

Transgender Students and Employees

The publication “Transgender Students and Employees” is designed to provide general information as a service to ASBSD members. It was written by Gerry Kaufman, ASBSD Director of Policy & Legal Services, with the assistance of SD Council of School Attorney members Rodney Freeman (COSA President), Lester Nies (COSA Past President), and Jessica Filler (COSA Member). It should not be relied upon as legal advice, and legal advice regarding this topic should be obtained from the school district’s legal counsel.

Public schools in South Dakota are dealing with the emerging issue of accommodating transgender students and employees. A transgender person is a person whose internal, psychological and emotional gender identity is different than the biological sex which the person was assigned at birth.

South Dakota law prohibits educational institutions from discriminating against a student or employee based on sex. SDCL 20-13-22. Additionally, SDCL 20-13-54 states “[t]his chapter [SDCL Ch. 20-13] shall be construed broadly to effectuate its purposes.” However, there is no clear legal authority in South Dakota identifying the rights of transgender persons in South Dakota, or the obligations and responsibilities of public schools in South Dakota, to accommodate transgender students and employees. This article will provide a brief overview of the status of the law followed by some things to consider when attempting to accommodate transgender students and employees.

Legal Overview: Although no federal law expressly prohibits discrimination on the basis of a student’s or employee’s being transgender, federal agencies such as the U.S. Dept. of Education Office of Civil Rights (OCR) , Equal Employment Opportunity Commission (EEOC) and the U.S. Dept. of Justice (DOJ) have unequivocally stated that federal laws prohibiting sex discrimination do apply to transgender students and transgender employees and protect transgender students and transgender employees from discrimination. On April 29, 2014, OCR issued what it identified as a “significant guidance document” and stated Title IX protects all students from sex discrimination, including straight, gay, lesbian, bisexual and transgender students.¹

Subsequently, on October 14, 2014, OCR entered into a Resolution Agreement with Downey Unified School District in California. A formal complaint had alleged the District discriminated against a transgender student by failing to respond adequately to complaints the student was subjected to harassment by peers, that staff disciplined her for wearing make-up, discouraged her from speaking about her gender identity with classmates and suggested that she transfer to another school. Under the terms of the voluntary agreement, the District agreed to take the following actions: (1) treat the student the same as other female students in all respects in the education programs and activities offered by the District, including access to sex-designated facilities for female students, (2) notify the student and parents that they may request the District develop a Student Success Plan to ensure the student has equal access and opportunity to participate in all programs and activities, and is otherwise protected from gender-based discrimination at school, and (3) conduct mandatory training on gender nonconformance issues and gender-based harassment for District and school administrators and implement anti-discrimination policies and procedures regarding transgender and gender nonconforming students.² Had the school district not entered into the Resolution Agreement with OCR, the school’s federal funding could have been jeopardized.

¹ Questions and Answers on Title IX and Sexual Violence, *April 29, 2014*, U.S. Dept. of Education, Office For Civil Rights, Assistant Secretary for Civil Rights Catherine E. Lhamon.

² Catherine E. Lhamon, OCR Asst. Sec. subsequently stated "I commend the Downey Unified School District for entering into this agreement to ensure that each of its students, including transgender students and students who do not conform to stereotyped notions of masculinity or femininity, can learn in a safe, educational environment."

In the employment arena, the United States Supreme Court held in *Price-Waterhouse v. Hopkins*³ in 1989 that sex stereotyping in the workplace to the detriment of a female employee would be a form of sex discrimination under Title VII.⁴ In 2013, the EEOC determined there was reasonable cause to believe that a company in Rapid City, South Dakota, violated Title VII after a discrimination charge was filed by former employee who had been fired for being transgender. The EEOC and employer entered into a “Conciliation Agreement” whereby the employer was required to pay \$50,000 to the former employee, obtain professional anti-discrimination training annually for all of its employees, and implement and distribute an anti-discrimination policy to all employees. Following the Agreement, acting director of the EEOC’s Minneapolis Area Office Julie Schmid stated “[e]mployers need to be made aware that their personal myths, fears, and stereotypes about gender identity can subject them to liability if they act upon them in an employment setting.”⁵

The 8th Circuit Court of Appeals (South Dakota is in the 8th Circuit) in 2002 addressed transgender in a school employment context in *Cruzan v. Special School District*.⁶ Debra Davis, a transgender female, was allowed to use the women’s faculty bathroom. Cruzan, a female co-worker, filed a lawsuit based on Title VII and the Minnesota Human Rights Act alleging hostile work environment sex discrimination because a transgender employee was allowed to use the faculty restroom of her gender identity instead of the restroom assigned for the employee’s biological sex (male).⁷ The 8th Circuit held in favor of the school, finding that Cruzan had failed to show the alleged harassment affected a term, condition, or privilege of her employment, that is was so severe or pervasive that it altered the conditions of her employment and created an abusive working environment. The Court held, “[g]iven the totality of the circumstances, we conclude a reasonable person would not have found the work environment hostile or abusive.”⁸ In essence, the Court held that the female transgender employee could use the women’s restroom notwithstanding the objection of another female employee.

