11</sup> Therefore, regardless of what jurisdiction school districts are in, it would serve all districts well to educate themselves on the issues facing transgender students and begin the process of making policy decisions as to how those issues will be addressed when they arise.

## **II. TERMINOLOGY**

One of the threshold difficulties in this area of the law is widespread misunderstanding by lawyers, judges, legislators and society at large of transgender terminology.<sup>12</sup> Although the terminology varies in statutes, case law and policies in effect around the country, some of the most basic terminology necessary to understand this area of the law is as follows.

- **Biological sex at birth** – This term refers to objectively measurable organs, hormones, and chromosomes a person possesses at birth associated with males, females or intersex people. Other terms commonly used to refer to biological sex at birth include “birth assigned gender”<sup>13</sup> and “gender assigned at birth.” Because biological sex at birth is assigned at birth, it does not change.
  
- **Gender identity** – This term refers to how people think of themselves and which gender

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<sup>10</sup> *Doe v. Yunitis*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000).

<sup>11</sup> *Doe v. Bell*, 754 N.Y.S. 2d 846 (N.Y. Super. Ct. 2003).

<sup>12</sup> See Phyllis Randolph Frye, Essay, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry and the Very Definition of Their Sex*, 7 Wm. & Mary J. Women & L. 133, 154 (2000) (noting a common misconception that transgender individuals are only those who undergo genital reconstruction).

<sup>13</sup> *Id.* at Section 12 (A)(4).

they feel they are. In other words, gender identity is an emotional, rather than a physical characteristic. Most, but not all, people's gender identity is the same as their biological sex at birth. It is generally believed that gender identity is formed by about the age of four (although an individual may not realize it until later) and it very rarely changes after that.<sup>14</sup>

- **Gender expression** – This term refers to how people demonstrate their gender to the outside world through things like dress, speech and behavior. A person's gender expression may change frequently depending upon their individual circumstances.
- **Transgender person** – This term, refers to a person whose gender identity does not match his or her biological sex at birth.<sup>15</sup> Importantly, a person's status as transgender does not depend upon whether that person has undergone (or even intends to undergo) any medical treatment for gender reassignment.

Other terminology that may be helpful when reviewing case law and other resources relating to transgender issues includes the following.

- **Cisgender** – This refers to a person whose gender identity is the same as his or her assigned sex at birth.
- **Transgender female** – This is a person whose assigned sex at birth is male but identifies and lives as a female. A transgender female may also be referred to as FTM or female-to-male.

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<sup>14</sup> See, e.g. *GLSEN, Model District Policy on Transgender and Gender Nonconforming Students* at p. 2, available at <http://glsen.org/article/transgender-model-district-policy>.

<sup>15</sup> The term "transgender" should be used as an adjective, not a noun. Thus, the correct term when referring to a person is "transgender person" or "transgender individual," not just "transgender." See, e.g. National Center for Transgender Equality, *Transgender Terminology* (updated January 2014), available at <http://transequality.org/Resources/index.html>.

- Transgender male – This is a person whose assigned sex at birth is female but identifies and as lives as a male. A transgender male may also be referred to as MTF or male-to-female.
- Transition – This is the process a transgender individual goes through to live as their self-identified gender. Although it may include medical intervention, no such treatment is required for a person to transition.
- Transsexual person – This is the medical definition for one who is in the process receiving medical treatment in the form of hormonal and often surgical intervention.

### III. COMMON ISSUES IMPACTING TRANSGENDER STUDENTS

#### A. Restrooms

One of the most common issues that a school faces, and the one that is most often litigated, arises with respect to what restroom facility a transgender student will be permitted to use. Whether a student will prefer to use the restroom of his or her assigned sex at birth, a gender-neutral restroom or the restroom of the gender with which she or he identifies varies from student to student. Some may feel more comfortable in a gender-neutral facility, others may want to use the restroom that is used by fellow students with similar anatomy (i.e. a restroom that is consistent with their biological sex at birth), and many want to use the restroom that is consistent with their gender identity. Often, school administrators will balk at the idea of permitting a transgender student to use a restroom consistent with gender identity. Some of the arguments commonly raised are that to do so would be dangerous to either the transgender student or his or her peers, or a violation of community norms.

