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# **Navigating Legal Issues Involving Transgender Students**

# NAVIGATING LEGAL ISSUES INVOLVING TRANSGENDER STUDENTS

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## **Introduction**

The landscape of transgender law and transgender and gender identity topics impacting higher education students is rapidly evolving. This manuscript addresses gender identity-related language and terms; summarizes governing law, including federal guidance and notable cases; and identifies suggested practices for campus operations in records, housing, facilities, academics, athletics, and other activities.<sup>1</sup>

### **I. Language and Terms**

The language and terms used in the discussion of gender identity policy and practice in higher education are complex and evolving. Nonetheless, it is helpful to identify some basic terms that are frequently employed when discussing transgender and gender identity topics. A non-exhaustive list of such terms is included here for your reference:<sup>2</sup>

**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. 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.

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<sup>1</sup> Given rapid developments in this area of the law, the authors would like to note that this outline is current as of May 24, 2016, the date it was submitted for printing. Subsequent developments will be addressed at the annual conference presentation in June 2016.

<sup>2</sup> These definitions are adapted from the work of Troy Perdue, Associate General Counsel at East Tennessee State University, in his NACUA Outline, *Top 5 Trans\* Issues for Colleges and Universities: Records, Housing, Bathrooms, Locker Rooms and Athletics*, p. 1-2 (June 22, 2014), based on those definitions provided by the National Center for Transgender Equality in *Transgender Terminology*, available at <http://www.transequality.org/issues/resources/transgender-terminology>.

**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. 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 outside of the gender binary. Genderfluid describes individuals with a flexible range of gender identity or expression that may change, even from day to day. These terms will be used as rough equivalents for persons whose gender is not identifiable solely or exclusively within the male and female binary categories.

**Gender Expression** – This term describes the external expression of one's gender identity, usually expressed through 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, female, or intersex. At birth, infants are assigned a sex based on a combination of bodily characteristics including: chromosomes, hormones, internal reproductive organs, and genitals. Generally, this paper will use the term birth sex to refer to persons' sex assigned at birth.

**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.

Other lists of nationally developed and disseminated terms can be found at various websites,<sup>3</sup> as well as the expansive list of terms in the attached Appendix A. Notably, an inclusive approach to language and terms goes beyond simple definitions; for additional ideas on how to construct and adopt inclusive language, see the attached Appendix B.

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<sup>3</sup> National Center for Transgender Equality (<http://www.transequality.org/>); Consortium for LGBT Resource Professional Campus Architect ([www.lgbtarchitect.org](http://www.lgbtarchitect.org/)); Center of Excellence for Transgender Health (<http://transhealth.ucsf.edu/>).

## II. Legal Background

The landscape of transgender law is rapidly developing. Driven in part by the Supreme Court's seminal decision on same sex-marriage in *Obergefell v. Hodges*<sup>4</sup> in June 2015, discussion of sexual orientation and gender identity in the law has taken on new fervor. More recently, the passage of a local ordinance offering additional protections for LGBT persons in Charlotte, North Carolina—and that state's legislature's swift reversal of the policy state-wide<sup>5</sup>—has thrust the topic of transgender protections in the law to the forefront of public discussion. And significantly, the Fourth Circuit Court of Appeals—the federal circuit in which North Carolina sits—has ruled that a transgender student states a claim under Title IX when he is denied access to the bathroom that corresponds with his gender identity. In this changing legal landscape, federal courts continue to grapple with how existing anti-discrimination laws protect transgender people. Meanwhile, the U.S. Department of Education's Office for Civil Rights ("OCR") has made clear through recent guidance its position that Title IX prohibits discrimination on the basis of gender identity and gender expression, and OCR's resolution agreements and findings in this context shed additional light on its expectations.

### A. Title VII

Up to this point, most of the case law relating to gender identity has arisen in the employment context. Since at least the 1970s, federal courts have struggled to establish a framework for addressing the rights of transgender people in the workplace. Courts typically evaluate plaintiffs' claims under the framework of sex discrimination in Title VII, with most courts recognizing that transgender persons may state a claim for sex discrimination where they allege that they were discriminated against for their failure to conform to sex stereotypes, based on the reasoning of *Price Waterhouse v. Hopkins*,<sup>6</sup> discussed below. Courts disagree, however, whether discrimination on the basis of transgender identity *itself* constitutes discrimination "because of sex."

