

TOP 5 TRANS* ISSUES FOR COLLEGES AND UNIVERSITIES: RECORDS, HOUSING, BATHROOMS, LOCKER ROOMS AND ATHLETICS

June 22-25, 2014

Troy J. Perdue¹

Associate General Counsel, East Tennessee State University
Johnson City, Tennessee

Preamble I. *Language Issues*

The concerns of transgender persons and related issues are raising awareness in both the public and in higher education, and for many of us there is new language to learn. The language is ever evolving, but it helps to have a common vocabulary. Here are a few terms and their meanings in the context of transgender issues. These are not exhaustive and are a bit simplified, but they should work as references for the subsequent materials.²

Transgender, Trans, Trans* – *Transgender* is an umbrella term for people whose gender identity or gender expression is different from those typically associated with their assigned sex at birth. *Trans* and *Trans** are shorthand expressions for transgender.³ Note that transgender persons may or may not decide to alter their bodies hormonally and/or surgically, so their identity as a transgender person is unrelated to physical alterations, such as surgery or hormone therapy.⁴

Trans man/trans male – A term for a transgender person who currently identifies as a man.

Female to male and *FTM* are also used.

Trans woman – A term for a transgender person who currently identifies as a woman. *Male to female* and *MTF* are also used.

Gender – One's internal, personal sense of being a man or a woman.⁵ For transgender persons, their birth sex and their own internal sense of gender identity do not match.

Genderqueer/genderfluid – *Genderqueer* is a term used by some individuals who identify as neither entirely male nor entirely female. *Genderfluid* describes individuals with a flexible

¹ I'd like to thank Lisa K. Williams, Assistant Counsel at East Tennessee State University, for her substantive contributions and superior editing skills in the preparation of these materials.

² These definitions are based on those provided by the National Center for Transgender Equality. See National Center for Transgender Equality, *Transgender Terminology*, http://transequality.org/Resources/TransTerminology_2014.pdf (last visited April 25, 2014). GLAAD provides an additional source for these and related definitions. See GLAAD, *GLAAD Media Reference Guide – Transgender Glossary of Terms*, <https://www.glaad.org/reference/transgender> (last visited April 25, 2014).

³ *Gender-variant* or *gender non-conforming* are also used, and will be used synonymously with *transgender* in this paper.

⁴ Gender Spectrum, *A Word About Words*, <https://www.genderspectrum.org/images/stories/08%20a%20word%20about%20words.gender.pdf> (last visited April 25, 2014).

⁵ Or neither gender, both genders, or no gender.

range of gender identity or expression that may change, even from day to day, such as identifying as a female at times and a male at other times, or a combination.⁶ These terms will be used as rough equivalents for persons whose gender is not identifiable solely or exclusively within the male and female categories.

Gender Expression – This term describes the external manifestation of one's gender identity, usually expressed through “masculine,” “feminine” or gender-variant behavior, including clothing, hairstyle, voice or body characteristics.

Sexual Orientation – *Sexual orientation* describes an individual's enduring physical, romantic and/or emotional attraction to another person. Although gender, birth sex and sexuality are all interrelated, they are distinct. So, for example, a transgender person can be heterosexual or homosexual (or bisexual or asexual or any other way of describing people's sexual attraction(s)).

Sex – Sex is the classification of people as male or female. At birth, infants are assigned a sex based on a combination of bodily characteristics including: chromosomes, hormones, internal reproductive organs, and genitals.⁷ Generally, this paper will use the term *birth sex* to refer to persons' sex assigned at birth.⁸

Transition – This term refers to the process of beginning to live in one's gender self-identify rather than one's birth sex. Transition can be social, legal and medical, but may not be all three aspects or all three aspects at the same time.⁹

Preamble II. Title IX and Transgender Status

Public awareness of the lives and concerns of transgender persons has increased markedly over the past few years. As a number of public figures have come out as transgender and have been recognized in high-profile fields, a more accurate understanding of the transgender experience is presented in public media. Society is reassessing its understanding of gender and

⁶ National Center for Transgender Equality, *supra* note 2.

⁷ NCTE doesn't define “sex.” This definition is provided by GLAAD. The medical community typically defines sex and gender, distinctively. “Sex is biologically determined, whereas gender is culturally determined.” Shuvo Gosh, *Gender Identity*, Medscape, <http://emedicine.medscape.com/article/917990-overview> (last visited April 25, 2014). Some in the transgender community do not believe that sex is binary, male or female, but is a spectrum. Thus, the terms “sex” or “biological sex” are, at best, inaccurate. With this in mind, the term “birth sex” will be used.

⁸ For clarity, this paper will occasionally use the term “biological sex” instead of “birth sex.” As noted, we will use “birth sex” for the sex assigned to persons at birth. However, in common usage and in policies the term “sex assigned at birth” (and, derivatively, “birth sex”) may not always mean “the male or female designation assigned to a person at birth.” These phrases may function as euphemisms for the physiology that was the impetus for assigning a given sex at birth. Also, sometimes references to “sex” do not mean “what is on the birth certificate” so “birth sex” is insufficient. Some institutional policies regarding a person's “sex” do not refer to a designation on a birth certificate – either “what is currently on the birth certificate” or what was “originally assigned on the birth certificate” (since a birth certificate can be changed in some states). Rather, they refer to a person's biology or physiology. In those instances, this paper will use the term “biological sex” to refer to typical male or female physiology that seems to be the underlying intent of a policy, argument or concern. In all other cases, “birth sex” will be used.

⁹ For example, transitioning often includes changing one's first name, dressing and grooming differently (social transition), but may not include taking hormones or having surgery (medical transition), or changing identity documents, such as drivers' licenses and Social Security records (legal transition).

the concerns of transgender persons and, in turn, the courts are grappling with how such reassessment should be expressed in the law. A limited number of court decisions have been issued, but a consensus on legal principles has not yet been established.

Although distinct from sexual orientation and from birth sex, gender identity is frequently “bundled up” with sexual orientation and birth sex in popular conceptions. The law, however, is struggling to determine if and how gender identity is distinguishable from these other concepts.¹⁰ To date, a number of federal courts and agencies under federal law, as well as state courts and administrative agencies under state and local law, have begun to recognize gender identity as a protected status,¹¹ while other federal and state courts have declined to do so.¹²

Thus far, nearly all of the case law relating to gender identity has been in the employment context. Specifically, federal courts that have recognized gender identity as a protected status have done so primarily as sex discrimination (on the “basis of sex”) under Title VII in employment contexts.¹³ The EEOC has also taken, and is enforcing, the position that gender identity and expression are protected under Title VII.¹⁴

Title IX analyses frequently follow Title VII, so many transgender rights advocates are encouraged by the successes in the employment context of some federal jurisdictions, and are applying similar arguments and rationales in the education context under Title IX,¹⁵ with

¹⁰ See Francine T. Bazluke, and Jeffrey J. Nolan, *Because of Sex: The Evolving Legal Riddle of Sexual vs. Gender Identity*, Bazluke, *Journal of College & University Law* 32 (2005).

¹¹ For an excellent analysis by NACUA colleagues on the state of the law for gender identity protection under Title VII, see, *Id.* The National Center for Lesbian Rights and Transgender Law Center provide the following summation of the case law:

“[...]the Ninth Circuit, the First Circuit, and [...] the Sixth Circuit have issued favorable decisions holding that transgender, or more broadly, gender non-conforming persons, are protected from discrimination under Title VII and other sex discrimination statutes[. . .] federal district courts are increasingly refusing to dismiss Title VII claims brought by transsexual plaintiffs[, and] courts and administrative agencies in Connecticut, Massachusetts, New Jersey, and New York have all found that transgender plaintiffs, who had been discriminated against because of their gender identity, had a right of action under existing state and/or local anti-discrimination laws.”

National Center for Lesbian Rights and Transgender Law Center, *Advancements in State And Federal Law Regarding Transgender Employees: A Compliance Guide for Employers and Employment Law Attorneys* (2006), available at <http://www.nclrights.org/legal-help-resources/resource/advancements-in-state-and-federal-law-regarding-transgender-employees/>. Although written in 2006, this summation is still an accurate reflection of current law, along with additional states and administrative agencies that recognize gender identity as a protected class under their respective laws.

¹² E.g., *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007); *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001); *Hispanic Aids Forum v. Estate of Joseph Bruno*, 792 N.Y.S.2d 43(N.Y. App. Div. 2005). *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

¹³ E.g., *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.C. 2008); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).