Historically, courts consistently held that sex, not gender identity, is an appropriate basis on which to segregate bathrooms.<sup>16</sup> Even in states which prohibit discrimination on the basis of sexual orientation, courts held that segregating bathrooms on the basis of biological sex did not constitute sexual orientation discrimination. Thus, for example, in *Goins v. West Group*,<sup>17</sup> in the employment context, the court held that even under a human rights act which includes sexual orientation as a protected class, bathrooms may still be segregated based on biological sex, stating:

[T]he traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender. To conclude that the [Minnesota Human Rights Act which prohibits discrimination based on gender identity] contemplates restrictions on an employer's ability to designate restroom facilities based on biological gender would likely restrain employer discretion in the gender designation of workplace shower and locker room facilities, a result not likely intended by the legislature. . . . the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender.<sup>18</sup>

The court went on, therefore, to hold that “absent more express guidance from the legislature, we conclude that an employer’s designation of employee restroom use based on biological gender is not sexual orientation discrimination in violation of the MHRA.”

Similarly, in *Hispanic Aids Forum v. Estate of Bruno*,<sup>19</sup> the New York Supreme Court held that segregating bathrooms on the basis of biological sex is not a violation of that state’s law

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<sup>16</sup> See *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977) (“we decline on behalf of Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.”); *Etsitty v. Utah Transit Authority* No. 2:04CV616 DS, 2005 WL 1505610 (June 24, 2005) (holding that that a transsexual employee could not make a discrimination claim based on “failure to conform to sex stereotypes” when her employer prohibited her from using the women’s restroom, because Title VII does not go so far as to permit “any male employee to dress as a woman, appear and act as a woman, and use the women’s restrooms, showers and locker rooms.”); *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2005 WL 1502899 (E.D. Wash. 2005) (stating that until the law explicitly imposes on an employer the obligation to allow a male undergoing a sex change to become a female to use the female restroom, the court will not require the employer to do so).

<sup>17</sup> 635 N.W.2d 717 (Minn. 2001).

<sup>18</sup> *Id.* at 723.

<sup>19</sup> 16 A.3d 294, 792 N.Y.S. 2d 43 (2005).

prohibiting discrimination in housing on the basis of sexual orientation. There, the plaintiff was denied a lease unless it would agree in writing not to let transgendered clientele use the restroom of the gender with which they identified, a requirement Plaintiff claimed amounted to sexual orientation discrimination. The court, however, dismissed the complaint, observing that transgendered individuals “were excluded on the same basis as all biological males and/or females are excluded from certain bathrooms-their biological sexual assignment.”

The first major decision to hold to the contrary was issued by the Colorado Department of Regulatory Affairs, Division of Civil Rights on June 17, 2013<sup>20</sup> in a case involving a six year old transgender girl who sought access to the girls’ restroom at the Eagleside Elementary School in Colorado. The student had been permitted to use the girls’ room in kindergarten but school administrators, citing safety concerns, decided to require that she use either the boys’ room or a gender-neutral staff bathroom in first grade. In response to a complaint filed by the student’s parents with Colorado’s Division of Civil Rights, its Director, Steven Chavez, held that the school violated Colorado law by refusing to give the child access to a bathroom consistent with her gender identity. In so doing, Chavez 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. Chavez characterized the school’s position as “reminiscent of the ‘separate but equal’ philosophy, which revealed, at least in terms of protected classes, that separate is very rarely, if ever, equal.”<sup>21</sup> He went on to explain:

School is not merely an institution for educating children through books and structured classes. It provides children with a platform that enables them to self-actualize into productive individuals. Children also learn social skills, such as respect, communication, trust, how to appropriately interact with people from different backgrounds, and how to

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<sup>20</sup> Mathis, *supra*, Note 7.