Early on, most federal courts declined to provide transgender persons with the protections of Title VII based on a limited interpretation of the phrase "because of . . . sex."<sup>7</sup> Those courts generally held that the drafters of Title VII intended to prohibit discrimination only on the basis of traditional concepts of sex—i.e., anatomical sex—rather than discrimination based on gender—i.e., the socially-constructed norms associated with one's sex.<sup>8</sup> The Supreme Court's decision in *Price Waterhouse v. Hopkins*, however, arguably changed that calculus. There, the

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<sup>4</sup> 135 S.Ct. 2584 (2015).

<sup>5</sup> North Carolina's House Bill 2 is currently being challenged in federal court based on Title IX and the Equal Protection and Due Process Clauses of the 14th Amendment. See *Carcaño v. McCrory*, No. 1:16-cv-236-TDS-JEP (M.D.N.C. filed March 28, 2016). On May 4, 2016, the Civil Rights Division of the Department of Justice sent letters to the Governor of North Carolina and to the University of North Carolina asserting that they are in violation of Title VII and Title IX, among other statutes, for electing to enforce HB2. And, on May 9 Governor On May 9, 2016, Governor McCrory and the Department of Justice each filed competing lawsuits against each other asking separate federal courts in North Carolina to rule on these matters.

<sup>6</sup> 490 U.S. 228 (1989).

<sup>7</sup> 42 U.S.C. § 2000e-2(a).

<sup>8</sup> See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085, 1086 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-63 (9th Cir. 1977).

Court held that sex stereotyping—that is, discrimination based on a person’s conformity (or lack of conformity) to societal expectations of gender—is impermissible discrimination under Title VII.<sup>9</sup>

Courts interpreting *Price Waterhouse* in the context of claims brought by transgender people—notably the Sixth and Ninth Circuits—have read that case to mean that Title VII’s reference to “sex” encompasses both the biological differences between men and women, as well as gender.<sup>10</sup> Thus, where plaintiffs can show that they were discriminated against for their failure to comply with gender norms associated with their birth sex, they have stated a cognizable claim under Title VII.<sup>11</sup>

The law is less clear, however, whether discrimination against transgender people *because* of their transgender status itself constitutes discrimination “on the basis of sex” under Title VII. In *Schroer v. Billington*,<sup>12</sup> the District Court for the District of Columbia recognized that “when the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII.”<sup>13</sup> That court, however, offered a thoughtful analogy on this point, reasoning that an employer could not avoid a discrimination claim under Title VII by arguing that it held no bias against Jews or Christians, but only “converts” from one religion to another.<sup>14</sup> While it stopped short of “drawing sweeping conclusions about the reach of Title VII” in this context, the court found that an employer’s refusal to hire the plaintiff after being told that the plaintiff planned to undergo sex reassignment surgery “was *literally* discrimination ‘because of . . . sex.’”<sup>15</sup>

Two federal district court opinions from the past year highlight the current disparity of opinion on this subject. In *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*,<sup>16</sup> the Eastern District of Michigan ruled unequivocally that “transgender or transsexual status is currently not a protected class under Title VII.”<sup>17</sup> Regardless, that court refused to dismiss a Title VII claim brought by the EEOC on behalf of a transgender funeral home employee because “Title VII nevertheless protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender.”<sup>18</sup>

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<sup>9</sup> 490 U.S. at 250-51..

<sup>10</sup> See, e.g., *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2000); *Schwenk v. Harford*, 204 F.3d 1187 (9th Cir. 2000). In addition, the Eleventh Circuit has held that the termination of an employee because of her transition from male to female was impermissible discrimination under the Equal Protection Clause of the Fourteenth Amendment. See *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

<sup>11</sup> See, e.g., *Smith*, 378 F.3d at 574. But see *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (holding, despite the ruling in *Price Waterhouse*, that Congress intended Title VII to apply traditional concepts of “male and female” in disallowing sex discrimination).

<sup>12</sup> 577 F. Supp. 2d 293 (D.D.C. 2008).

<sup>13</sup> *Id.* at 305 (citing *Ulane*, *Sommers*, and *Holloway*, among others).

<sup>14</sup> *Id.* at 306-07.

<sup>15</sup> *Id.* at 308.

