

Transgender Students, Title IX, and District Policies

A. LAW

a. Federal Law

i. Title IX

1. “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance.”
2. The law does not define sexual harassment as sex discrimination, but case law and enforcement guidelines make it clear that harassment is a form of discrimination under Title IX and harassment that is sufficiently severe can justify a private cause of action for monetary damages under Title IX.
3. Regulatory requirements, and their interpretations by the judicial system, have expanded the obligation of schools to investigate complaints of sex discrimination.

b. State Law

- i. 18 states currently have laws prohibiting discrimination against transgender individuals. Michigan is not one of them.
 1. Elliot Larsen Civil Rights Act does not include language specifically protecting transgender individuals.
 2. Executive Directives exist that prohibit employment discrimination based upon sexual orientation and gender identity, but applies to state employees only and does not allow for a private right of action.
- ii. Over 200 local municipalities have prohibitions against gender identity discrimination. None in Michigan (Although East Lansing was the first municipality in the country to pass a sexual orientation non-discrimination law, 44 years ago).

c. Case Law

- i. Doe v Regional School Unit 26 (Maine Supreme Court, 2014)
 1. Upheld transgender girl’s right to use the bathroom of the gender she identifies with.
- ii. Johnston v University of Pittsburgh (Federal District Court, PA., 2015)
 1. Dismissed case of transgender male who sued to allow use of male locker rooms, indicating that transgender status is not a protected class and Title IX language does not prohibit discrimination based upon gender identity.
 2. The university ultimately settled with the student and adopted more progressive transgender policies.
- iii. G.G. v Gloucester County School Board (4th Circuit, 2015)
 1. Federal District Court (Va.) dismisses transgender male’s claim of discrimination regarding restroom access, indicating that Title IX does not protect against transgender discrimination.
 2. 4th circuit panel reverses and sends the case back to district court, expressing its view that Title IX protections do extend to transgender claimants and that deference should be given to the Department of Education’s interpretation of Title IX.
 3. A stay has been issued of the panel decision pending a review by the full court.



d. “Dear Colleague” Letters

- i. On May 13, 2016 the DOJ and US Dept. of Ed, via their respective Offices of Civil Rights, [released a “Dear Colleague” Letter](#). These types of letters are meant to provide clarity and guidance for those interested in understanding precisely how OCR interprets Title IX and what OCR expects of those entities subject to Title IX with respect to transgender issues.
- ii. These letters are not “law” or even “binding authority” and do not change the analysis of what is required of a school district; however they can be cited as “persuasive authority” and given deference, as the 4th Circuit panel noted in *G.G. v. Gloucester*.
- iii. A “Dear Colleague” Letter was issued regarding Title IX Coordinators on [April 24, 2015](#) which may also be of some interest.

B. ENFORCEMENT

a. U.S. Department of Education: Office of Civil Rights

i. Edicts

1. “The Departments interpret Title IX to require that when a student or the student’s parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representation or records, the school will begin treating the student consistent with the student’s gender identity.”
 - a. Proof of a legal name change not required
 - b. Proof of medical interventions not required
 - c. In rare circumstances a district may wish to inquire as to whether or not this is a legitimately held identity, but must tread carefully when doing so. Discuss such situations with legal counsel and perhaps seek guidance from relevant activist groups.
2. “A school’s Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. *As is consistently recognized in civil rights cases, the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.*”

ii. Investigations and outcomes

After an OCR Title IX investigation involving transgender rights, there are a few common themes with respect to what districts must do moving forward under their resolution agreements:

- Henceforth the student at issue must be treated in accordance with their gender identity in all respects. This includes name, pronouns, application of dress code, rest room access, extra-curricular activities, overnight accommodations at district sponsored camps and so on.
- Ongoing review and revision of all policies and procedures in order to ensure that all students have equal opportunity, regardless of gender identity or gender non-conforming status.
- Student/parents must be informed of their option to request a Student Success Plan (SSP) which requires the district to collaborate in bringing together a group of professionals to consult and advise with respect to the students ongoing welfare. District will have to develop an SSP implementation guide which specifically addresses gender-based discrimination as part of the overall SSP framework.
- District must engage a third party consultant specializing in adolescent gender identity to support and assist the district with implementing new policies.