<sup>21</sup> *Id.* at p. 13.

become part of a community. Thus, a very important component of school is being accepted by one's peers. It enhances one's ability to learn and develop a healthy ego, which in turn ensures a positive educational experience. . . . Relegating the Charging Party 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 Charging Party to use the girls' restroom, the Respondent creates an environment rife with harassment is inapposite to a nurturing school atmosphere. This deprives the Charging Party of the acceptance that all students require to excel in their learning environment, creates a barrier where none should exist, and entirely disregards the Charging Party's gender identity.<sup>22</sup>

He accordingly issued a probable cause determination against the school district.

Six months later, on January 30, 2014, the Maine Supreme Judicial Court issued its decision in *Doe v. Regional School Unit 26*,<sup>23</sup> a case in which the court was asked to consider whether a Maine school unit discriminated against a transgendered girl when it permitted her to use a unisex, non-communal bathroom but denied her access to the girls' bathroom. Teachers, counselors, and administrators had worked closely with the student and her parents to support her and ensure her success in school. The team worked out a plan that would enable her to use the girls' communal bathroom, or to use a non-communal staff bathroom in the event any issues arose. When an issue did arise, school officials implemented the plan to have the student use the staff bathroom. The family initially brought a claim before the Maine Human Rights Commission which found that the school's exclusion of the student violated the Maine Human Rights Act. The Commission and the family then brought suit against the school. Although the school unit prevailed at the trial court level, the family appealed the case to Maine's Supreme Judicial Court.

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<sup>22</sup> *Id.*

<sup>23</sup> 2014 ME 11.



On appeal, the Court overturned the lower court’s decision and determined that the school violated the Maine Human Rights Act by failing to let the student choose which bathroom she wished to use. The Court applauded the school and its staff for working so closely with the family to develop a thoughtful and sensitive plan that would ensure the educational success of the student. However, the Court took the view that the school overstepped when it informed the family that the student could no longer use the communal girls’ room out of a concern for her well-being. This decision, according to the Court, had the effect of treating the student differently than her peers due to her transgender status.

The Court stressed that its ruling was not without limits. It cautioned that its opinion “must not be read to require schools to permit students casual access to any bathroom of their choice.”<sup>24</sup> “Thus, we do not suggest that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion without the plans developed in cooperation with the school and the accepted and respected diagnosis that are present in this case.”<sup>25</sup> The Court’s majority continued:

Where, as here, it has been clearly established that a student’s psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the MHRA.<sup>26</sup>

Thus, the court emphasized that this case involved a situation in which there was no question that the student was a girl. Indeed, her parents, friends, counselors, teachers, and school administrators all accepted that the student is a female. Further, the court stressed that the

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

student had received a diagnosis of gender dysphoria, a diagnosis that it stated the school had acknowledged and accepted.

The dissent in *RSU 26*, while accepting the premise that transgender people are best served by being allowed access to the bathroom of the gender with which they identify, noted that that the majority's decision was in conflict with a Maine statute requiring the separation of toilet facilities on the basis of sex and argued, therefore, that this is an issue that could only be addressed by the legislature.

The legislative solution advocated by the dissent in *RSU 26*, has been adopted by the State of California in a controversial bill called AD 1266. As noted above, the law specifically requires schools to provide students access to the facilities, athletic competition and school programs consistent with their gender identities. Efforts by opponents of the legislation to repeal the law failed and the School Success and Opportunity Act was signed into law in August, 2013.

#### B. Dress Codes

Dress codes are another area that impact directly on the rights of transgender students and, as a result, have spawned litigation. Interestingly, two of the leading cases decided in favor of the transgender plaintiffs in this area were decided not on the basis of state laws providing protection for gender identity, but rather under more traditional theories.<sup>27</sup>

First, in *Doe v. Yunitis*,<sup>28</sup> a Massachusetts superior court enjoined a school from enforcing its dress code on the minor male-to-female transgender student. In that case, after the school had informed the student that she would not be permitted to attend school if she wore female clothing, the student sued the school alleging violation of her right to freedom of

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<sup>27</sup> For a comprehensive discussion of issues relating to dress codes and transgender students, see Harris, *Breaking the Dress Code: Protecting Transgender Students, Their Identities and Their Rights*, 13 Scholar 149 (Winter 2010).