¹⁴ *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at 10 (E.E.O.C. Apr. 20, 2012)(EEOC affirms protections for transgender employees)(“Title VII prohibits discrimination based on sex whether motivated by hostility, desire to protect persons of a certain gender...or the desire to accommodate other people’s prejudices or discomfort.”)

¹⁵ See, e.g., Jean T. Harper, & Jennifer Levi, *Securing Equal Access to Sex-segregated Facilities For Transgender Students*, 28 *Wis. J.L. Gender & Soc’y* 301 (Fall, 2013); Erin Buzuvis, “*On The Basis Of Sex*”: Using Title IX to

occasional success.¹⁶ Although frequently complying with state discrimination laws and not Title IX precedent, some scholastic districts have begun including gender identity protection in their policies and decisions, and, in a number of high profile instances, transgender students have had success in obtaining protection and equal access in scholastic institutions.¹⁷

According to Campus Pride, approximately 730 colleges and universities are also including gender identity (and frequently, gender expression) as protected categories in their policies, also.¹⁸ Although Title IX has not historically been understood to include gender identity, the U.S. Department of Justice Office of Civil Rights (OCR) issued a Dear Colleague Letter in 2010 (“DCL”) that attempted to provide guidance to institutions on the proper inclusion of gender identity (and transgender rights, generally) in higher education.¹⁹ In brief, the DCL affirmed the OCR’s position that discrimination on the basis of gender identity or gender expression was protected under Title IX as discrimination “on the basis of sex.”²⁰

This, then, is the legal landscape that higher education institutions are navigating. Multiple federal appellate courts (and some state courts) have recognized transgender rights in employment context, while other federal appellate courts have explicitly declined to recognize such rights. The OCR has taken the position that transgender rights are protected under Title IX; however, such a position is merely “guidance” at present, and it is not clear how this policy is to be applied in the context of transgender access versus sex harassment, which was the primary framing of the DCL.²¹ It is also unclear whether OCR contemplates exceptions or limitations to gender identity inclusion for private and religious institutions or in light of state laws that are inconsistent with the OCR’s position.²²

Protect Transgender Students From Discrimination in Education, 28 Wis. J.L. Gender & Soc’y 219 (Fall, 2013); Katherine Kraschel, *Trans-cending Space in Women’s Only Spaces: Title IX Cannot Be the Basis For Exclusion*, 35 Harv. J.L. & Gender 463 (Summer, 2012); Tina Sohaili, *Securing Safe Schools: Using Title IX Liability to Address Peer Harassment of Transgender Students*, 20 Law & Sex. 79 (2011).

¹⁶ *Montgomery v. Independent School District No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000); *Miles v. New York University*, 979 F.Supp. 248 (U.S. Dist. Ct. S.D.N.Y. 1997).

¹⁷ See, e.g., Judy Harrison, *Maine Supreme Court rules in favor of transgender girl in Orono school bathroom case*, Bangor Daily News, <https://bangordailynews.com/2014/01/30/news/bangor/maine-supreme-court-rules-in-favor-of-transgender-girl-in-orono-school-bathroom-case/> (last visited April 25, 2014); Sadie Whitelocks and Alex Greig, *Transgender child, 6, wins civil rights case to use the girls restroom at school in Colorado*, The Daily Mail (June 24, 2013) available at <http://www.dailymail.co.uk/news/article-2347149/Coy-Mathis-Transgender-child-6-Colorado-wins-civil-rights-case-use-girls-bathroom-school.html>; Ruben Vives, *Transgender teen to play on Azusa High’s girls’ softball team*, Los Angeles Times (February 14, 2014) available at <https://latimes.com/local/lanow/la-me-ln-azusa-teen-first-transgender-softball-team-20140214,0,3667420.story>.

¹⁸ See, Campus Pride, *Colleges and Universities with Nondiscrimination Policies that Include Gender Identity/Expression*, <http://www.campuspride.org/tpc-nondiscrimination/> (last visited April 25, 2014).

¹⁹ U.S. Department of Education’s Office for Civil Rights, *Dear Colleague Letter on Harassment and Bullying*, (issued October 26, 2010), available at <http://www.ed.gov/ocr/letters/colleague-201010.html>.

²⁰ *Id.* The OCR also affirmed its position that such discrimination is impermissible gender/sex stereotyping. *Id.* at 7-8.

²¹ Only one sentence in the DCL seems to go beyond the context of harassment. “[...] Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.” *Id.* at 8.

²² See, e.g., Virginia scholastic athletics league policy requires participation based on birth sex or sex reassignment surgery. Lance Richardson, *Should Sex Reassignment Surgery Be Required for Transgender High School Athletes?*, SLATE, http://www.slate.com/blogs/outward/2014/02/21/virginia_s_transgender_high_school_athlete_policy_should_not_require_sex.html (last visited April 25, 2014); See also Lucinda Shen and Sarah Chaney, University of North Carolina System bans gender-neutral housing, dailytarheel.com, *University of North Carolina System bans gender-*

Given this landscape, the aim of this paper is to provide workable approaches where it can, and to highlight both practical and legal concerns when addressing these issues on campus.

I. Records

Students routinely are required to identify themselves by name and sex on forms and documents. Transgender students identifying themselves by a gender other than their birth sex frequently adopt a name consistent with their self-identified gender. So, which sex or gender, and which name, should a student use? This seemingly simple “document” problem can create unintended, but distressing, results.

Consider a recent confrontation on a college campus. A trans female student was exiting a women’s restroom on her college campus when she was approached by a campus security officer and asked for ID to verify that she was a female student. The officer began questioning the woman in the public hallway and called for backup. Four officers arrived and the student was questioned for 20 minutes before being escorted off campus. If the institution had a records policy that provided the student with a clear means of identifying herself for institutional purposes, this unfortunate event may not have occurred.²³

Presently, any number of government records are subject to differing rules from multiple agencies.²⁴ State and federal agencies are taking multitudinous positions on the changing of records.²⁵ Some states explicitly disallow changes to gender markers on governmental records, such as birth certificates,²⁶ while others require changes to governmental records upon meeting certain criteria.²⁷ Addressing these problems is beyond the scope of these materials, and is likely impossible. However, institutions may still be able to assist their students in this area.

A. Campus Records

A possible first step that bears minimal legal entanglements and accommodates the needs of transgender students is to address *campus records*. Institutions may want to work with their Registrar and Student Affairs Offices to establish a simple, one-stop procedure for

neutral housing, [dailytarheel.com](http://www.dailytarheel.com), <http://www.dailytarheel.com/article/2013/08/5205267e7af4d> (last visited April 25, 2014).

²³ Nicole Hensley, *Female transgender student suspended for using women’s bathroom*, New York Daily News, <http://www.nydailynews.com/news/national/transgender-student-suspended-women-bathroom-article-1.1746243> (last visited April 25, 2014). Note – in this particular case a good ID policy may not have been enough. The applicable state has made clear its position on gender-identity protections, and it is unclear that the student timely provided her ID.

²⁴ See, e.g., Lisa Mottet, *Modernizing State Vital Statistics Statutes And Policies To Ensure Accurate Gender Markers On Birth Certificates: A Good Government Approach To Recognizing The Lives of Transgender People*, 19 Mich. J. Gender & L. 373 (2013).

²⁵ For example, the U.S. Department of State implemented a passport policy allowing transgender people to change the birth identified on their passports upon presentation of a physician’s certification of gender transition, even if they have not undergone any hormonal treatment or surgery. U.S. Department of State, *New Policy on Gender Change in Passports Announced*, <http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm> (last visited April 25, 2014).

²⁶ E.g., Ohio Rev. Code § 3705.15(2006); Idaho Code § 39-250(2005).

²⁷ E.g., 18 Vt. Stat. § 5112 (2011)(*upon affidavit of gender transition from physician*); Mo. Ann. Stat. § 193.215(9)(2006)(*court order following surgery*).

students to change their name and/or gender on all of their campus records and documents.²⁸ Institutions may want to address the tension between campus records and governmental records that are outside of institutions' control through policy language such as the following:

“The school shall maintain a mandatory permanent pupil record that includes a student’s legal name and legal gender. However, to the extent that the school is not legally required to use a student’s legal name and gender on other school records or documents, the school shall use the name and gender preferred by the student.”²⁹

Additional options are set out in the *Promising Practices for Campus Records and Documents* created by the Pennsylvania State University LGBTQA Student Resource Center.³⁰ At a minimum, institutions should evaluate what institutional records can (and cannot) be changed to reflect a person’s gender self-identification, and under what conditions the institution will (or will not) alter those records.