In 2011 the 8th Circuit addressed a student’s complaint that he had been sexually harassed which was prohibited under Title IX in *Wolfe v. Fayetteville, Arkansas School District*.⁹ Although not addressing a transgender student issue, the Court’s language in *Wolfe* provides insight into the protection from discrimination likely to be given by the 8th Circuit to transgender students. The Court stated the student alleging sexual harassment under Title IX “was legally required to show the harasser intended to discriminate against him ‘on the basis of sex,’ meaning the harassment was motivated by either Wolfe’s gender or failure to conform with gender stereotypes.” (Emphasis added).¹⁰

³ 490 U.S. 228 (1989).

⁴ 42 U.S.C. §2000e-2(a) states: It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

⁵ U.S. Equal Employment Opportunity Commission Press Release, Sept. 16, 2013 (<http://www.eeoc.gov/eeoc/newesroom/release/9-16-13.cfm>)

⁶ 294 F.3d 981 (8th Cir. 2002)

⁷ Id.

⁸ Id.

⁹ 648 F.3d 860 (8th Cir. 2011)

¹⁰ Id.

The position of OCR and DOJ on the issue of nondiscrimination of transgender students has been clearly shown in a two Statement of Interest documents filed by OCR and DOJ this year, on February 20, 2015, and on June 29, 2015, in pending federal court cases in Michigan and Virginia.¹¹

In the Michigan case, a student was female at birth and the student's gender identity was male. The student alleged he was denied equal treatment and benefits and subjected him to harassment based on sex in violation of Title IX, Title IV, and the Equal Protection Clause of the 14th Amendment. The School District sought to have the complaint and lawsuit dismissed, and the OCR and the DOJ filed a document with the Court opposing the school's motion to dismiss. Within the document, OCR and DOJ argued (1) a person may establish sex discrimination through discriminatory conduct based on gender identity or transgender status, (2) the United States has a significant interest in ensuring that all students, including transgender students, have the opportunity to learn in an environment free of discrimination, (3) the Court should reject any suggestion that there is no legally cognizable claim under Title IX or the Equal Protection Clause because transgender is not an explicit suspect classification under either law and the relevant suspect classification is sex, which courts have held includes gender, gender identity, transgender status, and nonconformity to sex stereotypes, and (4) discrimination on the basis of gender identity is discrimination on the basis of sex, even though the words 'gender identity' or 'transgender' are not explicitly mentioned in Title IX or the Equal Protection Clause."

In the Virginia case, the ACLU filed a federal lawsuit on a student's behalf, alleging the school's policy which requires students to use either single-stall restrooms or the restrooms designated for their biological gender, discriminates against the student on the bases of gender identity and transgender status in violation of Title IX and the Equal Protection Clause of the 14th Amendment. OCR and DOJ filed a Statement of Interest in support of the student's request for a preliminary injunction to prohibit the school from enforcing its policy. The OCR and DOJ argued (1) "under Title IX, discrimination based on a person's gender identity, a person's transgender status, or a person's nonconformity to sex stereotypes constitutes discrimination based on sex" and "as such, prohibiting a student from accessing the restrooms that match his gender identity is prohibited sex discrimination under Title IX," (2) "the term 'sex' as it is used in Title IX is broad and encompasses gender identity, including transgender status," and "although certain parents and community members may object to students sharing a common use restroom with transgender students, any recognition of this discomfort as a basis for discriminating would undermine the public interest" and "a school district cannot justify sex discrimination by asserting that it acted upon a desire to accommodate other people's prejudices or discomfort."

On July 27, 2015, the Judge in the Virginia case dismissed the Title IX claim. However, the Court allowed the Equal Protection claim to continue.

