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Transgender Students' Rights And Schools' Responsibilities

Introduction

This document provides a brief overview of gender identity, and it outlines issues commonly faced by public schools with respect to bathroom and locker room access for transgender students, the use of preferred name and gender pronouns, and updating student records. It also includes legal citations, other resources, and references to model policies.

Gender Identity and Expression

A transgender student is a student whose gender identity is different from the student's assigned sex at birth. Gender identity refers to a person's genuine, internal, and deeply-rooted gender-related identification.¹ Transgender youth may begin to socially transition to living and interacting with others consistent with their gender identity at any age, and this often involves changing their first names, gender pronouns ("he/him" or "she/her"), clothing, and appearance to fully express their gender identity in all aspects of their lives.

For many youth, and for all young children, the experience of gender transition involves no medical intervention. Some transgender youth may also choose to complement their social transition with medical intervention, such as hormones, under the care of a physician. The decision about whether and how to undergo gender transition is personal and depends on the unique circumstances of each individual. There is no threshold medical or mental health diagnosis or treatment requirement that any student must meet in order to have his/her/their gender identity recognized and respected by a school.

The New York State Dignity for All Students Act (DASA)

DASA prohibits discrimination in schools on the basis of actual or perceived gender, gender identity, and gender expression. It also requires schools to take proactive measures to ensure students are not harassed or discriminated against because of their gender identity or expression and to foster a climate of mutual respect and dignity.² DASA defines harassment to include the creation of a hostile environment that would

¹ Sexual orientation, on the other hand, refers to a person's romantic or sexual attraction to people of the other and/or the same gender. Common terms used to describe sexual orientation include "straight," "lesbian," "gay," and "bisexual." Transgender students may identify as gay, lesbian, bisexual, or straight.

² N.Y. Education Law § 11 ("Gender" shall mean actual or perceived sex and shall include a person's gender identity or expression."); *see also* N.Y. Education Law §§ 10-18, 801-a, 2801.

substantially interfere with a student’s educational performance, opportunities or benefits, or mental, emotional or physical well-being.³

DASA is aimed at preventing the dangers that result from discriminatory treatment and hostile school environments. These dangers are well-documented. National surveys indicate that most transgender students feel “unsafe or uncomfortable” at school, and, as a result, more than half (53%) skipped school at least once per month, their GPAs dropped precipitously, and many became at-risk for developing depression and suicidal tendencies.⁴ These realities speak to the importance of school policies that affirm a student’s gender identity, as they provide a necessary foundation for the academic and personal success of transgender youth.

Restrooms, Locker Rooms, and Changing Facilities

A school is required under DASA, Title IX and other civil rights laws, and the New York State and Federal Constitutions, to permit transgender students access to the communal sex-segregated facilities consistent with their gender identity (including restrooms and locker rooms).

DASA and Other Laws Require Equal Access to Sex-Segregated Facilities For Transgender Students

The failure to allow a transgender student access to communal facilities consistent with their gender identity subjects that student to discrimination and a hostile education environment and clearly undermines the purpose and the implementation of DASA. By barring transgender students from accessing communal restrooms and locker rooms, the school explicitly discriminates on the basis of gender identity. In addition, transgender students may be “outed” by such a policy, may feel depressed or even suicidal because of their lack of equal access, and may limit their use of the restroom, resulting in physical harm.

There may be concern on the part of a school district that it could face legal action no matter what policy it adopts, from potential plaintiffs either opposed to or in support of an inclusive policy that permits transgender students to access sex-segregated facilities consistent their gender identity. However, such concerns do not accurately reflect the legal landscape. Across the country—in Maine, Colorado, and California—transgender students have successfully filed complaints against their school districts for access to the facilities consistent with their gender identity under laws that provide the same protections as DASA.⁵ The Maine and Colorado decisions involved elementary school students, and the two California resolutions

³ *Id.* at § 11(7).

⁴ Gay Lesbian Straight Education Network (GLSEN), National School Climate Survey (2011), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/002/2105-1.pdf.