II. Housing

Institutional housing departments typically assign on-campus housing based on students’ birth sex.³¹ Most institutions then place the students in sex-segregated dormitory buildings, floors or rooms.³² Consequently, transgender students commonly have trouble finding suitable or appropriate housing options. Some institutions have created gender-neutral or gender-inclusive housing, as well as gender-neutral floors and/or suites, to address transgender students’ needs.³³ Many institutions address this tension on a case-by-case basis upon the request of the individual student.

A common strategy is to provide individual or single-room housing for the transgender student. This may frequently be a positive outcome for a transgender student, but for a transgender student wishing to room with friends or with fellow students of the same gender, this option is unhelpful and may result in litigation.

A. George Fox University Case

²⁸ Genny Beemyn, *Ten Strategies to Improve Trans Inclusiveness on Campus*, Best of the Best: An Official Queer Guide to Higher Education (Alyson, 2006), available at <http://www.umass.edu/stonewall/transhand/>.

²⁹ Gay, Lesbian & Straight Education Network and National Center for Transgender Equality, *Model District Policy on Transgender and Gender Nonconforming Students*, <http://www.umass.edu/stonewall/uploads/listWidget/25135/Model%20District%20Trans%20Policy.pdf> (last visited April 25, 2014).

³⁰ Emily Johnson and Allison Subasic, *Promising Practices for Inclusion of Gender Identity/Gender Expression in Higher Education*, The Pennsylvania State University LGBTQA Student Resource Center, http://www.hendrix.edu/uploadedFiles/Student_Life/Student_Activities/Workshop%20Materials.pdf (last visited April 25, 2014).

³¹ David S. Cohen, *The Stubborn Persistence Of Sex Segregation*, 20 Colum. J. Gender & L. 51 (2011).

³² There is a rising number of schools allowing coed dorm rooms. Michelle R. Smith, *Colleges are allowing coed dorm rooms*, USA Today, available at http://usatoday30.usatoday.com/news/education/2008-05-02-coed-rooms_n.htm.

³³ Campus Pride, *Colleges and Universities that Provide Gender-Inclusive Housing*, <http://www.campuspride.org/tpc-gih/> (last visited April 25, 2014). But, some states explicitly disallow gender-inclusive housing. *E.g.*, Shen and Chaney, *supra* note 22.

Consider a recent occurrence at George Fox University. In preparation for returning to college for his sophomore year, a transgender male student approached student housing officials about rooming with his male friends.³⁴ The university has only sex-segregated housing on campus and the student did not want to live in individual housing. The university met with the student and the student's parents multiple times and eventually decided that it could not accommodate the student on campus but would allow him to use off-campus housing to room with male friends. The student subsequently filed a complaint with the Department of Education against the university, which is currently pending.³⁵

In light of the DCL's assertion that gender identity is a protected category under Title IX, the eventual decision of the OCR appears predictable: the university must allow the trans male student to live on campus in male housing (along with additional requirements on the university). A recent settlement with Arcadia Unified School District, discussed below, confirms this expectation. In all likelihood, George Fox University will need to litigate the matter in order to establish its right to make its desired housing decisions.

B. OCR-Arcadia Settlement Agreement

In July of 2013, the OCR reached a settlement with the Arcadia Unified School District of Arcadia, California, over the District's treatment of a transgender male middle school student ("Arcadia Settlement").³⁶ The District was prohibiting a transgender male student from using the boys' restrooms and locker rooms at school. Additionally, while on a school-sponsored camping trip, the District housed the student in a cabin alone with an adult chaperone rather than with the gender with which the student identified (male). The settlement agreement required the District to allow the transgender student to participate in all sex-segregated school activities consistent with his self-identified gender, including restrooms, locker rooms and housing.

The DCL makes clear that the OCR's position applies equally to institutions of higher education.³⁷ In the Arcadia Settlement, the OCR has moved beyond the harassment and bullying concerns it addressed in the 2010 DCL, and is now addressing equal access based on gender identity. Moreover, the OCR has further asserted its position that accommodations resulting in the segregation of the student *in contravention of the student's wishes* are impermissible.³⁸

So, while addressing transgender needs on a case-by-case basis is generally useful and

³⁴ Bob Heye, *Transgender student files sex discrimination complaint against George Fox University*, Komo News Network, <http://www.komonews.com/news/local/Transgender-student-files-sex-discrimination-complaint-against-George-Fox-254042331.html> (last visited April 25, 2014). This university could be described as using the "identity plus" model outlined at Section IV, *infra*.

³⁵ *Id.*

³⁶ U.S. Department of Education, Office for Civil Rights, *Resolution Agreement*, Case Number 09-12-1020, available at <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>.

³⁷ Allie Grasgreen, *Equal Access at All Levels*, Inside Higher Ed, <http://www.insidehighered.com/news/2013/07/29/settlement-favoring-transgender-student-has-implications-higher-ed> (last visited April 25, 2014).

³⁸ Arcadia Settlement, II.A.1. *See, generally*, Katherine A. Womack, *Please Check One - Male Or Female?: Confronting Gender Identity Discrimination In Collegiate Residential Life*, 44 U. Rich. L. Rev. 1365, 1378-9 (May, 2010).

fitting, in light of the Arcadia Settlement and the George Fox University OCR filing – and until the courts clarify the inclusion of gender identity under Title IX and the extent of those protections – institutions should carefully consider the risks of OCR investigations and subsequent litigation when these situations arise.

Proactive measures, including such useful practices as staff training and publicizing the contact information of trans-knowledgeable individuals within Housing and Student Affairs Offices, can be found at the *Promising Practices* attachment and at CampusPride.org.³⁹

III. Restrooms

The most common daily difficulty for a transgender student on campus is restroom usage. An inclusive policy for restroom access might very well be the most practical benefit an institution can provide to its transgender students. These students frequently face discomfort and sometimes harassment, no matter which restroom they choose – the one matching their birth sex or the one corresponding to their gender identity.⁴⁰

As noted above, a trans female student exiting a women’s restroom was publicly questioned by campus police and then escorted off campus.⁴¹ Though few are arrested or subjected to extensive interrogations in public, transgender students are recurrently shamed, shunned or harassed when using public restrooms. Many trans students choose to avoid sex-specified restrooms, including foregoing using any restroom, to avoid these difficulties. A common problem on institutional campuses is older buildings with only sex-specific restrooms, especially in high-use spaces such as classrooms, student centers and dining areas.

While some states have enacted legislation specifically protecting gender identity, including the provision of adequate restroom access, the majority have not. In the absence of legislation, the courts have been asked to address the issue of restroom access.

A. Case Law

Much of the case law arising from claims for access to restrooms has arisen in the employment context. As noted, above, employment discrimination based on transgender status under Title VII has been the most fertile ground for claims for gender identity protections. In relatively recent cases, higher courts have taken two different, somewhat inconsistent, approaches.

1. Gender identity (and not birth sex) may be sufficient criterion for restroom access.

In *Cruzan v. Special School District*, a case heard by the United States Court of Appeals for the Eighth Circuit, a female teacher alleged that the school district discriminated against her on the basis of her religion and her sex by allowing a transgender co-worker to use the women’s faculty restroom.⁴² The court determined that the plaintiff failed to express a bona

³⁹ E.g., Karen M. Williamsen-Garvey and Steve Wisener, *8 Steps to Improve Campus Housing for LGBT Students*, CampusPride.org, <http://www.campuspride.org/tools/8stepstoimprovestudenthousing/> (last visited April 25, 2014).

⁴⁰ See, generally, Jill D. Weinberg, *Transgender Bathroom Usage: A Privileging of Biology and Physical Difference in the Law*, 18 Buff. J. Gender L. & Soc. Pol’y 147 (2010).

⁴¹ Nicole Hensley, *supra* note 23.

