

Transgender Issues: Practical Advice for Implementing what the Courts have Decreed

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Presented by Lynn Panega and Zaria Udeh

INTRODUCTIONS

Lynn Panega, Ed.D. (Speaker)
Superintendent
Lake Park High School District 108
Roselle, IL



Zaria Udeh, Esq. (Speaker)
Attorney
Robbins Schwartz
Chicago, IL



TRANSGENDER ISSUES ARE GAINING TRACTION IN POPULAR CULTURE & MEDIA



Dozens of transgender volunteers seek to join military since Jan. 1

Tom Vanden Brook, USA TODAY Published 10:55 a.m. ET Jan. 15, 2018



(Photo: Jacquelyn Martin, AP)

WASHINGTON — Dozens of transgender individuals have expressed interest in joining the military since the Pentagon opened recruiting to them on Jan. 1, according to a group that has advocated their cause.

They are the first wave of transgender volunteers to the armed services after federal courts compelled the

Pentagon to begin accepting them under an Obama-era policy that President Trump's administration had sought to overturn.

TRANSGENDER ►

I Am Jazz: 14, Transgender, and the Star of My Own Docu-series

TRANSGENDER ISSUES: LEGAL UPDATE

Grimm v. Gloucester County School Board



- A 4th Circuit case about restroom access
- It made it all the way up to the Supreme Court
- It was sent back to the lower court after changes in the Department of Education
- The lower court denied the school district's motion to dismiss in May 2018

TRANSGENDER ISSUES: LEGAL UPDATE

- Claims of discrimination on the basis of transgender status:
 - Actionable under Title IX & the Equal Protection Clause
 - Citing the 6th and 7th Circuits:
 - Holding that excluding boys and girls who are transgender from the restrooms that align with their gender identity may subject them to discrimination on the basis of sex under Title IX, the Equal Protection Clause, or both
 - Noting that the school's privacy justification may be a legitimate and important interest
 - However, the school district's policy was not genuine because it is based upon sheer conjecture and abstraction

7th Cir. FEDERAL CASE LAW

Whitaker v. Kenosha Unified School District, 858 F.3d 1034 (7th Cir. May 2017)

- A 7th Circuit case about restroom access
- Acknowledged a “school district has a legitimate interest in ensuring bathroom privacy rights are protected”
- Preliminary injunctive relief:
 - Access to the restroom
 - Banned disciplining the student
 - Banned monitoring or surveilling the student
- Settled in January, 2018, with \$800,000 payment to the student



TRANSGENDER ISSUES: LEGAL UPDATE

- Claims of discrimination on the basis of transgender status:
- Actionable under Title IX & the Equal Protection Clause
 - Gender stereotyping theory under Title IX
 - Intermediate scrutiny applies under Equal Protection
- Plaintiff sufficiently pled that school's policy was not substantially related to achieving an important governmental objective

7th Cir. FEDERAL CASE LAW

Students and Parents for Privacy v. U.S. Dep't. of Educ., No. 16-4945 (N.D. Ill. December 2017)

- A 7th Circuit case about locker room access
- OCR and District 211 entered into an “Agreement to Resolve”
- The school district agreed to provide locker room access to a transgender student
- Cisgender students claimed they were harmed
- Court acknowledged students do not have a constitutional right not to share restrooms or locker rooms with transgender students
- Preliminary injunctive relief:
 - No intervention on behalf of the parent and student association
 - School district is not required to segregate facilities by biological sex
 - May allow access for transgender students



7th Cir. FEDERAL CASE LAW

- 7th Circuit did not grant the school district's motion to dismiss all claims of the parent and student association, on March 29, 2019
- The claims that survived include:
 - Title IX Sexual Harassment
 - Illinois Religious Freedom Restoration Act
 - Free Exercise Clause under the First Amendment
- The claims that did not survive include:
 - The right to bodily privacy in this context is not protected by the Due Process Clause
 - The right to direct the education of one's child under the Due Process Clause of the Fourteenth Amendment

7th Cir. FEDERAL CASE LAW

J.A.W. v. Evansville Vanderburgh Sch. Corp., 323 F. Supp. 3d 1030 (S.D. Ind. 2018), appeal dismissed (7th Cir. Sept. 13, 2018)

- A 7th Circuit case about restroom access
- The court noted, in dicta, there likely is a line to be drawn with regard to when Title IX requires a school to permit a transgender student to use the restrooms that coincide with his gender identity
 - The school district argued that parent request and a necessary/appropriate consideration was required
- The school district argued:
 - Potential harm to its operational efficiency
 - Potential harm to ability to maintain a safe and appropriate learning environment for all 23,000 of its students
- The school district had not demonstrated that it would suffer any harm if an injunction were to issue
- Preliminary injunctive relief for the transgender student

ILLINOIS HUMAN RIGHTS ACT

- The *Illinois Human Rights Act* prohibits schools from discriminating against students on the basis of, among other traits, sexual orientation and gender identity.
- Under the Act, sexual orientation is defined as actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity whether or not traditionally associated with the person's designated sex at birth. 775 ILCS 5/1-103(O-1).