⁵ See *Doe v. Regional School Unit 26*, 86 A.3d 600, 607 (Maine 2014) (when “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 unlawful discrimination); *Mathis v. Fountain-Fort Carson Sch. Dist.*, Colo. Div. of Civ. Rights Determination (June 17, 2013) (“By not permitting the [student] to use the restroom with which she identifies, as non-transgender students are permitted to do, the [school] treated the [student] less favorably than other students seeking the same service . . . giv[ing] rise to an inference of unlawful discrimination.”); Resolution Agreement Between Arcadia Unified Sch. Dist., the U.S. Dept. of Educ., and the U.S. Dept. of Justice, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70 (July 24, 2013) (as the result of a Title IX OCR complaint, school must “provide the Student access to sex-specific facilities designated for male students at school consistent with his gender identity” and “treat the Student the same as other male students in all respects in the education programs and activities offered by the District”); Resolution Agreement Between Downey Unified School District and the U.S. Dept. of Education, OCR Case No. 09-12-1095 (October 8, 2014); see also *Lusardi v. McHugh et al.*, E.E.O.C. Appeal No. 0120133395 (April 1, 2015)(same, in the context of employees), *available at* <http://transgenderlawcenter.org/archives/11521>.

involved every grade level.⁶ By contrast, we are not aware of any lawsuit that has ever been brought against a school on behalf of parents or students who *oppose* a policy permitting transgender students access to sex-segregated facilities. Certainly none has ever been successful.

A policy permitting transgender students access to the facilities consistent with their gender identity is also consistent with well-established legal responsibilities under other statutes and constitutional provisions. Title IX and the Equal Protection Clauses of the Federal and New York State Constitutions prohibit discrimination on the basis of sex.⁷ In a landmark case, the United States Department of Education’s Office for Civil Rights and the United States Department of Justice investigated Arcadia School District in California for Title IX violations based on the district’s refusal to allow a transgender student to access the sex-segregated facilities consistent with his gender identity, stating unequivocally that “[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX.”⁸ The resolution of that case mandated that the school “provide the Student access to sex-specific facilities designated for male students at school consistent with his gender identity” and “treat the Student the same as other male students in all respects in the education programs and activities offered by the District.”⁹

Since the Arcadia case, the Department of Education has issued official guidance confirming that “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity”¹⁰ and imposed another resolution agreement in October 2014 in a case involving a transgender student mandating “access to sex-designated facilities for female students at school, and at all District-sponsored activities, including overnight events, try-outs and participation in extracurricular activities on and off campus, consistent with her gender identity.”¹¹ By the same reasoning as the above cases, under all federal and state laws that prohibit sex discrimination, schools are legally prohibited from treating transgender students differently from other students by barring access to the appropriate communal restroom and locker room.¹² In a federal lawsuit brought by a transgender student

⁶ *See id.*

⁷ 20 U.S.C. § 1681; U.S. Const. amend. XIV; N.Y. Const., art. I, § 11.

⁸ Notification Letter from U.S. Dept. of Educ. and U.S. Dept. of Justice (July 24, 2013), *available at* http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia_Notification_Letter_07.24.2013.pdf.

⁹ Resolution Agreement Between Arcadia Unified School District, the U.S. Dept. of Education, and The U.S. Dept. of Justice, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70 (July 24, 2013), *available at* <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>.

¹⁰ Office for Civil Rights, U.S. Dep’t of Education, *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014) at 5-6 (“Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.”), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

¹¹ Resolution Agreement Between Downey Unified School District and the U.S. Dept. of Education, OCR Case No. 09-12-1095 (October 8, 2014), *available at* <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>.

¹² *See supra* notes 8-11 (Title IX); note 5 (state anti-discrimination laws); *see also* *Wilson v. Phoenix House*, 978 N.Y.S.2d 748 (Sup. Ct. 2013)(discrimination against transgender woman constituted sex discrimination and disability discrimination); *Buffong v. Castle on the Hudson*, 824 N.Y.S.2d 752 (Sup. Ct. 2005) (same); *Maffei v. Kolaeton Indust. Inc.*, 626 N.Y.S.2d 391, 396 (Sup. Ct. 1995) (discrimination against and harassment of transgender person because of their change of gender is sex discrimination); *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977) (not allowing transgender woman to play in women’s U.S. Open Tournament constituted prohibited sex discrimination under N.Y. law); *Rentos v. Oce-Office Sys.*, 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996) (transgender woman stated viable sex discrimination and sexual

whose school district was denying him access to the boys' restrooms and locker rooms, the Department of Education and Department of Justice jointly filed a statement of interest stating that he had a valid "sex discrimination claim under Title IX and the Equal Protection Clause on the grounds that [the defendant school district] treated him differently from other male students because of his transgender status, gender identity, and nonconformity to sex stereotypes."¹³ In an analogous case involving a transgender employee's rights under Title VII, the Equal Employment Opportunity Commission issued a decision holding that barring a transgender employee from accessing the women's restroom constituted prohibited sex discrimination.¹⁴

Additionally, provisions under DASA and other state laws prohibit discrimination on the basis of disability. Many transgender students have a diagnosis of Gender Dysphoria ("GD"). GD is the medical term for the distress caused by the discrepancy between an individual's gender identity and their sex assigned at birth, and it has been recognized as a protected disability under New York law.¹⁵ A critical aspect of the standard treatment for GD for transgender youth is that the child be allowed to live, uninterrupted, in the gender with which they identify.¹⁶ Schools are thus legally required to make reasonable accommodations under these circumstances, which means allowing the student to use the facilities consistent with their gender identity, and consistent with the gender with which their schoolmates identify them. Of course, a diagnosis of GD is *not* required to trigger the protections outlined in the paragraphs above regarding sex and gender identity discrimination.