⁴² *Cruzan v. Special School Dist, No.1*, 294 F.3d 981, C.A.8 (Minn. 2002).

hide religious belief, and didn't suffer an adverse employment action because of it. More importantly, the court held that the plaintiff failed to meet the requirements for a hostile work environment claim based on sex discrimination. The court stated, "To make this showing, Cruzan had to establish the school was 'permeated with discriminatory intention, ridicule, and insult.'"⁴³ Based on the totality of the circumstances – including Cruzan's access to other restrooms and the absence of any claim of inappropriate conduct by the transgender co-worker – the court held that allowing a transgender employee to use the bathroom associated with his or her gender identity does not create a hostile work environment.⁴⁴

2. Birth sex (and not gender identity) may be sufficient criterion for restroom access.

In *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001), the Supreme Court of Minnesota denied a claim of sexual orientation discrimination under the state human rights law which protected sexual orientation from employment discrimination. Goins, a trans female employee, had consistently used the female restrooms while at work. After receiving complaints, the employer mandated that restroom use must be consistent with a person's "biological sex."⁴⁵ When Goins complained, the employer provided a single-occupancy restroom. The court held that the relegation to a single-occupancy restroom was not a sufficient basis for a hostile work environment claim.⁴⁶ Following *Goins*, the New York district court held that a restroom designation based on biological sex, rather than gender identity, was not discriminatory.⁴⁷

In a 2007 case, *Etsitty v. Utah Transit Authority*, an employer terminated a trans female employee after discovering that she was using female restrooms. Etsitty brought a claim under Title VII, asserting that she was terminated (1) because of her sex, and (2) because she failed to adhere to traditional gender norms.⁴⁸ Citing a long line of cases, the Court of Appeals for the Tenth Circuit held that "...discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title XII."⁴⁹ Summary judgment was granted to the defendant employer.

B. Developing Policy

Institutions have taken varying paths when developing restroom policies. Most institutions do not have a specific policy, but in practice require students to use restrooms consistent with

⁴³ *Id.* at 984.

⁴⁴ *Id.* at 984.

⁴⁵ *Goins* at 721.

⁴⁶ The court further held that "...To conclude that the MHRA contemplates restrictions on an employer's ability to designate restroom facilities based on biological gender would likely restrain employer discretion in the gender designation of workplace shower and locker room facilities, a result not likely intended by the legislature. We believe, as does the Department of Human Rights, that the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender." *Id.* at 723.

⁴⁷ Similarly, in *Hispanic Aids Forum v. Estate of Bruno*, 792 N.Y.S.2d 43 (N.Y.A.D. 2005), a group of transgender plaintiffs brought a claim under state and city human rights laws, alleging that they were excluded from bathrooms based on their gender identities. The court determined that the individuals were not excluded from all restrooms, but were restricted to the restrooms corresponding to their biological sex, like every building tenant. *Id.* at 47-48.

⁴⁸ Etsitty based much of her claim on the "sex stereotyping" line of reasoning found in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁴⁹ *Etsitty v. Utah Transit Authority*, 502 F. 3d 1215, 1221 (2007).

their birth sex, or their self-identified gender provided no third party complains. With the publically questioned student as an example, continuing with this approach is rife with legal concerns for institutions. In the past, institutions attempting to accommodate transgender students have allowed access to restrooms consistent with gender identity only after an individual has proved some level of gender reassignment surgery or hormone therapy. This requirement places demanding and potentially unwanted requirements on transgender students. Gender reassignment surgery is a long process involving hormone therapy, significant cost, and substantial health risks.⁵⁰ This approach, too, creates legal concerns. A third option commonly employed by institutions is allowing access to facilities consistent with an individual's government issued ID, or possibly an institutionally issued ID. A policy based on governmental IDs (and institutional IDs that mirror governmental ID only) creates a potential equal protection claim, but is likely a more legally secure position.

When possible, institutions may want to consider converting existing restrooms to single-stall ("family"-style) restrooms or to gender-neutral restrooms, and publishing a map or website locating these restrooms. Other options are available in *Promising Practices* and *Suggested Best Practices for Supporting Trans Students* (CLE supplemental materials).⁵¹

IV. Locker rooms

Locker rooms, even more than restrooms, present difficulties for transgender students. Where most bathrooms have individual stalls, locker rooms often do not provide such privacy. Although contested by some transgender advocates,⁵² this comparative lack of privacy in the locker rooms counsels against treating locker rooms and bathrooms by the same policy. Specifically, the existence of nudity and the lack of privacy in locker rooms present distinct challenges for both transgender persons and institutions.⁵³

To the extent possible, creating individualized spaces in locker rooms, like those available in most restrooms, provides privacy for all students.⁵⁴ Importantly, it reduces the risk of harm,

⁵⁰ See Libby Adler, *T: Appending Transgender Equal Rights To Gay, Lesbian And Bisexual Equal Rights*, Columbia Journal of Gender & Law, Vol. 19, No. 3, pp. 595-616, 607 (2010).

⁵¹ See, also, Daniella A. Schmidt, *Bathroom Bias: Making the Case For Trans Rights Under Disability Law*, 20 Mich. J. Gender & L. 155 (2013); and Jennifer Levi, and Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 Seattle Univ. L. R. 133 (2010).

⁵² Tobin & Levi, *Securing Equal Access to Sex-segregated Facilities for Transgender Students*, 28 Wis. J.L. Gender & Soc'y 301, 317 (2013). Such advocacy seems to emphasize the needs of the transgender student's privacy while simultaneously dismissing any privacy rights in gender conforming students. E.g., "being forced to use gender-inappropriate facilities...is humiliating for [transgender] students, and "instills extraordinary anxiety about how they are seen and treated by peers," but gender-conforming persons' anxiety about their bodies being seen by others [including gender-non conforming persons] is "unfortunately rooted in cultural bias and stereotypes regarding transgender people." *Id.* at 306, 317. Moreover, if the mere knowledge of the nature of a person's anatomy is a constitutionally protected privacy interest (*Id.* at 317), it seems legally incongruous that visual assessment by others is not.

⁵³ See, e.g., City and County of San Francisco Human Rights Commission, *Compliance Guidelines to Prohibit Gender Identity Discrimination*, (§5(F)), <http://sf-hrc.org/compliance-guidelines-prohibit-gender-identity-discrimination> (last visited on April 25, 2014).

⁵⁴ The model policy of GLSEN for school districts proposes that increased privacy be provided to *any* student, regardless of the underlying reason. "Any student – transgender or not – who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative changing area such as the use of a private area (e.g., a nearby restroom stall with a door, an area separated by a curtain, a[n]...office in the

embarrassment or harassment to the transgender student, and also nullifies the most powerful argument (privacy) by potentially objecting students.⁵⁵ When this is possible, a clear benefit is the ability of the institution to avoid the seemingly impossible task of balancing different individual's interests. When creating such individualized spaces is not possible, institutions must make policy choices regarding access to sex-segregated spaces by gender non-conforming students.

Higher education institutions are “all over the board” in addressing access to locker rooms and similar spaces – from no policies to written policies with birth or biological sex requirements to written policies of full inclusion based on self-identity. Some school districts and other scholastic agencies are at the forefront of crafting policies to follow state or local law requirements, or OCR settlements, such as the historic Settlement Agreement with Arcadia Unified School District.⁵⁶ Some have enacted a broad policy of transgender inclusion based solely on gender self-identity;⁵⁷ others have required inclusion based on gender self-identity with exceptions or on case-by-case bases.⁵⁸

Self-identity policy. Some institutional determinations regarding the standard that will be used to establish self-identity may need to be made but, once established, granting access under a broad gender “self-identity” policy is fairly straightforward in application, if not in consequences. Under such a policy, a university would allow access to locker rooms in the same manner it allows access to other university facilities and activities, based solely on gender self-identity.

Identity-plus policy. A gender self-identity policy with either exceptions or additional considerations, an “identity plus” policy, would require an institution to establish the exceptions to the general policy of access or the factors that it would apply in granting access on a case-by-case basis. Common factors used in the establishment of exceptions or in a case-by-case analysis under an identity plus policy might include: the requesting student's preference, protecting all students' and facility users privacy, protecting the safety of the students involved, the availability of private space for the transgender students or other students and facility users, the presence of children, the relative importance of sex-segregation to particular areas (such as areas with the high likelihood of nudity or harassment), and

locker room, or a nearby health office restroom), or with a separate changing schedule (e.g., using the locker room that corresponds to their gender identity before or after other students.... In no case shall a student be required to use a locker room that conflicts with the student's gender identity.” Gay, Lesbian and Straight Education Network (GLSEN), *supra* note 29 at 6-7.

⁵⁵ “These facilities not only serve the needs of transgender students, but also parents with children of a different gender than themselves, people with disabilities who require the assistance of an attendant of a different gender, and anyone desiring greater privacy.” Genny Beemyn, *Ways that U.S. Colleges and Universities Meet the Day-to-Day Needs of Transgender Students*, Transgender Law & Policy Institute, <http://www.transgenderlaw.org/college/guidelines.htm> (last visited April 25, 2014).

⁵⁶ See discussion, section II.B, *supra*. U.S. Department of Education, Office for Civil Rights, *supra* note 36.