TRANSGENDER ISSUES RAISED IN CIRCUIT COURT

Maday v. District 211, Case No. 17 CH 15791 (January 25, 2018)



- District 211 allowed a transgender student to utilize the locker room of the student's identified gender
- Required use of a privacy partition
- On January 25, 2018, the court denied the request by the transgender student to issue an injunction

The school district was permitted to maintain the privacy curtain requirement for access to the locker room

ILLINOIS DEPARTMENT OF HUMAN RIGHTS DETERMINATIONS

- **DECEMBER 12, 2016 IDHR DETERMINATION**

- Charges: (1) Denial of full and equal access/sexual orientation (gender-related identity, transgender male); (2) Denial of full and equal access/ disability, gender dysphoria; and (3) Failure to accommodate/disability, gender dysphoria.
- Findings: Dismissed - IDHR concluded that: the district articulated a legitimate, non-discriminatory reason for its mandated privacy partition and its decision was “consistent with recent precedent established through the settlement of a comparable claim of discrimination.”

- **SEPTEMBER 6, 2017 IDHR DETERMINATION**

- Charges: (1) Denial of full and equal access of Respondent's facility/ gender-related identity, female (designated male at birth); (2) Denial of full and equal access of Respondent's facility/ disability, gender dysphoria; and (3) Failure to accommodate/disability gender dysphoria.
- Findings: Dismissed - IDHR concluded there was no evidence of unlawful discrimination when the District provided alternative locations to change for P.E. instead of the female locker room.

ILLINOIS DEPARTMENT OF HUMAN RIGHTS DETERMINATIONS

- **DECEMBER 29, 2017 IDHR DETERMINATION**

- Charge: (1) Denial of access to facilities or services (gender-related identity, transgender female)
- Findings: Discrimination Substantiated - IDHR concluded that there was unlawful discrimination or anti-transgender animus when the district allowed access to the locker room with the caveat that a partition be used (consistent with the privacy norms of restrooms).

- **MARCH 25, 2018 ILLINOIS HUMAN RIGHTS COMMISSION DETERMINATION**

- Charge: (1) Denial of access to facilities or services (gender-related identity, transgender male); (2) Denial of full and equal access/ disability, gender dysphoria; and (3) Failure to accommodate/disability, gender dysphoria.
- Findings: Discrimination Substantiated – IHRC concluded that there was unlawful discrimination when the student was banned from using the male restroom.

Human Rights Department Joins Transgender Discrimination Lawsuit Against Anoka-Hennepin School District

- March 2019
- The Minnesota Department of Human Rights joined a lawsuit by the ACLU against the state's largest school district
- Anoka-Hennepin School District is alleged to have discriminated against a transgender student
- Allegations:
 - After joining the boys' swim team and using the boys' locker room for months, the school board told the student he would be disciplined if he continued to use the locker room

Common Issues Impacting Transgender Students

Parental notification and involvement

Preferred name and pronouns

Bathrooms and locker rooms

Athletics

Attire, dances, yearbook

School trips

Gender segregation (gym and health classes)

Bullying

Student records

TRANSGENDER ISSUES: PRACTICAL TIPS

Other District and School-Wide Supports and Strategies

1. Designate support staff members.
2. Educate staff.
3. Create all-gender single stall washrooms.
4. Provide private or enclosed changing areas.

TRANSGENDER ISSUES: PRACTICAL TIPS

Other District and School-Wide Supports and Strategies

5. Educate students.
6. Provide school-wide student training.
7. Focus on shared values of privacy and modesty.
8. If necessary or useful, work with consultants.

Lake Park Guidance Points

Every student is in a different place in their Identification and/or transition, and it is critical to understand each student on a case by case basis to best help them and serve their needs.

Seek Student Information

- Gain an understanding on how the student wants to be perceived and referred to.
 - Legal name vs identified name
 - Pronoun preferences
- Sharing information with others
 - Do the student's teachers know anything about the student's gender preference?
 - Do the student's parents know anything about the student's gender preference?

Seek Student Information (cont'd)

- Facility usage preferences
 - Restrooms
 - Locker Room
- Extra-, Co-Curricular Involvement
 - Athletics
 - Activities

Create Plan to Support Student Needs

- Documents
 - Transcript (requires legal name change)
 - School database (tied to ISBE, requires legal name change)
 - ID cards, Google classroom, Diploma, Yearbook
- Communication
 - Does student want teachers to know?
 - How do they want teachers to refer to them?
 - How do they want to be referred to when speaking with their parents?

Create Plan to Support Student Needs

- Communication (cont'd)
 - If not aware, work with student to inform parents
 - Work with student on how to respond to peers in classroom, in the hallways, and on social media
- Facility Usage
 - Restroom preference (student may use whatever bathroom they want; nurse's restroom is an option)
 - Locker Room preference

Locker Room Access

- Set up team meeting (parent, student, PE teacher, counselor, social worker)
 - Does the student want to change behind a curtain or stall? (option, not required)
 - Does the student know any of the students who would be in the locker room (friends)?
 - Does the student have a preferred location in the locker room?

Locker Room Access (Cont'd)

- Make sure student is aware of supports and the importance of reporting bullying or harassment
- Take student and parent(s) to preview locker room
- Remind student of staff supervision in the locker room so they are aware of where there is support if needed.
- Remind student and parent that they can change in the Nurse's restroom anytime without notice.

Extra Curricular Activities

- Athletics
 - If a student wants to participate in a sport with their identified gender, they are required to apply to the IHSA through the school athletic director to be granted permission to do so.

Questions and Answers

We thank you for your time!

Presenters

MODERATOR INFO:

Linda Jeffers, Business Manager/CSBO
(708) 496-8700 x 102; ljeffers@isd109.org

PANELISTS INFO:

Lynn Panega, Ed.D. (Speaker)
- Superintendent, Lake Park High School District 108
(630)295-5410; lpanega@lphs.org

Zaria Udeh, Esq. (Speaker)
- Attorney, Robbins Schwartz
(312) 332-7760; zudeh@robbins-schwartz.com