- District must revise all complaint procedures to ensure Title IX compliance. This includes reviewing all investigative steps and standards as well as interim measures, legal standards and potential remedies.
- District must institute mandatory professional development as to gender nonconformance issues and ensure that all staff are trained with regards to all new policies, procedures, intervention techniques, and so on.
- District must contact third party sites where district sponsored events occur and request that their policies accommodate students accordingly. If facility refuses, District must find alternative sites to hold activities that are willing to comply with Title IX.
- District must implement age appropriate instruction into curriculum regarding gender identity, discrimination, prohibited conduct, etc.
- District must report all future gender-based discrimination complaints lodged against it to OCR as well as provide an explanation and documentation as to how each complaint was handled.
- District must conduct periodic school climate assessments to evaluate the effectiveness of its bullying/harassment prevention efforts and gauge inclusiveness.
- OCR reserves the right to return to the district at any time, interview staff and students regarding progress towards goals, request additional documentation, and so forth.
- OCR will continue to monitor the district until it is satisfied that all conditions of the consent agreement have been met.
- District must comply with numerous reporting requirements, many of which are on a very specific timetable. These include reports and updates regarding the third party consultant, policy change implementation, proof that changes have been integrated into policy and procedure guidelines, outcome reports concerning assessments, proof that notices have been posted regarding student rights, and so forth.

1. Arcadia (California)

a. [Facts/Allegations](#)

- i. Investigation initiated October, 2011.
- ii. 7th grade boy, who was female at birth but transitioned in 5th grade.
- iii. Transition was announced, child's name was changed, and teachers/classmates accepted this well. Level of acceptance at middle school level went well also, with many peers being unaware of the transition.
- iv. Student required to use private restroom in the school health office. Parents initially were in agreement with this arrangement, but over time found it untenable. Student unhappy and being singled out.
- v. Student had to change for P.E. in this bathroom as well, causing a significant amount of missed class and drawing attention to the situation by classmates as well creating miscommunication issues because the student wasn't in a locker room to hear announcements.
- vi. District would not allow student access to male bathrooms and would not allow student to cabin with male students during a 7th grade district sponsored camp.
- vii. During 7th grade field trip, district required student to stay in private cabin, away from all peers, despite the fact that the student had several male classmates who requested him in their cabin.



- viii. The camp itself offered several alternative arrangements to the district that would have accommodated the student, but these were not relayed to the parents.
 - ix. District noted that it consulted with the California Dept. of Ed. (CDE) when making these decisions, but when interviewed, CDE denied having been given all of the relevant information which presumably may have resulted in a different recommendation.
 - x. Due to new state law, parents obtained an identification document reflecting student's chosen male name. The district accepted this and began to allow student to use male restrooms; however, this did not result in a district policy change.
 - xi. District still investigated by OCR regarding initial refusal to allow student to use chosen facilities and reluctance to allow uniform gender presentation without an identification document, even though district has essentially relented as to all other points. OCR cites concerns over "future" arrangements as student transitions to high school.
- b. [Resolution Agreement](#)
- i. Student must be treated as a male in all respects, including restroom use and camp accommodations for the duration of enrollment.
 - ii. District must ensure that records are properly maintained to control access and protect information regarding the student's assigned sex.
 - iii. District must inform student/parents of their right to demand that a support team be established to ensure rights and treatment. The support team must meet very specific guidelines with respect to representatives, reports, documentation, etc.
 - iv. District must review and revise all policies to specifically include reference to gender-based discrimination as being prohibited. Policies must guarantee equal access for all in all district sponsored programs/activities.

2. Downey (California)

- a. [Facts/Allegations](#)
- i. Investigation initiated November, 2011.
 - ii. Allegations that elementary school continually punished transgender girl for not acting in accordance with birth gender (boy).
 - iii. District wouldn't allow her to wear make-up (other girls could).
 - iv. Student was forced her to write apology letter for "making male students uncomfortable."
 - v. Discouraged her from discussing her gender identity.
 - vi. Frequent verbal harassment was known but adequate steps were not taken to address it.
 - vii. Reluctant to use chosen female name, citing "California law."
 - viii. Transitioned to female identity as she moved to middle school. Middle school staff receptive to concerns and requests, student allowed to use female restrooms, however bullying/harassment continued from peers (while OCR investigation was occurring).
 - ix. Students responsible were disciplined.