⁵⁷ “A transgender student should not be required to use a locker room or restroom that conflicts with the student's gender identity.” New York City Department of Education, *Transgender Student Guidelines*, <http://schools.nyc.gov/RulesPolicies/TransgenderStudentGuidelines/default.htm> (last visited April 25, 2014).

⁵⁸ “If an individual's gender identity does not fit within the binary framework of man/woman or the person is in the process of transitioning to a different gender, participation in a particular gender designated activity will be handled on a case by case basis.” University of Massachusetts, Amherst, *Intramural Participant's Guide*, Section III, <http://www.umass.edu/campusrec/intramurals/participantsguide/index.html#III> (last visited April 25, 2014).

consistency with other institutional policies (such as equal opportunity to participate for all students, or religious traditions of the institution).

A. Applying a Gender Identity Policy

In late 2012, a seventeen-year-old girl was using the locker rooms at the local college as part of her high school swim club. When she entered the sauna area of the locker rooms, she encountered a person sitting in the sauna with male genitalia exposed. She immediately reported the incident to the facilities director of the college's recreation center.⁵⁹

Under a self-identity policy, the facilities coordinator would presumably need to determine the gender identity of the person, and then allow a self-identifying female to use the facilities regardless of physical anatomy or the discomfort of others. This position would consider any discomfort of the public irrelevant (if not irrational) in such circumstances. The benefit of the self-identity policy is that it provides the greatest accommodation to gender non-conforming persons. Moreover, this is the current position of the OCR.⁶⁰

Under an identity plus policy, the university would need to determine the gender identity of the person, and then determine whether an exception applied. If an exception did not apply, the university would then attempt to balance identified interests. Clearly, performing a balancing test on the spot, as the facilities coordinator would have to do (though maybe not alone), could be quite difficult. The case-by-case approach is the most common approach⁶¹ in higher education institutions and will likely be successful in most cases, as the institution and the student work through options. However, much like the housing situation at George Fox University, this approach makes institutions susceptible to an OCR complaint.

B. Identifying Gender

As shown by this example, under both self-identity and identity-plus policies an institution will need to determine the gender of an individual.⁶² The institution should determine, specifically, what criteria it will use to recognize the gender identity of students. Common standards include: “genuinely asserted,” “consistently asserted,” and “consistently and exclusively asserted” gender, as well as “sex/gender assigned at birth.”⁶³ These can be

⁵⁹ Evergreen State College Police Services, Police Report dated September 27, 2012.

⁶⁰ See U.S. Department of Education's Office for Civil Rights, *supra* note 19, and U.S. Department of Education, Office for Civil Rights, *supra* note 36.

⁶¹ Campus Pride identifies only seven institutions with self-identity (“trans-inclusive intramural”) policies. Campus Pride, *supra* note 33.

⁶² The issue of identification is fraught with difficulties. Having a consistent, thought-out policy on gender identity records would be a very good first step, allowing the student to quickly and easily identify themselves, such as providing a student ID. Note, however, that requesting that a student identify their gender is, itself, contentious. See controversy surrounding Central Piedmont Community College student, Andraya Williams (Williams' lawyer: “Why [should] a student be quizzed about her gender and asked for identification for using a bathroom?”) Scott Jaschik, *Questioned for Being Transgender?*, Inside Higher Ed, <http://www.insidehighered.com/news/2014/04/02/debate-central-piedmont-over-transgender-student-rights> (last visited April 25, 2014). Burdensome requirements for identification verification could easily move the “self-identity” policy to an “identity plus” policy.

⁶³ See, e.g., San Francisco Unified School District, Board of Education Administrative Regulation No. R5163a, available at <http://www.sfusd.edu/en/assets/sfusd-staff/site-wide/files/Non-Discrimination%20for%20Students%20and%20Employees%20AR%205163a.pdf>; and Pacifica School District, BP

thought of as most inclusive to least inclusive, respectively.

A “genuinely asserted” gender standard would require limited evidence of gender identity.

Supposedly, some informal documentation (such as an ID), the affirmations of family or friends, or possibly the gender expression of an individual could each be sufficient evidence of gender. A standard of “consistently asserted” gender would seemingly require a bit more evidence over some period of time, and seems to imply an exclusive commitment to either a male or female gender identity.⁶⁴ A “consistently and exclusively asserted” standard would seem to formalize the requirement of a commitment to a single gender identity by including an “exclusive” requirement which may not acknowledge ambiguous gender expressions, such as genderqueer and genderfluid identities. Finally, “sex (or gender) assigned at birth” (or its corollary, sex/gender identified on a particular document, such as a birth certificate) is clearly the most restrictive and least ambiguous, and thus the easiest to administer.

It is important to note that these standards are not sufficient in themselves. Each institution would need to determine what factors it will consider when evaluating conformity with the given standard. Factors may include: how long a student has asserted a particular gender identity, what documentation from a medical or other care provider (if any) will be required,⁶⁵ or whether the gender identity is consistently asserted across all or multiple settings.⁶⁶

A Model Policy recommended by GLSEN for school districts proposes that increased privacy be provided to *any* student, regardless of the underlying reason.⁶⁷ When this is possible, a clear benefit is the ability of an institution to avoid the seemingly impossible task of balancing different individual’s interests. As with other access issues, institutions should think through the risks and stakeholder interests when determining their policy.

V. Athletics

Various athletics organizations have dealt with transgender athletes’ participation in athletics. There appear to be three distinct approaches taken: (1) gender self-identity plus body modification and hormone treatment (the International Olympic Committee approach), (2)

5145.4: Gender Nondiscrimination, available at <http://www.pacificasd.org/boardpackets/2013/11-20-13/11b.pdf>.

⁶⁴ But see, e.g., Julia Baird, *Neither Male nor Female*, New York Times (April 6, 2014) available at <http://www.nytimes.com/2014/04/07/opinion/neither-female-nor-male.html?hp&rref=opinion>.

⁶⁵ We will presume that medical transition would never be required except, if at all, in limited circumstances in athletics. See next section, *infra*. Thus, we understand supporting documentation from a care provider would likely involve evidence from a medical doctor, therapist, social worker, counselor or possibly a religious minister of students’ sincerely held believe that they understand themselves to be the self-identified gender. To the extent such documentation is one factor among others, the students’ parents or even self-identification (e.g., in instances of estrangement from parents) may be sufficient in light of other factors.

⁶⁶ For example, what if a student chooses to identify for social purposes as a female, but as a male for athletics and for work? See, e.g., the cases of Pat Cordova-Goff and Kye Allums, *infra*.

⁶⁷ “Any student – transgender or not – who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative changing area such as the use of a private area (e.g., a nearby restroom stall with a door, an area separated by a curtain, a[n]...office in the locker room, or a nearby health office restroom), or with a separate changing schedule (e.g., using the locker room that corresponds to their gender identity before or after other students. . . . In no case shall a student be required to use a locker room that conflicts with the student’s gender identity).” Gay, Lesbian & Straight Education Network and National Center for Transgender Equality, *supra* note 29.

gender self-identity plus consideration of biological sex and hormone usage (the NCAA approach), and (3) gender self-identity alone (the scholastic approach).⁶⁸ In the higher education context, the latter two approaches are of special concern for colleges and universities.

A. NCAA. The National Collegiate Athletics Association has both recommendations and policies for the inclusion of transgender athletes in competitive athletics over which it has authority. The policies of the NCAA are set out in the *NCAA Policy on Transgender Student-Athletes Participation*⁶⁹ (NCAA Transgender Handbook), and state, in part:

1. A trans male (FTM) student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men's team, but is no longer eligible to compete on a women's team without changing that team status to a mixed team.⁷⁰
2. A trans female (MTF) student-athlete being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or transsexualism, for the purposes of NCAA competition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.

Any transgender student-athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.⁷¹

- A trans male (FTM) student-athlete who is not taking testosterone related to gender transition may participate on a men's or women's team.
- A trans female (MTF) transgender student-athlete who is not taking hormone treatments related to gender transition may not compete on a women's team.

This policy enables a transgender man who is not taking testosterone to compete on a women's team. Though he identifies as a man, he is female-bodied and has no unfair competitive advantage over non-transgender women. He may instead choose to compete on the men's team. However, because of testosterone

⁶⁸ Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 Seton Hall J. Sports & Ent. L. 1 (2011).

⁶⁹ NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes*, http://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (last visited April 25, 2014).