<sup>28</sup> No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000).

expression and liberty interest under the Massachusetts Constitution. In addition to finding for the plaintiff on her liberty claim, the court also determined that she established a reasonable likelihood of success on her free speech claim. The court first determined that the student's dress constituted protected symbolic speech:

Plaintiff in this case is likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with the gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being, as attested to by her treating therapist. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity.<sup>29</sup>

The Court then went on to reject the school's argument that the student's dress was disruptive to the school, noting that "Defendants do not find plaintiff's clothing distracting *per se*, but, essentially, distracting simply because plaintiff is a biological male."<sup>30</sup> It determined, therefore, that the plaintiff established a reasonable likelihood of succeeding on her free speech claim.

Second, in *Doe v. Bell*,<sup>31</sup> a court in New York found that a foster care center violated New York's Human Rights Law by discriminating against the youth on the basis of a disability when it refused to allow a male-to-female transgender youth to wear female attire. The youth in that case had been diagnosed with Gender Identity Disorder ("GID")<sup>32</sup> and her psychiatrist had recommended that she be permitted to dress as a female as an accommodation for the disorder. The court thus held that the facility's refusal to accommodate the youth was a violation of that state's law prohibiting discrimination on the basis of a disability.

It is unlikely that courts in most states would reach the same conclusion reached by the court in *Bell* because that case was decided on the basis of the specific provisions of New York

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<sup>29</sup> *Id.* at \*3.

<sup>30</sup> *Id.* at \*5.

<sup>31</sup> 754 N.Y. S 2d 846 (N.Y. Sup. Ct. 2003).

<sup>32</sup> GID is an older term. The Diagnostic and Statistical Manual of Mental Disorders (5<sup>th</sup> Ed) has substituted the term Gender Dysphoria for GID.

law. The Americans with Disabilities Act and the Rehabilitation Act both exclude GID and other related diagnoses from the definition of disability<sup>33</sup> and discrimination laws in many states are in accord. However, *Bell* is illustrative of the way that both advocates of transgender individuals and the courts are using legal theories other than laws that specifically provide protection for gender identity to further transgender rights. Other theories that have been advocated by commentators but not yet fully tested in the courts include bringing equal protection claims and claims for sex discrimination to enforce rights of transgender students.<sup>34</sup>

### C. Harassment

Anecdotally, transgender students are subjected to some severe peer-to-peer harassment while at school.<sup>35</sup> However, there have been few published cases discussing claims brought against schools for such harassment. One case in which peer-to-peer harassment claims were alleged against the school was in the Maine case *Doe v. RSU 26* where, in addition to asserting that the school discriminated against her by denying her access to the girls' bathroom, the plaintiff also asserted a discrimination claim based on the school's alleged failure to adequately address instances of peer-to-peer harassment. The trial court, however, entered summary judgment on behalf of the school finding that the undisputed record established that the school had taken reasonable steps to address incidents of harassment that occurred. That portion of the trial court's decision was not appealed and thus the decision by Maine's Supreme Judicial Court did not address the issue of peer-to-peer harassment.

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<sup>33</sup> See 42 U.S.C. § 12211(b)(1) (ADA) and 29 U.S.C. § 705(20)(F)(i) (Rehabilitation Act).

<sup>34</sup> See Heather L. McKay, Note, *Fighting for Victoria: Federal Equal Protection Claims Available to American Transgender Schoolchildren*, 29 Quinnipiac L. Rev. 493 (2011); Francine Tilewicz Bazluke, Article, "Because of Sex": *The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J.C. &U.L. 361 (2006).