At least one Court has held that the Equal Protection Clause of the 14th Amendment and Title IX do not prevent a public educational institution from prohibiting a transgender male student from using sex-segregated restrooms and locker rooms designated for men on a university campus."¹² In that case, Johnston, who was born female, identifies as a transgender male. Johnston alleged the University discriminated against him in violation of the 14th Amendment (Equal Protection) and Title IX, based on his sex and transgender status by prohibiting him from using sex-segregated locker rooms and restrooms that were designated for men.

¹¹ Tooley v. Van Buren Public Schools, No. 14-13466 (E.D. Mich.); G.G. v. Gloucester County School Board, Civil No. 4:15cv54 (E.D. Va.)

¹² Johnston v. University of Pittsburg, Case 3:13-cv-00213-KRG, (W.D. Pa., March 31, 2015)

The Court stated “this case presents one central question: whether a university, receiving federal funds, engages in unlawful discrimination, in violation of the United States Constitution and federal and state statutes, when it prohibits a transgender male student from using sex-segregated restrooms and locker rooms designated for men on a university campus.” The Court then held “[t]he simple answer is no.” The Court stated

Here, UPJ’s policy of segregating its bathroom and locker room facilities on the basis of birth sex is ‘substantially related to a sufficiently important government interest.’

Specifically, UPJ explained that its policy is based on the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by courts.

The Court concluded by stating “Plaintiff has failed to state a plausible claim for relief for discrimination or retaliation under either the Equal Protection Clause or Title IX.”

Accommodations: Accommodations for transgender/non-conforming students and employees may help to advance the District’s goals of (1) providing all students equal access to a safe, non-hostile learning environment, (2) providing all employees a safe, non-hostile working environment, and (3) providing guidance in an unsettled area of law. A policy related to accommodating transgender/non-conforming students and employees may assist school boards and administrators in application of State and federal anti-discrimination laws, and addressing accommodations which transgender/gender non-conforming students or employees may request. The District’s policy prohibiting bullying should apply in all cases, including for the safety and protection of transgender/non-conforming students and employees.

The Superintendent, Principal, and Nondiscrimination Coordinator, should be responsible for working with each transgender/gender non-conforming student and the student’s parent(s)/guardian(s), or the employee, to develop and manage accommodations. The School District’s Attorney should be consulted in each instance regarding legal compliance.

The goal of accommodations is so a transgender/gender non-conforming student may equally participate in educational and extracurricular opportunities and a transgender/nonconforming employee to fulfill their work duties in a professional and safe manner. Determining appropriate accommodations may be difficult. Schools need to consider the rights of transgender/gender non-conforming students and employees with the rights of other students and employees. The School District’s Attorney should be an indispensable member of the team that identifies and implements accommodations for a specific student or employee. The following list of things to consider as possible accommodations for transgender/non-conforming students and employees is certainly not exhaustive, and each student’s or employee’s request must be managed on a case-by-case basis: gender transition, names and pronouns, student/employment records, student/employee privacy and confidentiality, application of dress code, participation in physical education classes and athletic activities, and access to gender-segregated areas such as locker rooms and restrooms.

Access to gender-segregated areas such as locker rooms and restrooms is probably the most difficult accommodation to address and can vary widely. On one end of the spectrum is a policy which says restrooms, locker rooms and showers that are designated for one biological sex shall only be used by members of that biological sex and the sole determinant of a person’s sexual identity is the sexual identity noted on the birth certificate, driver’s license or similar document. On the other end of the spectrum is a policy which says a

transgender person is permitted to access restrooms and locker rooms that correspond to the gender identity that the person consistently asserts at school and in other social environments and persons who wish increased privacy may be provided access to a single-access restroom when it is reasonably available, but no person may be required to use such a restroom or locker room because of the person's transgender or gender non-conforming status. Between the two extremes would be a policy which says the school will on a case-by-case basis attempt to provide reasonable accommodations to transgender students and employees.

Conclusion: As stated and shown earlier, there is no clear legal authority in South Dakota (i.e., federal or state laws or court decisions) which sets forth the rights of transgender students and employees and the obligations and responsibilities of schools when accommodating transgender students or employees. ASBSD and the South Dakota Council of School Attorneys (COSA) believe it is prudent for ASBSD to serve in an advisory role for school districts when it comes to the issue of transgender students and employees. Because of the lack of clear legal authority in South Dakota, ASBSD and COSA also believe that local school districts should discuss with their own school attorney about whether the school board should consider adopting a policy related to transgender students and employees. If the school board decided it should consider such a policy, the school district would then work with its own school attorney to develop a local school district policy.