An understanding of the present state of affairs involving transgender student rights and a school district’s responsibilities as it relates to those rights requires an understanding of:

- Title IX
- State Law (or lack thereof)
- Judicial Precedent
- “Dear Colleague” Letters
- The U.S. Dep’t. of Ed. (DoE) Office of Civil Rights (OCR)

Title IX:
“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.”

Does not specifically mention discrimination based upon sexual orientation or gender identity.

Definitions:
“Cisgender” describes individuals whose gender identity aligns with their biological sex at birth, i.e., a person born as a biological girl identifies as a girl.

“Transgender” individuals’ gender identity differs from their biological sex at birth. A transgender person born as a biological girl identifies as male.
Definitions:

“Gender expression” is how one presents to the world, i.e., dress, hairstyle, kind of jewelry used, makeup, etc. It may or may not reflect a person’s gender identity.

But First…

“Gender Dysphoria” is a formal DSM-5 diagnosis in which, for at least a six-month period, an individual exhibits strong, persistent cross-gender identification as established through a variety of behaviors and persistent discomfort with his or her biological sex or sense of feeling inappropriate in the gender role of his or her assigned sex at birth.

But First…

“Gender Expansive” is term broadly applicable to individuals whose gender identity and gender expression presents outside of gender norms for their society or context.

[In discussions about gender, you will hear additional terminology which is reflected in some school districts’ policies and which will likely emerge in discrimination law suits.]
Transgender Students

Law

State Law:
The state of Michigan has no laws on the books which specifically address discrimination against transgender or gender non-conforming citizens.

There has been talk of introducing legislation which would require transgender individuals to use the restroom of their birth gender, but this is not the law at present.

Transgender Students

Enforcement

Some History:

On May 13, 2016 the Department of Justice (DOJ) and the Department of Education (Ed.), via their respective Offices of Civil Rights (OCR), 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. Similar letters have been issued previously. Courts do occasionally cite such letters as persuasive or otherwise give them deference, but they are not “binding authority.”
Transgender Students

Enforcement

Some History:
May 13, 2016 Dear Colleague Letter:
This letter was meant to reaffirm the already existing interpretation of Title IX by OCR. It emphasized and clarified what OCR expected at that time as it related to Title IX compliance and the treatment of transgender students.

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 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.
Some History:

May 13, 2016 Dear Colleague Letter:

“Title IX’s implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.”

“When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.”

A Change:


DOJ and Ed. issue a new “Dear Colleague” letter on February 22, 2017:

- May 13, 2016 guidance is withdrawn.

“In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them.”

“Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.”
Transgender Students

Enforcement

Statements that remain on the Ed. OCR website:

- Every school and every school leader has a responsibility to protect all students and ensure every child is respected and can learn in an accepting environment. Title IX protects all students, including LGBTQ students, from sex discrimination. Title IX encompasses discrimination based on a student’s failure to conform to stereotype notions of masculinity and femininity. Schools should also be aware of their obligations under Title IX and the Family Educational Rights and Privacy Act (FERPA) to protect the privacy of their students when maintaining educational records.

Transgender Students

Judicial Precedent

- Districts are sued by transgender students for denying restroom/locker room requests and for failing to adopt trans-inclusive policies.
- Districts are sued by community groups for accommodating restroom/locker room requests and for adopting trans-inclusive policies.
- Suits are generally filed in Federal Court citing Title IX and Constitutional grounds, but are sometimes filed in State Court based upon state civil rights and human rights laws.

- Districts are sued by transgender students for denying restroom/locker room requests and for failing to adopt trans-inclusive policies.
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Several states (including Michigan) have sued the federal government as Plaintiffs in two different federal district courts. The U.S. Department of Education (Ed.) and the U.S. Justice Department (DOJ) are often named as Defendants. Board members have been sued personally. The ACLU often gets involved. The Alliance Defending Freedom (ADF) sometimes gets involved. The Women's Liberation Front (WoLF) has sided with conservatives on this issue.

Transgender Students

Judicial Precedent

**Michigan**

- Tooley v Van Buren et. al.
  Transgender student files suit against multiple districts for various Title IX and Equal Protection Clause violations. ED filed a “statement of interest” in the case in 2015, asserting that Title IX affords protections to transgender students and prohibits sex based stereotyping. Parties settle for an undisclosed amount of money in March, 2017.