- x. Student requested a school wide assembly to address issue, but the district did not convene one.
 - b. [Resolution Agreement](#)
 - i. Student is to be treated as a female in all respects.
 - ii. Access to all sex-designated facilities at all events. If third party facility denies access, District must stop using them until they change their policy.
 - iii. Access to private facilities is an acceptable compromise, but only at the request of the student.
 - iv. Ensure that student isn't disciplined for acting or appearing in conformance with her gender identity.
 - v. Remove all prior discipline documentation from her file.
3. Palantine (Illinois)
- a. [Facts/Allegations](#)
 - i. The student was born male but identified as female from a young age, transitioning publicly to a female in middle school. Legal name changes along with appearance changes and hormone therapy are all in place.
 - ii. As student transitioned into high school, parents contacted the school to initiate a transition plan, indicating that the student was the subject of harassment for using the boy's locker room previously.
 - iii. By all accounts, the school had been very accommodating with respect to all other requests (name change, pronoun usage, restroom access, sports participation, etc.) and student enjoys good staff/peer support.
 - iv. Discussions occur regarding student's use of female locker rooms (P.E., swimming, sports). Student requests the ability to change privately (perhaps using a bathroom stall), but within the girl's locker room. Superintendent ultimately deems the request impractical, given the limitations of the facility and the number of students to accommodate, as well as the "rights" of other students.
 - v. District provides alternative options, all of which require the student to travel alone to another part of the building, change, and then return. Some alternatives also require access to a locked room, which requires the student to seek out a specific staff member to unlock when access is needed outside of her routine use times.
 - vi. Another alternative, to create a locker room for just the student and a few of her female friends was also implemented, but this increased the student's feelings of being singled out, rather than inclusive. Likewise, her friends were reluctant.
 - vii. The arrangement took her away from classmates and staff, creating communication issues when she was not in the locker room to hear announcements. She was once reprimanded for entering an empty girl's locker room when she was trying to find a teacher to provide her with a rental P.E. outfit.
 - viii. For swimming, an alternative area was provided that contained a shower, but did not contain many other normal amenities, such as a means for her to blow dry her hair. Other options were also available, but they increased the student's feelings of being scrutinized due to their location.



- ix. For sports, the student changed in a location separate from her teammates, decreasing bonding opportunities.
- x. The student did enter the locker room in certain situations where she felt it was appropriate (after all team mates were dressed) but was reprimanded for doing so. Some teammates complained about her being in the locker room at various times.
- xi. Privacy curtains were eventually installed in one of the three relevant locker rooms, with a requirement that the student use them if she chose to change in that locker room. Only this student would have this requirement.
- xii. Extensive negotiations with OCR over the few remaining issues involving this student took place. Eventually an impasse was reached. OCR described the district's reluctance to agree to its demands as "an unwillingness to resolve the Title IX violations voluntarily."

"The District stated that 'granting the student the option to change her clothes in the girls' locker room would expose female students as young as fifteen years of age to a biologically male body.' OCR finds the concerns unavailing in this case."

b. [Resolution Agreement](#)

- i. Student must be treated as a female in all respects. District must commit to working with the student to honor her requests for facility accommodations in a manner that is least disruptive to her.
- ii. Because student has indicated a willingness and desire to utilize a private changing area within the girl's locker room, she will be allowed access to the girl's locker room. Private changing areas are for all students who wish to use them and although student has indicated she will use private area, she is not required to.
- iii. District will coordinate with off campus sites to ensure that student has adequate access to female facilities in their buildings.
- iv. Students school record must be treated as confidential and information that might identify the student's prior birth name/gender must be maintained separately from her general records and not disclosed as except as required by law.
- v. Any student requesting additional privacy while in a locker room beyond the private changing stations must be provided with a reasonable alternative, such as assignment of a locker that is closer to the office of the P.E. teacher/coach, use of another private area (restroom stall), use of another nearby private area (single use facilities), or be provided with a separate schedule of use.
- vi. The district did push back against OCR to some extent regarding whether or not the locker room policy must be permanent and enforced district wide moving forward. Ultimately, OCR agreed that this particular resolution extended to this particular situation only. While OCR made it clear that it would expect that future situations involving similar circumstances would be handled in a similar manner, the district is still free to handle each case individually.



C. WHAT YOUR STUDENTS KNOW ABOUT THEIR RIGHTS

- a. The [transgender rights movement](#) is very high profile at the moment and the “push back” against this movement has, naturally, led to a proliferation of resources for transgender students to access.
 - i. [American Civil Liberties Union](#)
 - ii. [Lambda Legal](#)
 - iii. [Human Rights Campaign](#)
 - iv. [Transgender Law Center](#)
- b. These resources reiterate the current OCR interpretation of Title IX and encourage them to seek redress, via any means possible, if they feel their rights are being violated.

