



Where There's No Disagreement on Transgender Students

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Transgender students, with the assistance of the federal Office for Civil Rights, are becoming more visible in our schools. Many districts have addressed the need of transgender students, quietly and successfully, for years. While some issues, such as facilities use, remain controversial in schools, it is helpful to start in the areas where no real disagreement should exist.

Federal Enforcement

Transgender students face enormous threats of bullying and harassment, especially when they are first transitioning from their birth-assigned gender to their identified gender. All schools have policies prohibiting bullying and harassment, and these policies should protect transgender students. Failure to do so can lead to federal and state claims of discrimination.

OCR and the Department of Justice have made clear they see transgender discrimination as a form of sex discrimination, and violations will be dealt with as Title IX enforcement matters. OCR has the authority to terminate a school district's federal funding if it finds intentional discrimination has occurred. In addition, many states have human rights laws that have language that includes gender identify or have been interpreted to include gender identify and thus those state agencies also may have enforcement authority in this area.

Finally, individual transgender students may sue for damages, under state or federal law, if they can establish that the school failed to take appropriate steps to address bullying and harassment.

Also arising are name change, name preference and records issues. In many states, a legal procedure exists for changing a student's name and/or gender designation. However, some states and many computerized

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student records programs now offer an option to designate gender preference. Because the Family Education Rights and Privacy Act, also known as FERPA, and many state laws place records rights in the hands of the student's parents, records changes should not be made without parental consent until the student turns 18.

On the other hand, calling a student by his or her chosen name is a common practice in many schools. It is advisable in such cases to follow that practice for all students, including transgender students. Similarly, referring to the student by his or her identified gender can avoid or minimize a school district's liability for encouraging or perpetuating bullying. When students see a teacher treating the transgender student with respect and dignity, that may foster their own positive behavior. Similarly, seeing negative treatment may encourage them to harass or harm the student. Such behavior by teachers has been cited in at least one court case as evidence of discrimination by the school.

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Privacy Partitions

The issue receiving the most news attention is the use of school facilities such as restrooms and locker rooms. OCR's position is that transgender students should be permitted to use the facilities of their identified gender without any restrictions or prohibitions.

An Illinois school district granted a transgender female student access to the girls' locker room, but required her to change behind a privacy partition, citing the privacy concerns of other students. OCR settled with the district, but still maintains the mandatory separation is impermissible discrimination. OCR believes that offering the option of a privacy screen, either for the transgender girl and other girls, would be preferable. Because this is a rapidly developing area, schools should consult legal counsel before making decisions that could have serious financial and legal consequences.

Many difficult legal, political and community relations issues can arise when addressing any matter relating to transgender students. The bottom line should be this: Transgender students are at an extra-ordinarily high risk for bullying, self-harm, depression and suicide. Schools should do what they do best – put the needs of students first, especially vulnerable and at-risk students – and the rest of the issues will likely fall into place.

Nancy Krent is a retired school attorney in suburban Chicago who teaches school law and runs a consulting and mediation practice. She was recently honored by the NSBA Council of School Attorneys with their Lifetime Achievement Award. Reprinted with permission from the February 2016 issue of School Administrator magazine, published by AASA, The School Superintendents Association.

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