<sup>16</sup> 100 F. Supp. 3d 594 (E.D. Mich. 2015).

<sup>17</sup> *Id.* at 598.

<sup>18</sup> *Id.* at 599 (internal quotations omitted).

Conversely, in *Fabian v. Hospital of Central Connecticut*,<sup>19</sup> the District of Connecticut ruled that “discrimination on the basis of transgender identity is cognizable under Title VII.”<sup>20</sup> In that case, a transgender orthopedic surgeon alleged that she was not hired by the defendant hospital solely because of her transgender identity. After conducting a thorough analysis on the evolution of Title VII case law in the context of transgender discrimination, the court broadly ruled that “discrimination on the basis of gender stereotypes, or on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination ‘because of sex.’”<sup>21</sup> The court found that the plaintiff had met her burden under the *McDonnell Douglas* burden-shifting analysis and denied the defendant’s motion for summary judgment.<sup>22</sup>

The EEOC, on the other hand, has clearly indicated its position that discrimination based on transgender status is sex discrimination in violation of Title VII.<sup>23</sup> In a Fact Sheet released on May 2, 2016, the EEOC reiterated its position that denying an employee equal access to a common (i.e. multi-user) restroom corresponding to the employee’s gender identity is sex discrimination under Title VII.<sup>24</sup> The EEOC pronounced that an employer cannot condition the right to use a common restroom on the employee undergoing or providing proof of surgery or any other medical procedure. In addition, the EEOC stated that an employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it).

## **B. Title IX**

Title IX analyses frequently follow those of Title VII.<sup>25</sup> Thus, the changing legal landscape for transgender protections in the employment context is likely to have ramifications in the Title IX context, even though the courts have not historically understood Title IX to include gender identity.

Two recent federal court actions highlight the analyses that federal courts have performed in the context of Title IX actions, and those cases are likely to have a significant impact on the state of Title IX protections for transgender students.

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<sup>19</sup> No. 3:12-cv-1154, 2016 WL 1089178 (D. Conn. March 18, 2016).

<sup>20</sup> *Id.* at \*14.

<sup>21</sup> *Id.* at \*13.

<sup>22</sup> *Id.* at \*14.

<sup>23</sup> *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 12, 2012).

<sup>24</sup> EEOC Fact Sheet: *Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964* (May 2, 2016), available at [https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm?utm\\_source=ALERT%3A+5%2F6%2F2015+EEOC+Transgender&utm\\_campaign=UA-9297010-1&utm\\_medium=email](https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm?utm_source=ALERT%3A+5%2F6%2F2015+EEOC+Transgender&utm_campaign=UA-9297010-1&utm_medium=email); see also *Lusardi v. Dep’t of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015).

<sup>25</sup> See, e.g., *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992) (concluding that Title VII precedent was the basis for recognizing a Title IX private cause of action for sexual harassment).

Most notable is the Fourth Circuit Court of Appeals' recent ruling that a transgender teen stated a claim under Title IX where he alleged that his high school denied him access to the bathroom that corresponds to his gender identity. In *G.G. ex rel. Grimm v. Gloucester County School Board*,<sup>26</sup> a transgender youth brought an action under the Equal Protection Clause and Title IX challenging a local school board's bathroom policy, which restricted bathroom use based on students' "biological genders," and provided "alternative appropriate facilit[ies]" for students with "gender identity issues."<sup>27</sup> The district court dismissed the plaintiff's Title IX claim based largely on the Department of Education's own regulations, notably 34 C.F.R. § 106.33: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex . . . ."<sup>28</sup> The court reasoned that the language of the regulation allows schools to create separate facilities on the basis of biological sex, since any reading of the term "sex" implicitly includes biological sex. The regulation does not, however, require segregation *only* on the basis of "gender."<sup>29</sup> The court explicitly declined to decide whether the term "sex" in the regulation also includes "gender identity."<sup>30</sup>

OCR weighed in on the case, citing its own guidance that schools must treat transgender students consistent with their gender identity.<sup>31</sup> The court rejected this interpretation and declined to provide it any deference because "[s]ection 106.33 is not ambiguous," and "the Department of Education's interpretation . . . is plainly erroneous and inconsistent with the regulation."<sup>32</sup> The court also noted that the regulation had been in place since 1975, and OCR's guidance was only issued in 2014.<sup>33</sup>

