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## **Legal Rights of Transgender Students in Education**

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*Nearly 150,000 school-aged teenagers in the United States identify as transgender, but the population continues to face harassment, bullying, and discrimination from their peers and educators. The most recent battles for bathroom access based on gender identity has led to significant policy debates nationally and statewide. It is critical for school leaders to promote an all-inclusive and safe school environment to help improve the academic experience for transgender students. The purpose of this paper is to outline the current anti-discrimination federal and state laws that protect against sex and gender identity harassment in school, including Title IX, Equal Access Act, the Family Educational Rights and Privacy Act (FERPA), and the First and Fourteenth Amendments of the U.S. Constitution. Additionally, court cases such as *Whitaker v. Kenosha* and *G.G. v. Gloucester County School Board* have helped to set the precedence for equal access to facilities in public schools. This paper will conclude with opportunities for school leaders to cultivate an institution that ensures the success of transgender students.*

**KEYWORDS:** Transgender Students, discrimination laws, gender inclusion

The legal rights of transgender men and women have been at the focal point of political debate throughout the most recent years. In the United States alone, nearly 149,750 individuals aged 13 to 17 and 205,850 individuals aged 18 to 24 identified as transgender. Additionally, 967,100 individuals aged 25 to 64 and 217,050 adults aged 65 and older identified as transgender (Herman et al., 2017). While transgender men and women only retain a minimal portion of the population, they still continue to face several obstacles to overcoming discrimination, specifically in public school and institutions of higher education. Nearly 51% of transgender students surveyed reported that they could not use their preferred name or pronoun, and 60% reported that their superiors required them to use a bathroom or locker room based on their legal biological sex (Kosciw, Greytak, Giga, Villenas, & Danischewski, 2015). Additionally, about three in five LGBTQ (lesbian, gay, bisexual, transgender, and/or queer) students reported to having experienced sexual harassment at school. Approximately 40.5% of the LGBTQ participants reported to hearing remarks about transgender people including “tranny” or “he/she,” and nearly 65% of the participants overheard teachers and other school staff remark negatively about a student’s gender expression. Specific policies also prevented transgender students from wearing clothes based on the gender of which they identified with because school leaders acknowledged it as inappropriate (Kosciw et al., 2015).

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Transgender adults are also no strangers to controversy in their occupations and face higher rates of employment discrimination than their counterparts (Hunt, 2012). Currently, only 15 states have laws prohibiting workplace discrimination and harassment based on gender identity. However, more than half of the 79 transgender and gender-nonconforming public school educators who participated in an NPR survey reported to facing verbal harassment and discrimination, including coworkers intentionally calling them by the wrong pronouns (Kamenetz, 2018). Additionally, 17% of the educators alleged that they received requests to fix how they presented themselves in the workplace. Gender identity discrimination is also significant among educators at the university level. In 2013, an Azusa Pacific University supervisor fired theology professor H. Adam Ackley after he publicly came out as transgender (Bailey, 2013). Charin Davenport, a former Saginaw Valley State University professor, filed a sex discrimination suit against the institution's leaders in 2016 for terminating her two months after Davenport announced her gender transition (Zavadski, 2016).

Most recently, the battle over bathroom access based on gender identity has been at the forefront of federal and state anti-discrimination policies in addition to public school policies. In May 2016, officials from the Obama Administration affirmed transgender students' rights to use restrooms that corresponded with their gender identities (Emma, 2016). However, the Trump Administration withdrew Obama's guidance asserting that the issue should be at the state level, and arguing that legal issues were involved (Peters, Becker, & Davis, 2017). North Carolina is currently the only state to have possessed a law enforcing use of bathrooms based on biological gender, but legislatures repealed the law in 2017 (Kralik, 2017). Texas legislatures attempted to pass a similar bill that would prevent transgender individuals from accessing restrooms that aligned with their identified gender, but the bill failed to pass in the 2017 legislative session (Ura & Murphy, 2017). Along with Texas, policymakers from over a dozen states have contemplated legislation that would limit the rights of transgender students and prohibit access to multiuser restrooms (Kralik, 2017).