- Reynolds v Williamston School Dist. et. al.
  Parents and students file federal suit against district and board members, individually, charging that district’s trans-inclusive policy violates other student’s rights to privacy, parent’s rights to be notified of children’s health decisions, denial of free speech, right to receive a free public education, Title IX, and the Elliot-Larsen Civil Rights Act. Also alleges that board had no legal authority to add special non-discrimination categories to policies. ACLU has intervened on behalf of the district.
Conservative advocacy group filed suit on behalf of the District against ED in 2016 after being threatened with enforcement of a trans-inclusive policy in favor of an elementary student. District asked for an injunction denying enforcement of the policy for the pendency of the case and for OCR from taking actions against the district while the case is pending. This motion was denied.

Intervening transgender student requested an injunction demanding that the district abide by the trans-inclusive policy. This motion was granted. The district appealed to the Sixth Circuit, requesting that enforcement of the student’s granted injunction be stayed, this was denied. The school did not demonstrate a likelihood that it was going to be successful on the merits and the student demonstrated irreparable harm.

Why did the 6th Circuit majority (2-1 split) deny the district’s request for a stay of the injunction granted by the District Court? The school did not demonstrate a likelihood that it was going to be successful on the merits and the student demonstrated irreparable harm if barred from using the restroom of the gender she identifies with. Public interest weights strongly against not enforcing the trans-inclusive policy while the issues are being litigated.
Transgender Students
Judicial Precedent
US Supreme Ct.
- GG v Gloucester
Case originally filed in Federal District Court in Virginia in June of 2015 by a female to male transgender student regarding restroom accommodations. The case made its way to the US Supreme Court in August, 2016. Part of the consideration at this time was whether or not the Dept. of Ed., which was siding with the Plaintiff and arguing that it has the power to interpret Title IX in its “Dear Colleague” letters and then enforce Title IX as part of its own regulations.

Transgender Students
Judicial Precedent
US Supreme Ct.
- GG v Gloucester
Just as the case was to be heard by the Supreme Court, Donald Trump won the presidency and Ed. leadership changed. The prior transgender enforcement guidance was rescinded and, as this was the crux of the issue before the Court, the case was remanded back to the district court to be litigated in light of the department’s change in position on this issue. G.G. has now graduated and there is a chance the entire matter will be dismissed as being moot.

Transgender Students
Judicial Precedent
Elsewhere
- Many cases filed by activist groups against DOJ and Ed. concerning transgender/Title IX enforcement were suspended pending the outcome of the GG v Gloucester matter. Many of those have been voluntarily dismissed now that OCR has indicated that it will no longer investigate transgender Title IX complaints and given that most of the material issues in the Gloucester matter have been stripped away.
So where does this leave us?

- Students are still suing districts for failing to accommodate and are, generally, still prevailing in those lawsuits.
- Due to OCR’s change in enforcement policy, lawsuits from activist groups against districts which adopt trans-inclusive policies are on the rise as well. These lawsuits are less successful.
  - These groups will often assert that “OCR has declared that transgender students are not covered by Title IX.”

Transgender Students

The Now

- Several cases filed against school districts by transgender students continue to move forward.
- Despite OCR’s change in direction regarding enforcement, student Plaintiff’s continue to be granted injunctions or are successful in having opposition requests for injunctions denied.
- They are also obtaining settlements.

Transgender Students

Judicial Precedent

Elsewhere

- Whitaker v Kenosha School Dist. (Wt., 7th Cir.)
  - Female to male student filed suit alleging that he had been using the boys restroom without incident until an administrator intervened and forbid it.
  - Student claimed that he was then subject to humiliation and degradation (surveillance, suggestions that transgender students be made “readily identifiable” so that their restroom habits could be monitored, refusal to use student’s new name and gender pronouns…)
Transgender Students

Judicial Precedent

Elsewhere
Since the most recent OCR guidance:
- Whitaker v Kenosha School Dist. (Wi., 7th Cir.)
  In May, 2017 The 7th Circuit indicated that the Plaintiff student demonstrated a reasonable likelihood of success on the merits in granting the student’s injunction request.
  The District filed for appeal to the U.S. Supreme Court but then withdrew the request and settled with the Plaintiff for $800,000.
  Per the settlement, the Plaintiff student, only, must be allowed access to male restrooms.

Transgender Students

Judicial Precedent

Elsewhere
Since the most recent OCR guidance:
- Adams v St. Johns Co. School Bd. (Fl. Dist.)
  Female to male student filed suit against district due to denial of restroom accommodation.
  Student requests injunction to force district to provide accommodation pending the outcome of the matter.
  Judge denied student’s request stating that he was uncomfortable granting such without more time to review the evidence.