The Fourth Circuit took a different view of the Department of Education's interpretation. In a 2-1 opinion, the Circuit reversed the district court's decision on the student's Title IX claim and gave controlling weight to the department's interpretation. The court found that the regulation was ambiguous because "it is silent as to how a school should determine whether a transgender individual is a male or female for the purposes of sex-segregated restrooms."<sup>34</sup> It then concluded that "[t]he Department's interpretation resolves ambiguity by providing that in the case of a transgender individual . . . the individual's sex as male or female is to be generally determined by reference to the student's gender identity."<sup>35</sup>

In reaching its decision, the court examined the meaning of the word "sex" in the context of Title IX and the department's regulations. It drew on the definitions of "sex" in dictionaries from 1975—when the regulations were drafted—and noted that while a person's reproductive organs are an important part of sex, "the definitions also suggest that a hard-and-fast binary

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<sup>26</sup> No. 15-2056 (4th Cir. April 19, 2016).

<sup>27</sup> See *G.G. ex rel. Grimm v. Gloucester County School Board*, No. 4:15-cv-54, 2015 WL 5560190, at \*2 (E.D. Va. Sept. 17, 2015).

<sup>28</sup> *Id.* at \*4.

<sup>29</sup> *Id.* at \*8.

<sup>30</sup> *Id.*

<sup>31</sup> See *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (December 1, 2014).

<sup>32</sup> *Id.* at \*8.

<sup>33</sup> *Id.*

<sup>34</sup> No. 15-2056 (4th Cir. April 19, 2016) at 20.

<sup>35</sup> *Id.*

division on the basis of reproductive organs . . . [is] not universally descriptive.”<sup>36</sup> The court ultimately concluded that “the department’s interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects . . . included in the term ‘sex.’”<sup>37</sup> In addition to reversing the district court’s denial of the student’s Title IX claim, the Circuit vacated the denial of the student’s request for a preliminary injunction and remanded the matter for further proceedings.<sup>38</sup>

In *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*,<sup>39</sup> the district court reached a conclusion similar to that of the district court in *Grimm*. There, a transgender male student was expelled after repeatedly using the men’s restrooms and locker rooms, despite instructions not to. The student brought an action based on the Equal Protection Clause of the Fourteenth Amendment and Title IX, among other claims, alleging that he had been discriminated and retaliated against on the basis of sex.<sup>40</sup> The defendant university moved to dismiss the case, and the court granted the motion.<sup>41</sup> With respect to the plaintiff’s Equal Protection claim, the court noted that discrimination based on gender is subject to intermediate scrutiny, but that neither the Supreme Court nor the Third Circuit had recognized being transgender as a suspect class.<sup>42</sup> The court also noted that courts had routinely defined “sex” in the context of the Equal Protection Clause as “biological sex.”<sup>43</sup> Ultimately, the court concluded that, while plaintiff identifies as male, his birth sex is female, and that fact was “fatal” to his sex discrimination claim.<sup>44</sup>

The court treated similarly the plaintiff’s Title IX claims, relying mostly on Title VII jurisprudence, and stating unequivocally that “Title VII does not provide an avenue for a discrimination claim on the basis of transgender status.”<sup>45</sup> The court dealt separately with the plaintiff’s sex stereotyping claim, noting that such claims are based on “behaviors, mannerisms, and appearances,” and that plaintiff had not made allegations that he was discriminated against on these bases.<sup>46</sup> Otherwise, the court found that requiring individuals to use bathrooms consistent with birth sex is not discriminatory conduct.<sup>47</sup> The case was ultimately settled while on appeal to the Third Circuit.

These two cases demonstrate the disparity of opinion among federal courts on the viability of a Title IX claim based on a student’s transgender identity, and the ultimate resolution of the Fourth Circuit case will have important and practical implications for the rights of transgender students.

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<sup>36</sup> *Id.* at 22-23.

<sup>37</sup> *Id.* at 23-24.

<sup>38</sup> The Gloucester County School Board filed a petition for rehearing en banc on May 3, 2016. Dkt. Entry 76, No. 15-2056 (May 3, 2016). That petition is currently pending before the Fourth Circuit.

<sup>39</sup> 97 F. Supp. 3d 657 (W.D. Penn. 2015), *appeal docketed* April 25, 2015.