While the battle for equality has risen, so has progress in addressing transgender issues. In 2013, California Governor Jerry Brown signed the School Success and Opportunity Act. The state law is designed for transgender school-aged students to partake in sex-segregated school activities, such as athletics or sports. The bill also allows for students to access restrooms or locker rooms with respect to their gender identity ("California Law Allows," 2013; School Success and Opportunity Act, 2013). This historic landmark decision marked California as the first state to provide equal protection for transgender students. Officials from other states, including Rhode Island, New York, and Connecticut, and hundreds of school districts nationwide have adopted anti-discrimination policies that protect transgender students (National Center for Transgender Equality, 2018). University officials have also demonstrated attempts to embrace transgender students by implementing gender-inclusive dorms, in which students of different genders may room together. University of Southern California, Colorado College, University of New Haven, and Florida International University are among the 265 colleges and universities nationwide to have gender-inclusive dorms as of 2017 ("Colleges and Universities," n.d.).

Several laws exist that explicitly outline anti-discrimination policies, including those that protect against sex and gender identity harassment. These laws include Title IX, state laws and school district policies, the Equal Access Act, the Family Educational Rights and Privacy Act (FERPA), and the First and Fourteenth Amendments of the U.S. Constitution. Additionally, Supreme Court cases have established precedence for transgender students to fight for their equal rights.

## **Protection Laws for Transgender Students**

According to federal and state guidelines, transgender students possess the right to receive appropriate treatment according to their identities, the right for individuals to address them as their identified name and pronoun, the right to be free from harassment and bullying, the right to dress and present themselves according to their identities, the right to receive the same educational opportunities as their counterparts, and the right to protect their privacy about being transgender (National Center for Transgender Equality, 2018). Case laws, federal laws, statutes, and administrative policies comprise these rights that protect transgender individuals' equal access opportunities.

### **Title IX**

One of the most significant laws protecting individuals against sex discrimination in school and the work place is Title IX of the Education Amendments of 1972. President Richard Nixon signed a series of amendments, including Title IX, into law on June 23, 1972 in response to the continual exclusion and inequality women faced in education. The federal law prohibits any institution, both K-12 and higher education, that receives federal funds from denying benefits to or discriminating against individuals in the United States on the basis of their gender (Title IX, 1972; U.S. Department of Justice, 2012). Essentially, school leaders may not prevent students from educational opportunities including financial aid, university admission, student services, counseling, and athletics. As of 2011, Title IX applied to over 49 million students nationwide who were enrolled in more than 98,000 public schools and the 20 million students enrolled in postsecondary institutions. However, federal anti-discrimination laws may not be applicable to religious and non-religious private schools, or any institutions that do not receive federal funding (Kosciw, 2015).

Under the Obama administration, the U.S. Departments of Education and Justice officials extended the Title IX requirements following the rising number of transgender students who filed lawsuits against school districts. In 2014, the section of the law that prohibited sex discrimination in education would also pertain to discrimination against gender identity and gender expression under the new guidance (Molloy, 2014). In 2015, an Office for Civil Rights (OCR) official submitted a letter to the Department of Education describing his interpretation of Title IX. The official clarified that while the regulations allowed school leaders to segregate restrooms, locker rooms, and other facilities based on gender in certain circumstances, the school leaders "generally must treat transgender students consistent with their gender identity" (Ferg-Cadima, 2015, p. 2). In May 2016, Obama Administration officials clarified that federal legislation did essentially protect against transgender student discrimination (Lhamon & Gupta, 2016). Officials from the Departments of Justice and Education released a joint guidance declaring that school leaders must treat students consistent with their gender identity. Additionally, officials required the school leaders to allow transgender students and staff to access restroom facilities that aligned with their gender identity. They essentially acknowledged that barring students from school bathrooms that matched their identity was a form of sex discrimination. The guidance also outlined that school leaders must provide prompt and immediate response to sex-based harassment of students, allow students to participate in sex-segregated activities, and protect students' privacy under Title IX and the Family Educational Rights and Privacy Act (Lhamon & Gupta, 2016).

One month after President Trump took office, Secretary of Education Betsy DeVos and Attorney General Jeff Session rescinded the previous OCR letter and joint guidance under Title IX. The officials claimed that the withdrawal of Obama's guidance was based on a need to closely consider the legal issues, and that the decisions needed to be at the state level. According to DeVos, school leaders were not obligated under Title IX to permit transgender students to access their preferred restroom (de Vogue, Mallonee, & Grinberg, 2017). Additionally, Education Department spokesperson Elizabeth Hill asserted that Title IX does not protect from separating facilities based on sex (Brammer, 2018).