⁷⁰ NCAA rules regarding mixed teams is beyond the scope of these materials, but one significant effect is that the team may not be eligible for championship title recognition. For example, a women's basketball team with a non-transitioning trans woman student-athlete would be deemed a "mixed team," and would be ineligible for a women's NCAA championship. *Id.* at 12. See also, NCAA Bylaws 18 and 20, *et seq.*

⁷¹ By "assigned birth gender" the NCAA means the sex designation on a student's birth certificate. Since some states allow amendment of assigned sex on birth certificates, there is some ambiguity about birth certificates that have been amended, especially as the standards for amendment (e.g., physical or hormonal requirements) many vary among states. Those cases should be submitted to the NCAA's Office of Inclusion for determination.

production, a male-bodied transgender woman who is not taking estrogen may not compete on a woman's team. Whether a transgender student-athlete is competing on a men's or women's team, his or her gender identity should be respected by using the name and pronouns that student has chosen.⁷²

How does this look practically?

In 2011, Kye Allums competed as a self-identified male on the George Washington University women's basketball team.⁷³ This was permissible because Allums was (1) assigned female at birth (and identifying as male), and (2) not taking male hormones. Taking each in turn, regarding his assigned sex, if he had been assigned male at birth (and identifying as a male), then, as is common, he would be required to play on the men's team. Regarding hormones, if he was assigned male at birth and was legally taking male or female hormones, he could only play on the men's team. If he was assigned female at birth and was taking male hormones, then he may play on the men's team, but not on the women's team.⁷⁴

Compare this to an institution's intramural policy, discussed below, that states, "On sex-segregated teams, a student will compete on the team associated with the student's *consistently asserted gender identity*." The likely outcome would be that a trans male, such as Allums, would need to compete on the men's intramural team, regardless of hormone treatment or birth sex.⁷⁵

Note that the NCAA policies do not address a number of possible scenarios, such as treatment of genderqueer, socially (but not physically) transitioned,⁷⁶ or partial-medically transitioned student-athletes. For example, a trans female may elect to have an orchiectomy to remove both testes but choose not to take either hormone (testosterone) suppressors or estrogen. The NCAA's policy would disallow this athlete from competing on the women's team unless she were taking the testosterone suppressors (for one year or more). If an institution encounters a similar scenario, the school should contact the NCAA for a definitive answer given its particular facts.

In discussions regarding transgender athletes, the NCAA's Office of Inclusion

⁷² *Id.* at p.13.

⁷³ Erik Brady, *Transgender male Kye Allums on the women's team at GW*, USA Today (November 4, 2010) available at http://usatoday30.usatoday.com/sports/college/womensbasketball/atlantic10/2010-11-03-kye-allums-george-washington-transgender_N.htm?csp=digg.

⁷⁴ The taking of male hormones in these examples is presumed to be *legally* permitted, e.g., prescribed and taken under a doctor's care.

⁷⁵ One objection to this result might be that such a policy is unnecessarily restrictive on trans students, effectively creating a disparate impact. However, recognizing the self-identity of an individual may mean requiring the individual to commit, within the context of athletics, to the student's self-identified gender. In most circumstances, this is exactly what trans students are committed to doing. Note, however, that is not always the case. E.g., "Allums said he would like to receive the treatments but had held off because he did not want to jeopardize his spot on the team." Katie Thomas, *Transgender Man is on Women's Team*, The New York Times (November 1, 2010) available at <http://www.nytimes.com/2010/11/02/sports/ncaabasketball/02gender.html>.

See, also, *On the Team: Including Transgender Students*, National Center for Lesbian Rights and the Women's Sports Foundation (2009). Available at <http://sports.glsen.org/on-the-team/>.

⁷⁶ For example, a socially transitioned student-athlete who is declining or delaying medical transition. See, note 32, *supra*, and comments of a Bates College student-athlete, "I [chose] to forego any medical transitioning to remain on my women's team." NCAA Office of Inclusion, *supra* note 69 at 11.

emphasized that its committee would look to the underlying purpose of its rule (transgender inclusion balanced with competitive fairness) in deciding these cases. So, in this example, the student-athlete's lack of testes might be reviewed as an equivalent of "hormonal suppression" under the formal policy, thus allowing the transgender athlete to play on the women's team.

B. NAIA. In late 2013, the Gender Equality Committee of the National Association of Intercollegiate Athletics (NAIA) submitted a Transgender Policy recommendation to the NAIA Council of Presidents. As of the date of this paper, the NAIA does not have a policy directly addressing the eligibility status of transgender student-athletes.

C. NJCAA. The National Junior College Athletic Association (NJCAA) policy is similar to the NCAA's policy. A transgender male student-athlete "who has received a medical exception for treatment with testosterone for gender transition" may compete on a men's team but is no longer eligible to compete on a women's team. A transgender female student-athlete "being treated with testosterone suppression medication for gender transition" may continue to compete on a men's team but may not compete on a women's team until completing one calendar year of documented testosterone-suppression treatment. The NJCAA is otherwise silent.⁷⁷

D. Intramurals. Intramural athletics occupy a unique position somewhere between the NCAA's acknowledgment of biological distinctions in highly competitive intercollegiate sports and the inclusion-focused policies of interscholastic sports. Are intramural athletics more like NCAA competitions or more like high school sports?

Interscholastic institutions have been at the forefront of transgender inclusion in athletics and in school activities, generally. This may be the result of a confluence of causes: new state statutes including gender identity and/or expression, OCR's 2010 announced position and subsequent enforcement efforts, and an increase in the number of gender non-conforming students asserting rights to facility access or activity participation.⁷⁸

A number of states have passed gender-identity legislation and/or guidelines that establish the right of transgender athletes to participate on sex-segregated teams consistent with their gender-identities and not their birth sex.⁷⁹ In resolving the tension between inclusion and

⁷⁷ See National Junior College Athletic Association, *Eligibility Rules of The National Junior College Athletic Association (2013-2014)* at §6, http://www.njcaa.org/njcaa/forms/130528_2_Eligibility%20Pamphlet%2013-14.pdf (last visited April 25, 2014).

⁷⁸ E.g., high school baseball player switches to girls' softball team. Ruben Vives, *Transgender teen to play on Azusa High's girls' softball team*, Los Angeles Times (February 14, 2014) available at <http://latimes.com/local/lanow/la-me-ln-azusa-teen-first-transgender-softball-team-20140214,0,3667420.story>.

⁷⁹ See, e.g., California's School Success and Opportunity Act (AB 1266)(amending Section 221.5 of the California Education Code, signed Aug. 12, 2013), California Interscholastic Federation Bylaw 300 D., and *Guidelines for Gender Identity Participation* (November 1, 2012) available at <http://www.cifccs.org/meetings/Documents%20Winter/2012-2013/gender%20identity%20participation.pdf>. See, also, Washington Interscholastic Athletics Association Handbook, §18.15.0 (May 1, 2013) available at <http://wiaa.com/ConDocs/Con1287/Handbook%20%28Web%29.pdf>.

But, see Wisconsin and Virginia policies, respectively, which are similar to the NCAA policy in valuing competitive equity. Wisconsin Interscholastic Athletic Association, *Transgender Participation Policy*, http://media.wix.com/ugd/2bc3fc_95ec28cdb3ee4df89ee624229b9caa48.pdf (last visited April 25, 2014); and

Competitive fairness, these policies prioritize inclusion based on the lack of substantial physiological differences in young athletes and the inclusive principles overriding scholastic education.⁸⁰

Along with Title IX's acknowledgement and sometime support of sex distinctions, institutions may want to assess the nature of their respective intramural programs. Are they participation focused, akin to interscholastic competition? Or are they highly competitive sex-segregated associations that necessitate biological distinctions on the basis of competitive fairness?

Some scholastic and higher education institutions have attempted to balance these interests, and their policies may be useful. Bates College is one such example. The college allows participation of trans students in intramural sports solely in accordance with their self-identity, but includes the NCAA approach (inclusion plus hormone usage) for both NCAA and club sports.⁸¹ Similarly, one Canadian school district requires inclusion on the basis of self-identity, "subject to safety considerations."⁸² For institutions whose intramural programs are focused more on participation, the scholastic model may be preferable.

Conclusion

Although the law is currently unsettled, institutions can avoid costly litigation and serve their transgender students by taking proactive, accommodating measures akin to other civil rights protections. Institutional counsel should make themselves aware of any state and local laws applicable to their institutions, and any case law applicable in their respective federal circuit. As transgender issues continue to increase on campuses, including the *Top 5* mentioned in these materials, institutional counsel should be ready to advise their policymakers, help lead institutional discussions and, hopefully, propose positive resolutions.

Lance Richardson, *supra* at note 22.