<sup>40</sup> *Id.* at 666.

<sup>41</sup> *Id.* at 684.

<sup>42</sup> *Id.* at 668.

<sup>43</sup> *Id.* at 670.

<sup>44</sup> *Id.* at 671.

<sup>45</sup> *Id.* at 676.

<sup>46</sup> *Id.* at 680-81.

<sup>47</sup> *Id.*



Another case of note is *Tooley ex rel. Tooley v. Van Buren Public Schools*,<sup>48</sup> wherein a transgender high school student brought claims under Title IX, Title IV, and the Equal Protection Clause, alleging that his school refused to let him use the boys' restroom, instead requiring him to use the staff women's restroom and also that school personnel and administrators called him by his female name and "outed" him as transgender to other students and the parents of other students. OCR filed a Statement of Interest in the case arguing that Title IX and the Equal Protection Clause prohibit discrimination against transgender people as a form of sex discrimination, and that transgender plaintiffs do not have to plead their claims solely as "sex stereotyping" claims under *Price Waterhouse*.<sup>49</sup> The court in that case is currently considering a motion to dismiss.

### C. OCR Guidance

For its part, the Office of Civil Rights has taken an active role in transgender student issues in recent years. As noted above, not only has OCR intervened in federal court cases where the rights of transgender students are implicated, it has also offered significant guidance on its position on gender identity issues. In 2010, OCR issued a Dear Colleague Letter that addressed sexual harassment and bullying under Title IX and also attempted to provide guidance on the proper inclusion of gender identity and transgender rights in higher education.<sup>50</sup> The 2010 letter affirmed OCR's position that discrimination on the basis of gender identity or gender expression is protected under Title IX as discrimination "on the basis of sex."<sup>51</sup>

Later, in April 2014, OCR issued its *Questions and Answers on Title IX and Sexual Violence*.<sup>52</sup> While specifically addressed to sexual harassment and sexual violence, this guidance included OCR's position that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity."<sup>53</sup>

Then on December 1, 2014, OCR issued its *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, in which it reasserted its position on gender identity in the context of Title IX:

All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX [and] a recipient generally must treat transgender students consistent with their gender identity in all aspects . . . of single-sex classes.<sup>54</sup>

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<sup>48</sup> No. 2:14-cv-13466-AC-DRG (E.D. Mich.)

<sup>49</sup> See *id.* Docket No. 64-1 (filed Feb. 24, 2015).

<sup>50</sup> U.S. Department of Education Office for Civil Rights, *Dear Colleague Letter on Harassment and Bullying* (issued October 26, 2010).

<sup>51</sup> *Id.* at 7-8.

<sup>52</sup> U.S. Department of Education Office for Civil Rights, *Questions and Answers about Title IX and Sexual Violence* (April 29, 2014).

<sup>53</sup> *Id.* at 5.

<sup>54</sup> *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* at 25.

Finally, on May 13, 2016, OCR together with the Department of Justice released a Dear Colleague Letter on Transgender Students (the “Letter”),<sup>55</sup> which both agencies determined is “significant guidance” in this field. Broadly, the Letter affirms OCR’s and DOJ’s position that Title IX’s prohibition on discrimination and harassment “on the basis of sex” includes discrimination and harassment on the basis of gender identity. It articulates a consistent treatment principle in which Title IX recipients are broadly expected to treat students consistent with their gender identity upon notification from the student that they will “assert a gender identity that differs from previous representations or records.” The Letter offers specific guidance for applying this consistent treatment principle in various situations. For example, schools also must use pronouns and names consistent with a student’s gender identity.

The Letter makes clear that such notification does not require a medical diagnosis or that the student is undergoing treatment, nor does it require that the student present identification documents that reflect their gender identity. The Letter also pointedly observes that these requirements exist “even in circumstances in which other students, parents, or community members raise objections or concerns,” and goes on to state that “the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.”

More specifically, the Letter places the onus on Title IX recipients to create a safe and non-discriminatory environment for transgender students and to “take prompt and effective steps to end” any harassment that occurs, “prevent its recurrence, and, as appropriate, remedy its effects.”

With respect to sex-segregated activities and facilities, the Letter requires schools to allow transgender students to use restrooms and locker rooms consistent with their gender identity and states that schools may not require transgender students to use individual-user facilities when other students are not required to do so. Schools may make individual-user options available, however, “to all students who voluntarily seek additional privacy.”