## **FERPA**

The Family Educational Rights and Privacy Act (FERPA) is a federal law that provides protection for the privacy of students' educational records (FERPA, 1974). Like Title IX, the law applies to all schools and educational programs that receive federal funding. Parents possess the rights to their children's educational records under FERPA, but the rights transfer to the students once they reach the age of 18 or attend postsecondary school. Additionally, school leaders must obtain written permission from the parents before releasing any confidential information from the students' records. The only information that school leaders may release without previous consent is directory information, which includes the students' names, addresses, telephone numbers, date and place of birth, honors and awards, dates of attendance, participation in sports, degrees, and the recent educational agency or institution attended (FERPA, 1974). Students also maintain the right to amend their school records "that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights" (FERPA, 1974, p. 4).

FERPA protects the status and medical history of transgender students by making it illegal for school officials to disclose their records without permission. Under the law, transgender students may also amend their legal name and gender marker on their educational records ("A Transgender Advocate's Guide," n.d.). However, the law requires the parents of transgender students who are minors to make the amendment request. Once the students reach 18 years of age or enroll in postsecondary school, the right to amend their records transfers from the parents to the students. School officials who do not promptly change the gender markers on the educational records run the risk of unintentionally disclosing transgender status should any individual view the records ("A Transgender Advocate's Guide," n.d.).

## **Equal Access Act**

On August 11, 1984, President Ronald Reagan and Congress members signed into law the Equal Access Act. The Act prohibits public secondary schools that receive federal funding and possess a limited open forum from denying equal access or opportunity to any student organizations during non-instructional time. Essentially, school leaders may not ban student meetings within their facilities based on the content of the speech (Equal Access Act, 1984). One of the sole legal exceptions to denying access involves only accepting student groups that are curriculum related (National School Board Association [NSBA], n.d.). The law requires school leaders to offer fair opportunities to students within the limited open forum, and the meetings must be of a voluntary capacity and student-led. School leaders may not direct, participate in, or sponsor the meetings in any form.

The initial purpose of the act was to ban discrimination against religious speech in public schools. However, the law has since reached the LGBTQ student community. Equal treatment of all student groups is an obligation, which includes student groups that address LGBT-related matters. The law prevents school leaders from intentionally targeting or segregating specific student groups based on their content. While officials may release a general statement clarifying that they are not directly sponsoring the student organizations, they may not forbid student groups from convening on campus (NSBA, n.d.).

### **First and Fourteenth Amendments**

While the Constitution does not contain any straightforward Amendments protecting transgender individuals, there exist some privacy, speech, and equality protections that could apply. According to the First Amendment of the U.S. Constitution, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances” (U.S. Const. amend. I). In other words, the Constitution provides protection for transgender individuals to display their gender expression publicly and to dress in respect to their identified gender (National Center for Transgender Equality, 2018). On the other hand, transgender individuals also have a right to privacy under the First Amendment and ultimately maintain the choice of not disclosing their gender identity publicly.

The Fourteenth Amendment contains the Equal Protection Clause, which prevents state officials from denying any individual equal protection under the law (U.S. Const. amend. XIV, §1). Therefore, individuals in the public school and higher education level may not treat transgender individuals differently than their counterparts.

### **Public Education Court Cases**

U.S. and state policymakers have made significant advances in protecting the privacy and well-being of transgender individuals in addition to allowing room for equality. However, the laws still remain open to interpretation, specifically when it involves allowing multiuser access to restrooms regardless of gender. Two landmark cases, with one still pending, have set the precedence for the controversial bathroom access issues.

#### **Whitaker v. Kenosha**

Ashton Whitaker, an open male transgender student, attended George Nelson Tremper High School in Kenosha, Wisconsin (*Whitaker v. Kenosha*, 2017). School administrators denied his request to access the male restroom. They informed Whitaker and his mother that he could use the girls’ restrooms or the office’s gender-neutral restroom, which was the only gender-neutral restroom on the campus. Due to fear of consequences and judgment, Whitaker ceased drinking water throughout the school day with the belief that he would avoid any restroom visits (*Whitaker v. Kenosha*, 2017).

Whitaker’s doctor eventually diagnosed him with vasovagal syncope, which would mean he would need to hydrate regularly or he could suffer from seizures and/or fainting. He continued to restrict his water intake during the school day and endured the debilitating symptoms of the disease. The next school year, administrators, who learned about Whitaker’s

regular male restroom use, continued to inform Whitaker and his mother that he still could not gain access to the male restrooms because his records showed he was legally a female. After receiving documentation from Whitaker's pediatrician asserting that he was, in fact, a male, administrators suggested he undergo a surgical transition, an illegal procedure for individuals under 18 years of age (*Whitaker v. Kenosha*, 2017).