D. QUESTIONS AND CONSIDERATIONS

a. **So where are we at, legally, with this right now?**

- i. Some states have passed, and others are debating, bills which would require transgender individuals to use bathroom/locker room facilities that correspond with their birth gender.
- ii. Obviously, schools cannot comply with such a state law, and with OCR’s interpretation of Title IX, at the same time.
- iii. In Michigan there are currently no laws forbidding, or compelling, a policy which specifically addresses transgender or gender non-conforming student rights, although such a bill has been introduced.

b. **What’s potentially at stake for my district right now?**

- i. If a transgender student files a complaint with OCR, an investigation may occur. If OCR is not satisfied with your district’s response, its federal funding could be at risk. For some schools this may be as much as 15% of their total revenue, for other schools it may be very little.
- ii. Civil suits also remain a possibility, and can occur simultaneously with an OCR investigation. Although Title IX remains the strongest argument transgender students have when it comes to a civil rights case, such a lawsuit can take many forms and include free speech claims, equal protection claims, civil rights claims, etc. These lawsuits rarely result in large monetary awards for the Plaintiff, but the potential for that exists if the facts are egregious enough.
- iii. OCR complaints and lawsuits also cost a significant amount of money even if, ultimately, the district is absolved.

c. **We don’t *have* to change our harassment/discrimination policies, but *should* we?**

- i. Every district needs to look at their specific situation, taking into account the present reality.
 1. Do you have a transgender student enrolled at present?
 2. What is the likely community sentiment?
- ii. OCR is not initiating investigations against districts simply because they do not have transgender specific anti-bullying policies.
- iii. Neola has stated that it will not modify its current model policies, asserting that, as written, they already cover bullying and harassment of all students. Neola will also not create new policies and procedures given the current uncertainty in the law, but encourages districts to understand OCR interpretations and the ramifications of non-compliance with OCR guidance.

- iv. If your current bullying/harassment policies meet state law requirements, simply maintaining these (at least for the time being) is understandable and legally acceptable.
- d. But what do we do when a transgender student does present with accommodation requests?**
 - i. Regardless of how specific your current policies are, any district looking to avoid OCR entanglements will follow OCR's guidance as it relates to *enforcing* those policies and will make accommodation decisions that are informed by past OCR investigation outcomes.
 - ii. Presently, OCR is less concerned about whether or not a district's policies explicitly mention transgender students and more concerned about how they react when a transgender student begins to make accommodation requests.
- e. Community sentiment**
 - i. Districts seeking to avoid or minimize negative community reaction need not draw undue attention to this issue by adopting overly progressive policies in a very public fashion, especially in situations where they are not faced with any transgender student issues.
 - ii. No matter how "quietly" a district handles its policy issues, once word gets out that a district is complying with a transgender student's request to use a restroom or locker room that differs from their birth gender, community sentiment can be, and often will be, intense. At a certain point this is often simply unavoidable.
 - iii. The reality is that communities prone to controversy over such issues will put pressure on school board members and administrators. This will happen whether the district immediately complies with such requests at the outset or is forced to comply with the requests at the conclusion of an OCR investigation.
 - iv. An OCR investigation may provide some "cover" for administrators and board members with the community, but this comes at the expense of significant district autonomy, not to mention the steep financial costs. Likewise, OCR involvement often drags out the controversy and increases the negative attention for a much longer period of time.

Your district need not have progressive transgender policies in place now, but if a transgender student situation is mishandled, resulting in an OCR investigation, your district WILL have progressive transgender policies in place by the time OCR offers its resolution.
- f. Have a plan**
 - i. Have a plan for dealing with transgender accommodation requests. A plan is necessary to ensure that the manner in which accommodations are made is as consistent as possible.
 - ii. When a transgender student presents with accommodation requests, take those requests seriously and work with them closely.
 - iii. Seeking some compromise is fine, but understand that if the student is demanding something that you know OCR would give them, you're risking an OCR investigation if you do not comply.
 - iv. Best practice would be to offer to collaborate with the student and parents on a support plan that will follow the student until they leave the district.
 - v. The plan need not be adopted as board policy and accompanied by public hearings. The plan can simply be based upon your current anti-bullying and equal rights policies, with an underlying understanding that, at the administrative level, OCR has certain, clear expectations.
 - vi. Provide training to school administrators, and principals particularly, to ensure a thorough understanding of how board policy will be enforced in these matters.