Likewise, with respect to housing, schools must allow transgender students access to housing consistent with their gender identity and may not require a student to stay in single-occupancy accommodations. Schools may, however, provide such accommodations if the student requests them. In this context, schools may not require a student to “disclose personal information when not required of other students.”

The Letter also offers guidance regarding athletics. It observes that Title IX regulations permit a school to provide sex-segregated athletic teams under certain circumstances, but notes that schools may not “adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or others’ discomfort with transgender students.” The Letter goes on to note that “Title IX does not prohibit age-appropriate, tailored requirements based on

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<sup>55</sup> U.S. Department of Education Office for Civil Rights and U.S. Department of Justice Civil Rights Division, *Dear Colleague Letter on Transgender Students* (May 13, 2016).

sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport.”

Lastly, the Letter outlines several requirements meant to ensure that students' gender identities remain confidential and private. Gender identity may never be designated as “directory information” under FERPA. Recipients must use caution in determining which employees have a “legitimate educational interest” in students' gender identity information, such that FERPA allows that information to be shared with those employees. And when a school receives a request to amend a transgender student's records, it must respond “consistent with its general practices for amending other students' records.” Notably, the Letter stops short of explicitly requiring schools to honor such a request.<sup>56</sup> The Letter does go on to say that “failing to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth,” could in and of itself be a violation of Title IX. Thus, while “[a] school may maintain records with this information...such records should be kept confidential.”

In sum, OCR has taken a firm stance on the rights of transgender students in the context of Title IX. Its most recent guidance does, however, leave some important questions unanswered. For example, what information, if any, may schools request of a student in order to confirm his or her gender identity or transgender status? Previous resolution agreements defined “gender identity” as one's internal sense of gender that is “consistently and uniformly asserted, or for which there is other evidence that the gender identity is sincerely held as part of the student's core identity.”<sup>57</sup> This limiting language, however, does not appear in the Letter. Also, how are schools and universities expected to treat situations of gender fluidity, where students sometimes identify as male, and sometimes identify as female, or identify as both female and male? Certainly, universities will continue to grapple with these questions in the near term.

## **D. Notable OCR Findings and Resolution Agreements**

### **1. Arcadia Unified School District (CA)**

One of the more notable OCR matters concerning the rights of transgender students involved a resolution agreement between OCR and the Arcadia Unified School District in Arcadia, California.<sup>58</sup> In that case, a transgender male student filed a complaint against the

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<sup>56</sup> In 1991, the Family Policy Compliance Office (FPCO) of the Department of Education determined that the FERPA right to amend does not apply to a situation in which a student asks to correct their records to reflect a change in name or gender as a result of transitioning. Looking to the legislative history for FERPA, the FPCO reasoned that FERPA was “not intended to overturn established standards and procedures for the challenge of substantive decisions made by an educational institution,” and that this type of change was not a “recordkeeping error,” but was in fact a “substantive decision.” *November 13, 1991 Letter to Great Falls School District*. Although this view has not formally been reconsidered by the FPCO, the Letter clearly calls this determination into question. See also *A Transgender Advocate's Guide to Updating and Amending School Records*, published by Lambda Legal (May 2014).

<sup>57</sup> See *Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division*, No. 09-12-1020 (July 24, 2013), at 2.

<sup>58</sup> *Id.*

school district for alleged violations of Title IX and Title IV for discrimination on the basis of sex.<sup>59</sup> The complaint alleged that, despite the fact that he had presented as male for several years and been accepted as male by his friends, family, and teachers, the district denied the student access to sex-specific facilities designated for male students for use during school and extracurricular activities, and that the district housed the student in a separate cabin alone while on a school-sponsored camping trip.<sup>60</sup>

The school district entered into a resolution agreement with OCR in July of 2013. It agreed to allow the student access to sex-specific facilities designated for male students both on campus and during all district-sponsored activities, and agreed to treat the student the same as other male students in all respects in the educational programs and activities offered by the district.<sup>61</sup> The district also agreed to a number of remedial measures, including revising all of its policies and procedures to specifically include gender-based discrimination as a form of discrimination based on sex, and to state that gender-based discrimination includes discrimination based on a student's gender identity, gender expression, gender transition, transgender status, or gender nonconformity.<sup>62</sup>