Finally, any prohibition on a student's use of the facilities consistent with their gender identity contravenes schools' obligation to keep that student's transgender status confidential if the student so wishes. An individual has a constitutional right to privacy regarding their transgender status.¹⁷ Requiring a student to use a single-occupancy restroom separate and apart from the facilities used by others can effectively "out" that student, and it would accordingly violate the student's constitutional right to privacy.¹⁸

harassment claims under N.Y. law); *Schroer v. Billington*, 577 F. Supp. 2d 293(D.D.C. 2008) (discrimination against transgender person because of their transition from one gender to another and their failure to conform to sex stereotypes was prohibited sex discrimination under Title VII); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (transgender woman stated claim for sex stereotyping employment discrimination); *Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997) (transgender student stated Title IX sexual harassment claim); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (transgender woman stated viable constitutional sex discrimination claim).

¹³ *Tooley v. Van Buren Public Schools*, Case No. 2:14-cv-13466 (E.D. Mich. filed Sept. 5, 2014), at 17-18, *available at* <http://blogs.edweek.org/edweek/rulesforengagement/Tooley%20SOI%20-%202-24-15.pdf>.

¹⁴ *Lusardi v. McHugh et al.*, E.E.O.C. Appeal No. 0120133395 (April 1, 2015), *available at* <http://transgenderlawcenter.org/archives/11521>.

¹⁵ *See Wilson*, 978 N.Y.S.2d at 750 (holding that GD is a disability that must be accommodated under New York law, and that a reasonable accommodation for a transgender woman is being "entitled to experience living as" a female); *Doe v. Bell*, 754 N.Y.S.2d 846, 851 (Sup. Ct. 2003); N.Y. Civ. Rights § 40-c(2) (defining disability as consistent with the New York State Human Rights Law).

¹⁶ World Professional Assoc. for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (2012), *available at* http://www.wpath.org/uploaded_files/140/files/IJT%20SOC,%20V7.pdf.

¹⁷ *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (holding that "the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism").

¹⁸ In addition to a student's constitutional privacy interest, statutory guarantees of confidentiality in students' education records are implicated by any school action that reveals a student's private information. *See* Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g).

Creating a Supportive School Climate

In addition to equal access to sex-segregated facilities, a school district must address all of the issues that may negatively impact school climate for transgender students including: consistent use of student's preferred name and gender pronouns by school staff, updating student records, and communication with families.

Names and Gender Pronouns

The issue of the correct name and pronoun to use when referring to a transgender student is one of the first that schools must resolve to create an environment in which that student feels safe and supported. School personnel should use the student's chosen name and pronouns appropriate to a student's gender identity, regardless of the student's assigned sex at birth. For those students who have been attending a school and undergo gender transition while attending the same school, it is important to develop a plan for initiating and ensuring use of the chosen name and pronouns consistent with the student's gender identity. Failing to use the correct name and gender pronouns has been held to violate a transgender person's right to be free from discrimination, since "the purposeful use of masculine pronouns in addressing [a person] who presented as female. . . is not a light matter, but one which is laden with discriminatory intent."¹⁹

Student Records

Student records should be updated to reflect a transgender student's chosen name and gender pronouns. Under the New York Education Law, information about a student's assigned sex at birth, name change for gender identity purposes, gender transition, medical or mental health treatment related to gender identity, or any other information of a similar nature, regardless of its form, is part of the individual's student record, is confidential, and must be kept private and secure, except in limited circumstances.²⁰ The Family Educational Rights and Privacy Act (FERPA) also protects the privacy of education records and requires that certain sensitive information be kept secure and confidential.²¹

When a transgender or gender nonconforming student new to a school is using a chosen name, that student's birth name should be considered private information and should be disclosed to members of the school community, including school staff or students, only with authorization from the student or the student's parents as provided under the New York Education Law. If the student has previously been known at school or in school records by his or her birth name, the principal should direct school personnel to use the student's chosen name. Every effort should be made to update student records with the student's chosen name and not circulate records with the student's birth name. Records with the student's birth name should be kept in a separate, confidential file. Updating student records, such as attendance sheets, to reflect a student's chosen name and gender pronouns, is an important step in preventing the creation of a hostile school environment and can protect a student from unnecessary discomfort in the learning environment.