<sup>35</sup> Harsh Realities Finds Transgender Youth Face Extreme Harassment in School, Gay, Lesbian & Straight Educ. Network (Mar. 17, 2009), available at <http://www.glsen.org/cgi-bin/iowal/all/news/record/2388.html>.

Although there is little case law addressing claims of harassment of transgender students, OCR has recently indicated that it may view harassment on the basis of gender identity as a form of gender discrimination which is prohibited under Title IX of the Education Amendments of 1972.<sup>36</sup> In particular, in its Questions and Answers on Title IX and Sexual Violence issued on April 29, 2014 as a supplement to its April 4, 2011 “Dear Colleague” letter on sexual violence, OCR specifically included transgender students as among those protected by Title IX.<sup>37</sup>

Another indication of OCR’s willingness to bring gender identity under the umbrella of sex discrimination occurred recently in connection with a joint investigation by OCR and the Department of Justice into a complaint brought against the Arcadia Unified School District in Arcadia, California. On July 24, 2014, OCR entered into a resolution agreement<sup>38</sup> with that district after initiating an investigation into allegations that the district violated Title IX when it refused to allow a female-to-male middle school student access to boys’ restrooms and locker rooms as well as boys’ accommodations during an overnight trip. Under the resolution agreement which OCR determined “resolved all of the issues in the complaint,” the district agreed, among other things, to provide the student with access to male designated sex-specific facilities both at school and at school-sponsored events, to treat the student as a male and to keep school records with the student’s birth name and assigned sex at birth confidential.

#### D. Student Records

Student records are another issue that often arises in the school context with regard to transgender students. It is unclear whether the law requires schools to change a transgender

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<sup>36</sup> 42 U.S.C. § 1681.

<sup>37</sup> Another matter indicating OCR’s potential willingness to analyze allegations of discrimination against transgender students under Title IX arises in its

<sup>38</sup> Letter to Dr. Joel Shawn, Superintendent of Arcadia Unified School District dated July 24, 2013 with attached Resolution Agreement.

student’s record. Under the Family Educational Rights and Privacy Act (“FERPA”), parents or eligible students may review their educational records and change “inaccurate” or “misleading” information.<sup>39</sup> The U.S. Department of Education’s Family Policy Compliance Office first offered guidance on this question with respect to alumni in 1991, determining that FERPA does not apply to a transgender former student’s request to change his or her name or gender on an education record.<sup>40</sup> The Department reasoned that because the former student’s record contained no “inaccuracy,” there was no obligation under FERPA to revise the record. Instead, the Department suggests that each school district is free to develop its own policy on this question. There appears to be no guidance from the Department as to whether or not this same legal analysis should apply to *current* students.

Although there may be no requirement that schools change permanent records, virtually all sources agree that schools should use a student’s chosen name and preferred pronoun in daily use and must maintain the student’s birth name and assigned sex at birth as confidential if requested by the student. A number of schools adjust gender markers in their records to reflect the student’s self-identified gender.<sup>41</sup>

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<sup>39</sup> 20 U.S.C. § 1232g.

<sup>40</sup> Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Karol Johnson, Assistant Superintendent, Great Falls Public Schools (Nov. 13, 1991) (on file with FPCO).

<sup>41</sup> See, e.g. Massachusetts Dep’t of Elem. and Sec. Educ., *Guidance for Massachusetts Public Schools Creating a Safe Supportive School Environment*, available at <http://www.masstpc.org/issues/education/>; Connecticut Safe School Coalition, *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws*, available at <http://www.ct.gov.Guidelines-for-Schools-on-Gender-Identity-and-Expression-final-4-24-12.pdf>

#### IV. POLICIES AND PROCEDURES: ONE APPROACH

In introducing AD 1266 in California, Legislator Tony Ammiano said of the purpose of the bill: “Making this gender identity requirement clear will help parents and students understand their rights while also helping schools comply with the law, reducing conflict and the potential for litigation, while protecting students’ health and well-being.”<sup>42</sup> In those states without the clear legislative guidance that exists in California, schools should achieve this clarity through the adoption of policies and procedures that spell out how issues relating to transgender students will be addressed when they arise.