Transgender Students

Judicial Precedent

Elsewhere
Since the most recent OCR guidance:
- Adams v St. Johns Co. School Bd. (Fl. Dist.)
  Judge also indicated that recent case law might favor Plaintiff, but that this case had some unique facts and circumstances requiring greater analysis.
  Judge addressed student directly stating that the last thing he wants to do is be “someone who is adding to your problems.”
Elsewhere
Since the most recent OCR guidance:
- Smith v. Frederick Co. School District (Md. Dist.)
  Female student and mother file suit alleging district’s adoption of trans-inclusive policy violates student’s privacy rights. ACLU intervenes on behalf of district.
  Plaintiff’s voluntarily dismissed the suit.
  School Board President: “pleased that suit was withdrawn and would defend the policy again if other legal action arose.”

Transgender Students
Judicial Precedent

Elsewhere
Since the most recent OCR guidance:
- Evancho v Pine-Richland School District (Pa., 3rd Cir.)
  Three transgender students sue as a result of district’s policy allowing for restroom use based upon birth gender only. Lambda Legal represents Plaintiffs.
  Court grants students motion for injunction (on policy enforcement) based on Equal Protection grounds but denies it as to Title IX.
  District settles the suit, rescinding its policy and agrees to adjust its policies regarding sexual orientation.

Transgender Students
Judicial Precedent

Elsewhere
Since the most recent OCR guidance:
- Doe v Boyertown Schools (Pa., Dist.)
  ADF files suit against district for policy allowing restroom accommodations for transgender students and requests injunction regarding policy enforcement.
  Court denies Plaintiff’s request for injunction stating that they did not demonstrate that they are likely to succeed on the merits.
  Currently on appeal to the 3rd. Cir.
Transgender Students

Judicial Precedent

Elsewhere

Since the most recent OCR guidance:
- R.M.A v Blue Springs School Dist. (Mo. State Court)
  Female to male student sues in state court for failure to accommodate restroom request, citing the Missouri Human Rights Act (MHRA).
  State Court of Appeals holds that MHRA does not extend its protections to gender identity. Court notes that the Whitaker case accepted such theories under Title IX only.
  State Supreme Court oral arguments heard on April 25, 2018.

Transgender Students

The Latest

April 15, 2019

Illinois Parents Group Drops Suit Against District Challenging Its Trans-inclusive Restroom Policies

“The parents’ decision followed the judge’s dismissal of portions of the suit, including counts alleging the district violated other students’ right to bodily privacy and their parents’ right to direct their education.”

The District issued the following statement in response to dismissal of the suit, “The district will continue our practices of affirming and supporting the identity of our students with access to bathrooms and locker rooms.”

Transgender Students

The Latest

April 10, 2019

Baltimore City Public Schools Adopts Trans-inclusive Policies

“The policy allows all student access to facilities that correspond with their gender identity, including restrooms and locker rooms and provides a ‘safe non-stigmatizing alternative’ for those who are uncomfortable using a gender-segregated facility.”
Missouri Supreme Court Rules that Transgender Student has a Valid Cause of Action for Violation of Missouri Human Rights Act

The Missouri Supreme Court, in a 5-2 split, vacated the Circuit Court's judgment and remanded the case back to the Circuit Court for further proceedings. It held that the plaintiff student has stated a valid cause of action for sex discrimination in violation of the MHRA. The court found that the plaintiff had successfully pleaded the three elements of a case of action based on the MHRA:

1. Plaintiff is a member of a class protected by section 213.065;
2. Plaintiff was discriminated against in the use of a public accommodation (as defined by section 213.010); and
3. Plaintiff's status as a member of a protected class was a contributing factor in that discrimination.

Transgender Students

February 26, 2019

The Latest

Missouri Supreme Court Rules that Transgender Student has a Valid Cause of Action for Violation of Missouri Human Rights Act

Transgender Students

February 18, 2019

The Latest

Gloucester County School Board Considers Revising its Policy to Allow Transgender Students to Use Restrooms Which Correspond With Their Gender Identity.

Transgender Students

The Now

So where does this leave us?

- OCR will not be conducting Title IX investigations regarding any failure to accommodate a restroom/locker room accommodation demand.
- Students are still suing districts for failing to accommodate and are, generally, still prevailing in those lawsuits.
So where does this leave us?

- Due to OCR’s change in enforcement policy, lawsuits from activist groups against districts which adopt trans-inclusive policies are on the rise as well. These lawsuits are less successful.
- These groups will often assert that “OCR has declared that transgender students are not covered by Title IX.”

But as we’ve seen, that’s not entirely true.

Given the amount of attention being paid to this issue, transgender students are more aware than ever of the options available to them when they feel as though their civil rights have been violated.

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. These resources encourage them to become activists.