## **2. Palatine Township High School District 211 (IL)**

More recently, Case No. 05-14-1055<sup>63</sup> involved allegations against Township High School District 211 in Palatine, Illinois by "Student A," a transgender female, who complained that her high school had denied her access to the girls' locker room consistent with her gender identity. In a findings letter issued November 2, 2015, OCR found that the school did give Student A unlimited access to girls' restrooms, allowed her to participate in girls' athletics, and used her female name and female pronouns to refer to her.<sup>64</sup> However, the school initially denied her request to change in the girls' locker rooms because of the "privacy concerns of all students," and because it was not practical to provide her with a secluded changing area in the girls' locker rooms.<sup>65</sup> Instead, the school made arrangements for Student A to change in other, more secluded restrooms. The school later did install privacy curtains in one of the locker rooms, but still did not permit Student A to use that locker room.<sup>66</sup>

OCR found that the school district violated Title IX by not allowing Student A access to the girls' locker room.<sup>67</sup> It found that the district could alleviate any privacy concerns by installing privacy curtains in the girls' locker rooms and noted that Student A had agreed to utilize those privacy curtains. OCR noted that other students who did not wish to change in front of other girls, "including transgender girls," could likewise use the privacy curtains.<sup>68</sup> Ultimately, OCR found that the "totality of the circumstances weigh[ed] in favor of the District

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<sup>59</sup> *Id.* at 1.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.* at 4.

<sup>63</sup> No. 05-14-1055 (Nov. 2, 2015).

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.* at 2-3.

<sup>66</sup> *Id.* at 9.

<sup>67</sup> *Id.* at 12-13.

<sup>68</sup> *Id.*

granting Student A equal access to the girls' locker rooms, while protecting the privacy of its students.”<sup>69</sup>

Importantly, OCR noted that this was the first time that it had actually found a school district in violation of civil rights laws over transgender issues. The school district later entered into a resolution agreement with OCR, whereby it agreed, among other things, to allow Student A access to the girls' locker room, and to install sufficient privacy curtains for students to use.<sup>70</sup>

Interestingly, subsequent to this finding and resolution, a group of parents filed suit in federal court arguing that the actions of Township High School District 211 and the Department of Education create a hostile environment for the students who share the spaces with the transgender student, and violate those students' expectations of privacy.<sup>71</sup>

### **3. Broadalbin-Perth Central School District (NY)**

Similarly, in Case No. 02-13-1220,<sup>72</sup> a transgender student brought a complaint against the Broadalbin-Perth Central School District, in Broadalbin, New York for not allowing the student to use the bathroom with which the student identifies. The school district had made arrangements for the student to use a gender-neutral family restroom and a restroom in the nurse's office instead, and when the student attempted to use non-gender neutral restrooms consistent with the student's gender identity, teachers allegedly reprimanded the student.<sup>73</sup> District staff defended their actions by invoking the privacy concerns of other students.<sup>74</sup>

OCR found that the district violated 34 C.F.R. § 106.31.<sup>75</sup> It noted that the presence of private, locking stalls rendered concerns about involuntary or inadvertent exposure negligible, and that the district's actions increased the threat of the student's privacy being violated.<sup>76</sup> The school district entered into an agreement with OCR whereby it agreed to permit the student access to bathrooms and locker rooms consistent with the student's gender identity, and to provide any individualized support the student requested.<sup>77</sup>

### **4. Central Piedmont Community College (NC)**

Also instructive is Case No. 11-14-2265 involving Central Piedmont Community College in Charlotte, North Carolina.<sup>78</sup> In that case, a student filed a complaint against CPCC after

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<sup>69</sup> *Id.*

<sup>70</sup> *See Agreement to Resolve between Township High School District 211 and the U.S. Department of Education, Office for Civil Rights* (Dec. 2, 2015).

<sup>71</sup> *Students and Parents for Privacy v. U.S. Dept. of Education et al.*, No. 1:16-cv-04945 (N.D. Ill. May 4, 2016); *see Chicago Tribune*, May 5, 2016 (<http://www.chicagotribune.com/news/local/breaking/ct-transgender-palatine-high-school-lawsuit-met-20160504-story.html>).

<sup>72</sup> Case No. 02-13-1220 (Dec. 22, 2015).

