

Client Alert Supporting Transgender Students

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Education Law

Whether it be reviewing your discrimination and bullying policies, providing training for teachers and staff, or providing legal advice as issues arise, Osborn Maledon's Education Law team is here to help. For more information, please contact:

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Imagine that Rachel has just enrolled in your school. Rachel is just like all the other girls in her class except that Rachel was born a boy – Rachel is transgender. Is your school prepared to ensure that Rachel may attend her classes free from bullying and harassment? Has your school considered how to respond if a parent complains about Rachel using the girl's restroom and locker room?

The legal rights of transgender persons are rapidly developing, and schools are increasingly facing these novel legal issues. Both the Departments of Justice and Education recently indicated that discrimination against transgender persons violates Title IX, which prohibits discrimination on the basis of sex in federally funded educational programs, and the Equal Protection Clause of the Fourteenth Amendment of the Constitution. Although schools should evaluate *all* of their policies and practices to ensure they are fully prepared to support transgender students, questions about the following two areas arise frequently.

Bullying/Harassment. Many transgender students report experiencing bullying and harassment at school. One study by the National Gay and Lesbian Task Force reported that 78% of K-12 transgender students experienced harassment at school. Arizona law requires school district governing boards to adopt and enforce policies to prohibit students from “harassing, intimidating and bullying,” including cyber-bullying, other students at school and school-related events. A.R.S. § 15-341(A)(37). Although not specifically required by state law, charter schools should adopt such policies as a matter of appropriate governance. When adopting a bullying and harassment policy, schools should consider the following:

- How does your school define harassment and bullying?
- Who at your school is responsible for investigating allegations of bullying?
- What are your school's protocols for investigating and documenting an allegation of bullying?
- What procedures does your school have in place to ensure parental notification while protecting the confidentiality of others?

In regard to transgender students, schools should make certain that staff members responsible for investigating and responding to allegations of bullying have a basic understanding of issues faced by transgender students and that the investigation and enforcement of bullying and harassment policies respect students' gender identity.

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Restrooms/Locker Rooms. Schools may be faced with the task of balancing the needs of a transgender student against complaints from parents and students who may not understand a transgender student's need to use restroom, locker room or other facilities that match his or her gender identity. Before the issue arises, schools should make sure they have a plan in place that will allow transgender students safe access to the restrooms and changing facilities that correspond with their gender identity. This plan should be consistently implemented to avoid discrimination.

An additional way to manage a transgender student's experience at school is through a Section 504 plan, if appropriate. Section 504 prohibits discrimination on the basis of disability – a broad term that encompasses any mental or physical impairment that substantially limits any major life activity, including nearly any task associated with being a student at a school. If, for example, a student experiences anxiety or depression as a result of issues related to his or her gender identity, he or she may be eligible for Section 504 accommodations. A student's Section 504 committee can address any accommodations the transgender student might need, including the use of facilities that correspond with the student's gender identity. Schools should understand the procedures for evaluating students and determining whether they are in need of special education or related services – schools should obviously not assume that every transgender student is in need of accommodations or services.

These complex issues not only have the potential for causing dissent among parents, other students, and staff, they may also lead to lawsuits or OCR investigations. For example, a transgender student in Maine was recently awarded \$75,000 in damages after her school required her to use a staff restroom rather than the girls' restroom, in violation of the state's Human Rights Act. *Doe v. Regional School Unit 26*, 2014 ME 11 (Jan. 30, 2014). The Maine Supreme Court held that the school had discriminated against the student on the basis of her transgender identity. Although Arizona does not have a similar state law, that case is a cautionary tale about the potential consequences of not responding appropriately to these potentially difficult issues.

The Departments of Justice and Education have recognized that transgender students deserve the opportunity to learn and grow in an educational environment free from discrimination and harassment. Taking proactive steps before issues arise, including evaluating policies and educating staff, will help to ensure that your school is prepared to create a welcoming environment where all students can thrive. We are happy to consult with you regarding your policies or to provide any other guidance you may need.

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