A number of organizations around the country have adopted model policies and procedures regarding transgender students.<sup>43</sup> These models vary in the way they deal with a number of the issues discussed above. For example, with regard to restroom accessibility, while the California Safe Schools Coalition Model School District Policy Regarding Transgender and Gender Nonconforming Students<sup>44</sup> and the GLSEN Model District Policy on Transgender and Nonconforming Students both provide a bright line obligation for schools to provide students with access consistent with their gender identity, the Transgender Student Guidelines adopted by the New York City Department of Education,<sup>45</sup> does not. Instead, the New York City guidelines require consideration by school administrators of a number of factors including not only the student’s preference but also other factors such as student safety.<sup>46</sup>

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<sup>42</sup> Quoted in Bunch, Bill Expands Transgender Anti-Discrimination Laws to Include Sports, available at: <http://ivn.us/2013/05/15/bill-expands-transgender-anti-discrimination-laws-to-include-sports/>.

<sup>43</sup> These models often appear to use the term “Policy” interchangeably with “Procedures” or “Guidelines”. There is, however, a significant difference between a Policy, which is normally adopted by the school board pursuant to a formal process and procedures or guidelines which are adopted administratively to implement board policies.

<sup>44</sup> Available at <http://www.safeschoolscoalition.org/lawpolicy-models.html>.

<sup>45</sup> Available at <http://schools.nyc.gov/RulesPolicies/Transgender> Student Guidelines/default.htm.

<sup>46</sup> *Id.*

One approach, drafted by this firm for use by schools in Maine in response to the *RSU 26* decision is attached to this article as Appendix A.<sup>47</sup> Recognizing that individual transgender students will differ in what approach makes them most comfortable in addressing these issues and that in many cases, the students and their parents will need support from the school, these guidelines set out a process loosely patterned after the 504 process schools use regularly to create accommodations for students with disabilities. This, we believe, fosters communication between school and student and avoids creating an impression that there is a one size fits all solution to the needs of transgender students in schools. Other aspects of this firm’s proposed guidelines include:

- We define a student as transgender, and thus able to utilize the procedure set forth in the guidelines “if, at school, he/she consistently asserts a gender identity or expression different from the gender assigned at birth. This involves more than a casual declaration of gender identity or expression, but it does not necessarily require a medical diagnosis.” This definition is arguably more inclusive than the one identified by the Court in *RSU 26*, which placed some weight on the plaintiff’s gender dysphoria diagnosis. It is consistent with the California Safe Schools and GLSEN policies which both define gender identity to be a “deeply held” sense of gender.
- We require that at the outset, the team establish a plan addressing how to deal with privacy issues in a way that is consistent with the student’s wishes. We

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<sup>47</sup> All school boards in Maine have adopted policies prohibiting discrimination on the basis of sexual orientation which, we think, is a sufficient statement of policy. We, therefore, chose to create guidelines rather than a detailed policy.



believe that the requirement to develop a plan early on will minimize inadvertent disclosures by staff.

- We require that students be permitted (but not required) to use the restroom that is consistent with their gender identity.
- We require that transgender students be permitted to dress in accordance with their gender identity (this may require changes to school dress codes as well).
- We specifically provide for support of staff who have responsibilities for the transgender student plan.

## V. CONCLUSION

Navigating - and ultimately charting - the uncharted territory of accommodating transgender students in public schools will undoubtedly be challenging for most school districts around the country. Transgender issues are widely misunderstood and this often leads to unwarranted fear on the part of school administrators, board members and the school community at large. The key to success in this area is thus made up of two things: (1) education; and (2) clear guidelines. As an initial step, schools should provide training to students, parents, teachers, administrators, board members and the broader community about what gender identity is, what it means to be a transgender person and why accommodating transgender students is necessary. Once the school community has an understanding of the subject matter and the trend in the law toward providing protection for this class of students, achieving broad based buy-in for policies and procedures that provide appropriate accommodation will likely be easier to attain. Next, schools should think through the issues and adopt clear guidelines (or policies) as to how those issues will be addressed. Although the law in most states does not yet require this

accommodation, as discussed above, it is likely that at some point it will and undergoing this process before it is imposed by court order will make adoption and acceptance of changes easier.