E. SPECIFICS

a. **Records Changes**

- i. It is somewhat unclear under Michigan Law if a student's name and gender can be changed in their school record simply based upon a request. Changes to student records are allowed per FERPA if the record is "inaccurate, misleading, or in violation of the student's privacy."
- ii. A gender transitions may qualify as an "inaccuracy," even without a legal name change or some type of medical corroboration. Most districts faced with such an issue do accept this rationale and make the necessary changes. There is a legal basis for refusing such, although it is doubtful that OCR would accept this reasoning.
- iii. Regardless, at the very least, ensure that the student is addressed by their preferred names and pronouns at school.

b. **Confidentiality**

- i. FERPA protects student information and remains the standard. A student's transgender status, even without any accompanying medical corroboration, would probably still qualify as protected, private information.
- ii. Districts are not obligated to "scrub" an entire academic record to erase all traces of a prior name or gender identifier, but should take reasonable steps to ensure that a student's transgender status is not unnecessarily revealed. Obviously, this is especially true in situations where the information is otherwise being kept private, but remains true even when the situation is considered "common knowledge."
- iii. Communication is key. The District should be up front with the student about the steps that are being taken to ensure privacy, as well as what the student's expectations should be.
- iv. Districts are not obligated provide a "platform" for a particular student's social agenda, but should always take accommodation requests seriously and continuously communicate with a student concerning their needs and experiences. Collaboration can help avoid a situation where difficult "demands" come into play. (Recall that in the *Downey* matter, OCR actually mentioned the district's refusal to hold an assembly in its restatement of the facts.)
- v. Administrators are allowed to have a dialogue with the student and parents, express their own concerns, and attempt to reach a resolution that works for everyone.

c. **Sports Participation**

- i. Decisions about participation in sports follow the same analysis as all other issues. OCR has yet to investigate such a situation, but based upon the language of their various Resolutions, they expect schools to allow such participation.
- ii. The Michigan High School Athletic Association has specific guidance, which essentially states that biological males cannot participate on female athletic teams (in MHSAA sanctioned events) without demonstrating that they've taken steps to transition medically (i.e. reassignment surgery or hormone suppression therapy).
- iii. This places districts in the middle of two competing policies. Districts must make it clear that it is the MHSAA policy, not their own, that prohibits transgender female participation in MHSAA sanctioned events (tournaments, playoffs, etc.).

d. **Dress Code**

- i. In the eyes of OCR, dress codes should be applied uniformly and equally, regardless of gender identity. If biological females are allowed to wear makeup, then transgender females should be allowed to as well.



- ii. It is recommended that dress code policies be reviewed and revised to be gender neutral. Policies which read “Girls wearing dresses must ensure that...” can be easily changed to “*Students* wearing dresses must ensure that...”.
 - iii. Districts still have the ability to regulate what constitutes appropriate attire, but should avoid language which demands students to comport to stereotypical gender appearances. Such is allowed only where it serves “a legitimate educational interest” which is a difficult standard to meet.
 - iv. Enforcing such policies would likely be deemed a violation not only of Title IX, but of free speech and equal protection as well as state and federal civil rights laws.
 - v. Many districts have already either abolished gender based graduation gown colors, or have indicated that no particular color is assigned to any particular gender, and all students are free to wear whichever color they choose.
- e. Staff**
- i. By accepting employment with a school district, administrators and school staff agree to abide by, uphold, and enforce all of their school board’s policies and procedures. This includes federal and state laws, as well as several non-discrimination laws in general, and Title IX in particular, regardless of any “personally held beliefs.”
 - ii. An Employee’s failure to comply could create a discriminatory environment and possibly lead to liability. Preventing such is a basic responsibility of all employees.
 - iii. In a non-school context, the Supreme Court has recognized a free exercise exemption to a government mandate which directed behavior that was otherwise contrary to the employee’s sincerely held religious belief. Whether or not such a claim would be successful in federal court, in this context, is not clear, however, in the past the Supreme Court has given employers significant control over employee speech when that speech runs counter to their official job duties.

Ultimately, a school district’s goal should be to draft and implement policies that protect all students and comply with the law, while considering, to the extent possible, the sentiments of the community.