Whitaker continued to use the male restroom throughout the remainder of the year, but administrators would regularly remove him from class to inform him of the policy. The school district officials eventually provided Whitaker with access to single-user, gender-neutral restrooms on the opposite side of the campus. Along with banning him from male restrooms, administrators also forbade Whitaker to run for prom king, refused to call him male pronouns, and called him by his birth name. Whitaker also claimed the school officials contemplated issuing green wristbands to all transgender students on campus in order to monitor their restroom usage, which they denied.

Whitaker eventually filed suit against the district arguing that the administrators violated his rights under Title IX and the Equal Protection Clause. He claimed in his suit that avoiding the restroom would worsen his disease, and that the continual issues rendered him suicidal, depressed, and physically ill. The district court denied the defendant's motion to dismiss and granted a preliminary injunction to Whitaker. The administrators appealed to the 7<sup>th</sup> Circuit Court of Appeals, which ultimately upheld Whitaker's injunction. The Court found that the policy requiring Whitaker to use the girls' restroom or gender-neutral facilities was based upon sex, not a rational basis. Therefore, the Equal Protection Clause applied to the case. Additionally, the administrators illegally singled him out through the issue of the policy, which was a form of discrimination (*Whitaker v. Kenosha*, 2017). In January 2018, Kenosha Unified School District officials agreed to pay Whitaker a settlement of \$800,000 (Johnson, 2018).

### **Gloucester County School Board v. G.G.**

What previously would have been the first historical landmark transgender case in the U.S. Supreme Court (Williams, 2017) is still ongoing. Transgender high school student Gavin Grimm obtained permission from his high school principal to access the boys' restroom (*G.G. v. Gloucester County School Board*, 2015). However, numerous Gloucester residents contacted the school board to voice their concerns and demand that the administrators bar Grimm from using the boys' restroom. Following several objections and complaints, the board officials vacated their initial plans to implement security measures for the restrooms. Instead, they created a policy for transgender students to only use single-stall, unisex restrooms that aligned with their biological sex.

After the Office of Civil Rights official issued his open letter to the Department of Education, Grimm applied the interpretation to his lawsuit against the School Board arguing that the restroom policy violated his Title IX and Fourteenth Amendment rights. Grimm sought damages and a preliminary injunction in his lawsuit. The School Board members filed a motion to dismiss Grimm's claims, in which the Court granted in addition to denying Grimm his preliminary injunction. Grimm ultimately appealed to the Fourth Circuit, which reversed the decision of the district court. It ruled that the term "sex" within the Department of Education's Title IX interpretation was applicable to transgender students. Since the letter included that school leaders must treat transgender students with respect to their gender identity, the Court of Appeals ruled in Grimm's favor (*G.G. v. Gloucester County School Board*, 2015). The School Board members, in turn, petitioned for review to the U.S. Supreme Court, and the decision of the

Court of Appeals was stayed. However, the U.S. Supreme Court vacated Grimm's case after Trump's officials announced their withdrawal from the new guidance (Williams, 2017). The Supreme Court sent the case back to the Fourth Circuit Court of Appeals, which, in turn, sent the case back to the district court three months later. In May 2018, the U.S. District Court of the Eastern District of Virginia denied the school board officials' motion to dismiss Grimm's case and ordered the parties to schedule a settlement conference (Stevens, 2018).

## Conclusion

There exists a recent development of lawsuits and complaints regarding discriminatory treatment and harassment of transgender school-aged students. With the rise in students who identify as transgender, it is critical for school leaders to understand the anti-discrimination laws, and to provide equal treatment to all students regardless of their gender identity. It is important that leaders foster an inclusive, welcoming environment, and provide transgender students with the appropriate campus support including counseling, nursing, and more (Kurt, 2017).

Ultimately, school leaders set the foundation for educator policies and actions. However, the lack of a detailed gender policy may leave educators unaware about how to enhance the school experience for transgender youth (Mangin, 2018). School personnel should regularly communicate the school's values of maintaining a supportive community and stress their commitment to safety (Kurt, 2017). They could also promote policies protecting students' rights to participate in gender inclusive sports teams and create dress codes allowing students to express their identities (Tunac De Pedro, Jackson, Campbell, Gilley, & Ciarelli, 2016). Principals have broadened their knowledge on equal rights for transgender students by reading, hiring consultants, and seeking information from activist organizations such as the Gay, Lesbian, and Straight Education Network (Mangin, 2018). While the federal and state bathroom policies may remain vague, providing equal access to and ensuring the privacy of transgender students should be clear. Students ultimately maintain the educational and legal rights to gender inclusive school programs and activities (Mangin, 2018).

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