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## APPENDIX A

*DWM NOTE: Local school units could consider different options for addressing this topic. One option is to implement these guidelines at the administrative level. Another option is to have the Board adopt a policy and procedure on this topic, although there is no legal requirement for a Board-level policy. The approach chosen can be made based on local school unit needs.*

*This topic is complex and involves legal and other issues. This sample can be revised (or converted into a Board policy and procedure), but we strongly recommend discussing any proposed changes with legal counsel before they are finalized.*

*As administrators and policy makers review this sample, they should keep in mind that the needs of students and families vary depending on a number of factors including a student's individual circumstances, age and grade level, and other issues. In addition, the needs of particular schools may also vary depending upon programs, facilities and resources available. This sample is intended as a starting point for discussion about how best to respond to the needs of transgender students in local school units.*

### TRANSGENDER STUDENTS GUIDELINES

#### A. Purpose

The purposes of these guidelines are: 1) to foster a learning environment that is safe, and free from discrimination, harassment and bullying; and 2) to assist in the educational and social integration of transgender students in our schools. These guidelines are intended to be interpreted in light of applicable federal and state laws and regulations, as well as Board policies, procedures and school rules.

These guidelines are not intended to anticipate every possible situation that may occur, since the needs of particular students and families differ depending on the student's age and other factors. In addition, the programs, facilities and resources of each school also differ. Administrators and school staff are expected to consider the needs of students on a case-by-case basis, and to utilize these guidelines and other available resources as appropriate.

#### B. Definitions

The following definitions are not intended to provide rigid labels for students, but to assist in discussing and addressing the needs of students. The terminology in this area is constantly evolving, and preferences for particular terminology vary widely. Administrators, school staff, volunteers, students and others who interact with students are expected to be sensitive to the ways in which particular transgender students may wish to be identified. However, for the sake of brevity, these guidelines refer to "transgender students."

1. *Sexual orientation* – Sexual orientation is defined in the Maine Human Rights Act as

an individual's "actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression." This is the only term related to these guidelines which is defined in Maine law.

***DWM NOTE: Different organizations have different definitions for the following terms. We have chosen to utilize the definitions provided by the Gay, Lesbian & Straight Education Network/National Center for Transgender Equality, but local school units could decide to use definitions provided by other organizations.***

2. *Gender identity* – A person's deeply held sense or psychological knowledge of their own gender. One's gender identity can be the same or different than the gender assigned at birth.
3. *Gender expression* – The manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice or mannerisms.
4. *Transgender* – An adjective describing a person whose gender identity or expression is different from that traditionally associated with an assigned sex at birth.
5. *Transition* – The process by which a person goes from living and identifying as one gender to living and identifying as another. For most elementary and secondary students, this involves no or minimal medical interventions. In most cases, transgender students under the age of 18 are in a process of social transition from one gender to another.

### **C. Addressing the Needs of Transgender Students**

For the purposes of these guidelines, a student will be considered transgender if, at school, he/she consistently asserts a gender identity or expression different from the gender assigned at birth. This involves more than a casual declaration of gender identity or expression, but it does not necessarily require a medical diagnosis.

The following procedure will be used to address needs raised by transgender students and/or their parent(s)/guardian(s).