Also see, New York City's policy, which requires participation with "consistently asserted identity" in sports but allows for case-by-case exceptions ("Participation in competitive athletic activities and contact sports will be resolved on a case-by-case basis.") New York City Department of Education, *supra* note 57.

⁸⁰ Elizabeth M. Ziegler; Tamara Isadora Huntley, *It Got too Tough to Not Be Me: Accommodating Transgender Athletes in Sport*, 39 J.C. & U.L. 467, 487-8 (2013). See, also, Arcadia Settlement, Section II.A.2 (addressing access for all extracurricular activities according to self-identified gender).

⁸¹ Bates Athletics, *Transgender Inclusion Policies*, Bates College, <http://www.bates.edu/noexcuse/files/2011/04/Bates-Athletics-Trans-Inclusion-Policy.pdf> (last visited April 25, 2014).

⁸² "Transgender and transsexual students. . . shall, subject to safety considerations, be permitted to participate in any gender-segregated activities in accordance with their consistently asserted gender identity, if they so choose." Edmonton Public Schools, *Sexual Orientation and Gender Identity Policy* (2012) available at <http://www.epsb.ca/ourdistrict/policy/h/hfa-ar/>.

SUGGESTED BEST PRACTICES FOR SUPPORTING TRANS STUDENTS

Genny Beemyn, Ph.D.,
Consortium of Higher Education LGBT Resource Professionals¹

I. Recommendations Related to Campus Records and Documents

- Change software to enable students to use a name other than their legal first name on campus records, including course and grade rosters, directory listings, unofficial transcripts, advisor lists, and other documents. Currently, at least 75 colleges and universities provide this option (www.campuspride.org/tpc).
- Where not prevented by state law, allow students to use a name other than their legal first name on campus ID cards and diplomas.
- Enable students to change the gender marker on their campus records upon their request (i.e., without a letter from a therapist or doctor and without the need to change other documents). Almost 50 colleges and universities provide this option (www.campuspride.org/tpc).
- Change software to enable students to indicate the pronouns they use for themselves that would appear on course and grade rosters and advisor lists. Suggested options: she, he, ze, and they.
 - ✓ University of Vermont options: not marked (nothing listed), she, ze, he, and “prefer name only.”
- Enable students to self-identify their gender on forms. Suggested wording:

Gender Identity: _____

or, when such an open-ended question is not possible:

Gender Identity (choose all that apply)

_woman

_man

_trans or transgender (please specify): _____

_another identity (please specify): _____

- Ideally, institutions should only ask gender identity. But recognizing that many women’s

¹ The Consortium of Higher Education LGBT Resource Professionals (known as “the Consortium”) is the international association of staff, faculty, and administrators who provide support to LGBT students on college and university campuses. More than five hundred individuals on several hundred college campuses are members of the Consortium. For more information: www.lgbtcampus.org.

colleges currently limit enrollment to women whose documents identify them as such, it may still be necessary to ask “sex” on admissions forms. In this case, both “sex” (“female” and “male”) and “gender identity” should be asked.

- Have an easily accessible web page that details the policies and procedures related to changing names and gender markers and indicating pronouns on campus records.
- Critically examine if asking gender on a document is really needed. For example, is gender identity relevant to a student’s participation in a career center event?

II. Recommendations *Related to Campus Housing*

- Hire trans-identified and trans-knowledgeable Res Life staff.
- Have all professional and student Res Life staff members attend a trans-focused ally training. (If such a training is not provided on your campus, work with trans advocates to develop one).
- Have an easily accessible web page as part of the housing site that explains the school’s housing policies related to gender identity and that provides the contact information for a housing official who can be the point person for these policies.
- Enable all students to self-identify their gender on their housing application.
Suggested wording:

Gender Identity: _____

or, when such an open-ended question is not possible:

Gender Identity (choose all that apply)

_woman

_man

_trans or transgender (please specify): _____

_another identity (please specify): _____

- If this more expansive gender identity question is not possible on the housing application, then include “transgender” as part of a “special needs” question.
- Develop and publicize a trans-supportive housing policy. This policy should state:
 - ✓ That the college will always recognize and respect the stated gender identity of the student.
 - ✓ Students who inform the college that they are trans in a timely manner will be housed in keeping with their gender identity/expression.

- ✓ Although housing concerns are addressed on a case-by-case basis, a trans student will always be given a comfortable and supportive housing assignment.
 - ✓ The policy of the University of California, Riverside: <http://out.ucr.edu/ourcampus/Pages/Housing.aspx>
- Establish a gender-inclusive housing (GIH) option that:
 - ✓ is available for both new and returning students.
 - ✓ is separate from an LGBTQ-theme floor.
 - ✓ is open to all students, not just to trans students.
 - ✓ is offered in different parts of campus and, if possible, in different types of housing (doubles, suites, apartments).
 - ✓ includes gender-inclusive bathrooms/showers.
 - ✓ Currently, about 150 colleges and universities offer a gender-inclusive housing option (www.campuspride.org/tpc).
 - Create gender-inclusive bathrooms and private showers in all renovated and newly constructed residence halls.
 - Have a res hall bathroom policy that states that “individuals should use bathrooms that correspond to their sex or gender identity, depending on which option they feel is safer, or utilize bathrooms that are designated gender-neutral/gender-inclusive” (UMass Amherst policy).
 - If your institution does not have “gender identity” in its general nondiscrimination policy, include it in your housing policies.
 - Have a zero-tolerance policy for acts of harassment and discrimination (including anti-trans acts) that occur in residence halls.
 - Encourage RAs to hold trans awareness programs on their floors and to post trans educational material.

III. Recommendations Related to Bathrooms

- Have an inclusive, written campus bathroom policy. See above policy wording.
- Have a policy requiring at least one gender-inclusive restroom (a bathroom open to people of all genders) in all newly constructed or significantly renovated buildings, including residence halls.
- Have gender-inclusive restrooms in at least half of the administrative and academic buildings on campus.

- Have an online list/map of campus gender-inclusive restrooms.
- For gender-inclusive bathrooms, use a sign that avoids the male and female stick figures. Suggested signage (from Macalester College):



IV. Recommendations Related to Recreational Sports and Locker Rooms

- Develop a policy for transgender students to compete in intramurals. Currently, at least nine campuses have a trans-inclusive intramural policy (www.campuspride.org/tpc).
- ✓ UMass Amherst policy: “When an activity makes a gender designation, an individual who has transitioned to a different gender can participate in the division of the individual’s current gender. If an individual is in the process of transitioning to a different gender, participation in a particular gender designated activity will be handled on a case-by-case basis.”
- Offer lockable, single user changing and shower rooms that are readily available to trans students in campus rec centers and athletic facilities.
- Create greater privacy in men’s and women’s locker rooms by constructing private shower and changing cubicles when athletic facilities are built or renovated.

DEVELOPMENTS IN TRANSGENDER STUDENTS' RIGHTS: RESOURCES AND LINKS

M. Dru Levasseur

Transgender Rights Project National Director
Lambda Legal

Lambda Legal Transgender Rights Toolkit

<http://www.lambdalegal.org/publications/trans-toolkit>

This toolkit, produced by Lambda Legal, is intended to provide transgender individuals and their allies with quick and easy access to information about transgender rights in a variety of contexts, including access to public restrooms, identity documents, and workplace rights and wrongs.

Doe v. Clenchy (Maine Supreme Court, 2014)

<https://www.glad.org/uploads/docs/cases/doe-v-clenchy/doe-v-clenchy-decision-1-30-14.pdf>

<https://www.glad.org/work/cases/doe-v.-clenchy>

A transgender girl in Orono, Maine, was denied access to the girls' restroom in her elementary and middle schools because of her transgender status. Instead, she was forced to use a separate, staff only, non-communal restroom. In January 2014, the Maine Supreme Court held that this treatment was discrimination on the basis of gender identity, in violation of Maine's Human Rights Act. The Court held that because the student was accepted at school as a girl, she must have been singled out for different treatment solely because of her status as transgender.

Amicus Brief for Doe v. Clenchy (see above)

<http://www.glad.org/uploads/docs/cases/doe-v-clenchy/2013-05-03-doe-v-clenchy-amicus-brieffinal.pdf>

Associations of Maine pediatricians, psychologists, social workers, youth advocates, and women's advocates came together to sign this amicus brief in the case of Doe v. Clenchy. These associations agreed that "[t]he promise of equal educational opportunity for transgender students can be fulfilled only if they are able to live fully – including in all components of the school environment – as the gender that they are. . . . For these [transgender] individuals, normal psychological development and educational growth, including the critical ability to form peer relationships, require that they integrate their gender identity into their lived experience. . . . [T]hat must include the ability to use the restroom consistent with one's gender identity." Also critical to the Maine Supreme Court's ruling was evidence put forward in the brief showing that bathrooms "play an important role in peer relationships and socialization, which are critical to a child's ability to feel safe and learn," and that "requiring a transgender girl to use a separate bathroom disrupts her development and is harmful to her long-term health and well-being."