Communication with Families

¹⁹ *Doe v. City of New York*, 42 Misc. 3d 502, 507 (Sup. Ct., N.Y. County, 2013) (finding discrimination in the context of a public accommodation).

²⁰ N.Y. Educ. Law § 2-d (Unauthorized Release of Personally Identifiable Information); *see also Powell*, 175 F.3d at 111.

²¹ 20 U.S.C. § 1232g; 4 C.F.R. §§ 99.00 et seq.

Some transgender and gender nonconforming students have not talked to their families about their gender identity for various reasons, including safety concerns or a lack of acceptance. School personnel should speak with the student first before discussing that student's gender nonconformity or transgender status with the student's parent or guardian. For the same reasons, school personnel should discuss with the student how the school should refer to the student, including appropriate pronoun use, in written communication to the student's parent or guardian.

Conclusion

To fully support students' gender identity and to create a welcoming and supportive learning environment in compliance with the law, a school district must permit all transgender students to use the sex-segregated facilities that correspond with their gender identity. In addition, school personnel should consistently respect the preferred name and gender pronouns of students and update school records to keep students' transgender status private. We strongly urge all districts to adopt a policy that tracks the model policies attached to this letter. In particular, the policy of the Los Angeles Unified School District, which has been in place for over ten years without incident and with great success,²² offers a succinct and nondiscriminatory example of model language on the issue of access to facilities:

Restroom Accessibility

1. *Schools may maintain separate restroom facilities for male and female students. Students shall have access to restrooms that correspond to their gender identity asserted at school.*

Locker Room Accessibility

1. *Schools may maintain separate locker room facilities for male and female students. Students shall have access to the locker room facility that corresponds to their gender identity asserted at school.*²³

The NYCLU would welcome the opportunity to develop a policy for your school district in accordance with the legal requirements outlined above. In addition, NYCLU staff are available to conduct trainings for members of the school community or to answer any questions you may have. Please do not hesitate to contact us (212-607-3300; rhodgson@nyclu.org) to discuss this issue further.

²² "In the 10+ years that Los Angeles and San Francisco have had transgender inclusive policies . . . we have never had any problems of inappropriate conduct by the transgender students in the restrooms." Letter from Dr. Judy Chiasson, Director of Human Relations, Diversity & Equality, Los Angeles Unified School District, to Thomas Aberli, Principal, J.M. Atherton High School (May 29, 2014), *available at* <http://www.jefferson.kyschools.us/schools/High/Atherton/SBDMDocuments/Letter%20from%20LA%20Unified%20School%20District%20Asst%20Supt.pdf>; *see also* Testimony of Dr. Judy Chiasson before the California State Senate Education Committee (June 12, 2013) ("[W]e've not had any problems. On the contrary, it has solved many problems. It's a nonissue on our campuses. Our transgender students use the bathrooms for the same reasons as everybody else. They do their business, fix their hair and make-up, and gossip with friends."), *available at* <https://www.youtube.com/watch?v=Xmq9dIQdsNE>.

²³ Los Angeles Unified School District Transgender Student Policy, *available at* http://notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/FLDR_ORGANIZATIONS/STUDENT_HEALTH_HUMAN_SERVICES/SHHS/HUMAN_RELATIONS_HOME_PAGE/HUMAN_RELATIONS_BULLETINS_MAMOS/BUL-6224.0%20-%20TRANSGENDER%20POLICY%20BULLETIN%2002-03-14_0.PDF.

Model Policies

Examples of model policies that properly acknowledge the legal rights of transgender students in schools include:

- ***Gay, Lesbian, & Straight Education Network (GLSEN) model policy:***
http://www.glsen.org/sites/default/files/Trans_ModelPolicy_2014.pdf
- ***Massachusetts:***
<http://www.doe.mass.edu/ssce/genderidentity.pdf>
- ***Connecticut:***
http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf
- ***Los Angeles Unified School District:***
http://notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/FLDR_ORGANIZATIONS/STUDENT_HEALTH_HUMAN_SERVICES/SHHS/HUMAN_RELATIONS_HOME_PAGE/HUMAN_RELATIONS_BULLETINS_MEMOS/BUL-6224.0%20-%20TRANSGENDER%20POLICY%20BULLETIN%2002-03-14_0.PDF