1. A transgender student and/or his/her parent(s)/guardian(s) should contact the building administrator or the student's guidance counselor. In the case of a student who has not yet enrolled in school, the appropriate building administrator should be contacted.
2. A meeting should be scheduled to discuss the student's particular circumstances and needs. In addition to the student, parent(s)/guardian(s) and building administrator, other participants may include the guidance counselor or social worker, school nurse, teachers and/or other school staff, and possibly outside providers who can assist in developing a plan for that student.
3. A plan should be developed by the school, in consultation with the student, parent(s)/

guardian(s) and others as appropriate, to address the student's particular needs. If the student has an IEP and/or a 504 Plan, the provisions of these plans should be taken into consideration in developing the plan for addressing transgender issues.

4. The school may request documentation from medical providers or other service providers as necessary to assist staff in developing a plan appropriate for the student.
5. If the parties cannot reach an agreement about the elements to be included in the plan, the building administrator and/or Superintendent shall be consulted as appropriate.

**D. Guidance on Specific Issues**

1. **Privacy:** The student plan should address how to deal with disclosures that the student is transgender. 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 plan and not to inadvertently disclose information that is intended to be kept private or that is protected from disclosure (such as confidential medical information).

School staff should keep in mind that under FERPA, student records may only be accessed and disclosed to staff with a legitimate educational interest in the information. Disclosures to others should only be made with appropriate authorization from the administration and/or parents/guardians.

2. **Official Records:** Schools are required to maintain a permanent record for each student which includes legal name and gender. This information is also required for standardized tests and official school unit reports. This official information will only be changed upon receipt of documentation that a student's name or gender has been changed in accordance with any applicable laws. Any requests to change a student's legal name or gender in official records should be referred to the Superintendent.

To the extent that the school is not required to use a student's legal name or gender on school records or other documents, the school should use the name and gender identified in the student's plan.

3. **Names/Pronouns:** A student who has been identified as transgender under these guidelines should be addressed by school staff and other students by the name and pronoun corresponding to their gender identity that is consistently asserted at school.
4. **Restrooms:** A student who has been identified as transgender under these guidelines should be permitted to use the restrooms assigned to the gender which the student consistently asserts at school. A transgender student who expresses a need for privacy will be provided with reasonable alternative facilities or accommodations such as using a separate stall or a staff facility. However, a student shall not be required to use a separate noncommunal facility over his/her objection.

5. Locker Rooms: The use of locker rooms requires schools to consider a number of factors, including but not necessarily limited to the safety and comfort of students; the transgender student's preference; student privacy; the ages of students; and available facilities. As a general rule, transgender students will be permitted to use the locker room assigned to the gender which the student consistently asserts at school. A transgender student will not be required to use a locker room that conflicts with the gender identity consistently asserted at school. A transgender student who expresses a need for privacy will be provided with reasonable alternative facilities or accommodations, such as using a separate stall, a staff facility or separate schedule.
6. Other Gender-Segregated Facilities or Activities: As a general rule, in any other facilities or activities when students may be separated by gender, transgender students may participate in accordance with the gender identity consistently asserted at school. Interscholastic athletic activities should be addressed through the Maine Principals Association Transgender Participation Policy.
7. Dress Code: Transgender students may dress in accordance with their consistently asserted gender identity, consistent with any applicable requirements in the dress code or school rules.
8. Safety and Support for Transgender and Transitioning Students: School staff are expected to comply with any plan developed for a transgender student and to notify the building administrator or other designated support person for the student if there are concerns about the plan, or about the student's safety or welfare.

School staff should be sensitive to the fact that transgender and transitioning students may be at higher risk for being bullied or harassed, and should immediately notify the appropriate administrator if he/she becomes aware of a problem.

**E. Staff Training and Informational Materials**

1. The Superintendent and/or building principal may institute in-service training and/or distribute educational materials about transgender issues to school staff as he/she deems appropriate.
2. Teachers and other staff who have responsibilities for a transgender student with a plan will receive support in implementing the plan.

***DWM NOTE: Any related policies/procedures/forms should be reviewed to ensure that they are consistent with this procedure and to address any gaps. Consider: student emergency cards, first aid/emergency response procedure, medications policy/procedures, field trip procedures, bus procedures, athletic procedures, recordkeeping and confidentiality procedures.***