California Assembly Bill No. 1266 (School Success and Opportunity Act)

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1266

This amendment to the California Education Code, which went into effect January 1, 2014, requires that students in California public schools be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records. It also requires school counselors to give students advice irrespective of students' sex, so as to affirm students' identities and to encourage them to explore gender non-conforming career options.

Resolution Agreement between Arcadia Unified School District, the Office for Civil Rights of the U.S. Department of Education, and the Civil Rights Division of the U.S. Justice Department

<http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>

Recently, the Department of Justice (DOJ) and the Department of Education (DOE) investigated the complaint of a transgender male student in California whose school district had forced him to use a single-user restroom instead of the men's room, and had segregated him from the rest of the male students during an overnight field trip. The DOJ and DOE wrote that "[t]here [was] no dispute the District treated the student differently than other students because of his gender identity." As a result of the investigation, the school district voluntarily agreed to grant the student access to male-designated facilities at school and on school-sponsored trips.

Mathis v. Fountain-Fort Carson School District 8

http://www.transgenderlegal.org/media/uploads/doc_529.pdf

Last year, the Colorado Civil Rights Division ruled in favor of six-year-old Coy Mathis, whose school had barred her from using the girls' bathroom at her elementary school because she is transgender. This decision was the first of its kind in the nation, holding that transgender students must be allowed to use bathrooms that match who they are, and one of the most comprehensive rulings supporting the rights of transgender people to access bathrooms without harassment or discrimination.

NCAA Inclusion of Transgender Student-Athletes

http://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf

This resource, produced by the NCAA Office of Inclusion, provides guidance to NCAA athletic programs about how to ensure transgender student-athletes fair, respectful, and legal access to collegiate sports teams based on current medical and legal knowledge. This includes best practice and policy recommendations for intercollegiate athletic programs to provide transgender student athletes with fair and equal opportunities to participate (with specific best practice recommendations for athletic administrators, coaches, student-athletes, and the media), as well as guidance for implementing these policies to ensure the safety, privacy, and dignity of transgender student-athletes as well as their teammates.

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into this ____ day of _____, 2010, by and between [REDACTED] and the [REDACTED] BOARD OF EDUCATION, whose address is [REDACTED] its present and former members, officers, employees, agents and representatives (collectively, the "Board"). [REDACTED] and the Board (collectively "the parties") mutually desire to enter into this Agreement.

WHEREAS, [REDACTED] was enrolled as a student at [REDACTED] from 1986 to 1990 and graduated from [REDACTED] in 1990;

WHEREAS, on or about April 12, 2010, [REDACTED] filed a Petition before the Commissioner of Education of the State of New Jersey, [REDACTED] Agency Docket No. [REDACTED] ("the Petition"), seeking a declaratory ruling that the Board is authorized to amend his student records; and the Board filed an Answer denying the allegations in the Petition and requesting that the Commissioner of Education issue an order declaring that the Board is not authorized to amend student records as requested, or alternatively declaring that the Board is authorized to do so and directing it to do so, and for such further relief as the Commissioner may deem just and equitable;

WHEREAS, the parties wish to resolve this matter and all outstanding disputes between them in accordance with the terms set forth in this Agreement; and

WHEREAS, at a meeting on September 21, 2010, the Board adopted a resolution approving the settlement set forth herein and authorizing execution of this Agreement;

NOW, THEREFORE, for the good and sufficient consideration set forth below, the parties hereby AGREE as follows:

1. Denial of Liability. It is understood and agreed that execution of this Agreement by the Board does not in any way constitute an admission or concession of liability or wrongdoing on its part.

2. Consideration.

(a) In consideration for execution of this Agreement by [REDACTED] within 30 days of receipt of a decision of the Commissioner of Education approving this settlement and authorizing and directing its implementation, the Board agrees to take the following action:

(1) The Board shall remove [REDACTED]'s former name from any and all student records maintained or kept on file by [REDACTED] or in any Board office or facility, and shall replace it with his current legal name, [REDACTED].

(2) The Board shall remove [REDACTED]'s former sex designation, "F" or "female," from any and all student records maintained or kept on file by [REDACTED] or in any Board office or facility and replace it with "M" or "male."

(3) The Board shall remove any pictures of [REDACTED] from his permanent record file and from any and all student records maintained or kept on file by [REDACTED] or in any Board office or facility; provided, however, that the Board shall NOT be required to remove any pictures of [REDACTED] from any copies of the [REDACTED] yearbook, school

newspaper or any other student publication in its possession or in possession of any present or former member, officer, employee, agent or representative of the Board.

(b) [REDACTED] acknowledges that the Board's agreement to the terms set forth in subparagraph (a) above is good and valuable consideration, and he understands and agrees that he would not receive the consideration set forth in this paragraph except for his execution of this Agreement and fulfillment of the promises contained herein.

3. General Release of Claims. It is understood and agreed by and between the parties that in return for the consideration set forth in Paragraph 2 and the other promises contained herein, [REDACTED] does, knowingly and voluntarily, completely and forever waive, release and discharge the Board, its present and former members, employees, officers, agents and representatives from any and all claims, causes of action, and judgments, and any and all claims and rights to compensatory or punitive damages, pre- or post-judgment interest, or attorneys' fees, and any claim of liability of whatever kind and character based on any conduct or incident occurring at any time up to and including the date of this Agreement and relating in any way to [REDACTED]'s enrollment or attendance at [REDACTED] or his student records. Without limiting the foregoing, this General Release includes any and all claims [REDACTED] or anyone on his behalf may have arising under Title 18A of the New Jersey statutes or rules of the New Jersey State Board of Education governing public education, the New Jersey Law Against Discrimination, the Family Educational Rights and Privacy Act ("FERPA"), or any other federal, state, or local law, rule and/or regulation or any claim arising under the common law, including but not limited to contract or tort law, whether cognizable in law or in equity. [REDACTED] represents that he has not filed any claims, charges or actions or

made any allegations relating to the Board in any matter filed in any court, agency, or tribunal, other than the Petition.

4. Withdrawal of Petition. [REDACTED] shall withdraw the Petition and take any and all action necessary to secure its dismissal with prejudice, subject only to his right to seek relief in the event that the Board fails to implement the settlement as set forth herein as authorized and directed by the Commissioner.

5. Severability. If any provision of this Agreement is declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, that provision will immediately become null and void, leaving the remainder of the Agreement in full force and effect.

6. Construction. The parties have had an ample opportunity to review and have in fact reviewed this Agreement. Accordingly, the normal rule of construction, to the effect that any ambiguities are to be resolved against the drafting party, shall not be employed in the interpretation of this Agreement.

7. Governing Law. This Agreement is entered into in the State of New Jersey and shall be construed and interpreted in accordance with the laws of the State of New Jersey.

8. Integration. This Agreement represents the complete understanding between the parties. No other promises, agreements, discussions, or understandings have been made or relied upon by either party to induce the execution of this Agreement by the other party. No other promises, agreements, discussions, or understandings shall be binding or shall modify this Agreement unless made in writing and signed by the parties thereto.

9. Acknowledgement. By signing this Agreement [redacted] acknowledges that:

- (a) He has read this Agreement completely.
- (b) He has had an opportunity to consider the terms of this Agreement.
- (c) He has had an opportunity to consult an attorney to explain this Agreement and its consequences to him before he signed it, and he has used this opportunity to whatever extent he desired.
- (d) He understands and means everything he has said in this Agreement and he agrees to all its terms.
- (e) He is not relying on the Board or any representative of the Board to explain this Agreement to him.

[redacted] and THE BOARD by its duly authorized representative, intending to be bound, have hereunto set forth their signatures as of the date first stated above.

Witness: [redacted]
[redacted]
(print name)

[redacted]

Attest: [redacted]
(print name)

[redacted]
[redacted]
BOARD OF EDUCATION
[redacted]
By: [redacted]
Superintendent of Schools

The PowerPoint presentation(s) for this session are available at the following link(s):

Troy Perdue, M. Dru Levasseur, and Genny Beemyn: [Trans 201: Challenges Facing Transgender Students and Workable Solutions](#)