<sup>73</sup> *Id.* at 4-5.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 5.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 5-6.

<sup>78</sup> No. 11-14-2265 (Aug. 14, 2015).

campus security allegedly confronted her when she emerged from the women's restroom and asked for identification to ascertain her sex.<sup>79</sup> She presented identification that did not designate her sex, and allegedly was told to leave campus and that she was suspended.<sup>80</sup> Her suspension was lifted the next day, but school administrators allegedly told her she should use gender-neutral restrooms and encouraged her not to file a complaint under Title IX.<sup>81</sup>

CPCC entered into a voluntary resolution agreement to resolve the complaint.<sup>82</sup> It agreed to revise its Title IX procedures to ensure that claims would be properly investigated, and to include a clear definition of the type of conduct prohibited under Title IX.<sup>83</sup> It further agreed to communicate through its website and other publications that all students have the right to use the bathroom that coincides with their gender identity, to change students' official records to reflect a change in legal name or gender upon receipt of proper documentation to that effect, and to provide gender-based discrimination and harassment training to its staff.<sup>84</sup> CPCC also agreed to permit the student to re-take any courses in which she was enrolled when she left the college in March 2014 or, alternately, to correct her transcript to reflect her withdrawal from those courses.<sup>85</sup>

### **E. Religious Exemption**

One exception to these OCR-enforced requirements is contained in the "religious exemption" of Title IX and its implementing regulations. The Title IX statute itself, at 20 U.S.C. § 1681, provides that "this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."<sup>86</sup> This statutory proclamation is implemented by 34 C.F.R. § 106.12, which requires an education institution wishing to claim the exemption to "submit in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization."<sup>87</sup> OCR will normally consider an institution to be controlled by a religious organization if it is a school or department of divinity that prepares students to become ministers or members of some other religious vocation, if it requires its students and faculty to become members of, or espouse a belief in, the religion of the organization by which the institution claims to be controlled, or if the institution officially proclaims to be controlled by a religious organization, its board of governors are appointed by the religious organization, and it receives a significant amount of financial support from the organization.<sup>88</sup>

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<sup>79</sup> *Id.* at 3.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See *Voluntary Resolution Agreement, Central Piedmont Community College* (Aug. 13, 2015).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> 20 U.S.C. § 1681(a)(3).

<sup>87</sup> 34 C.F.R. § 106.12(b).

<sup>88</sup> U.S. Department of Education, Office for Civil Rights, *Religious Exemption*, <http://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/rel-exempt-pr.html>.

One notable example of a university availing itself of the religious exemption comes from George Fox University in 2014. In preparation for returning to school, a transgender male student requested that University officials allow him to room with his male friends in on-campus student housing.<sup>89</sup> The University had only individual and sex-segregated housing on campus. After meeting with the student and his parents multiple times, the University denied his request, and the student subsequently filed a complaint with OCR alleging discrimination in violation of Title IX.<sup>90</sup> OCR eventually denied the claim after the university sought and OCR granted it a religious exemption from transgender protections under Title IX.<sup>91</sup> A number of other universities have sought and obtained similar religious exemptions from OCR.<sup>92</sup>

### **III. Suggested Practices in Campus Operations**

#### **A. Records**

Decisions about when a transgender student can change the demographic information in their student records, most significantly name and gender, are foundational in that many other decisions about campus communications and activities flow from a student's record. For example, decisions about housing, restroom access, athletics, transcripts and diplomas, and routine communications from faculty and the university are all often depending on the information in a student's record.

#### **1. External Laws and Rules Regarding Record Changes**

State laws and federal requirements vary widely with respect to the conditions that must be met in order for an individual to modify demographic information on their vital records. For example, some entities refuse to allow an individual to change the sex on their birth certificate *even if* they have a "sex change surgery."<sup>93</sup> Other entities will allow an individual to change the sex on their birth certificate *only if* they can demonstrate that the current designation is inaccurate as the result of an operation.<sup>94</sup> And still others permit an individual to change the sex designation on their birth certificate simply with an affidavit from a physician with a bona fide relationship with the individual indicating that the individual has transitioned (with no explicit mention of surgery).<sup>95</sup> Ultimately, given this piecemeal approach to changes to legal records, the

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<sup>89</sup> Bob Heye, *Transgender student files sex discrimination complaint against George Fox University*, KOMONEWS.COM (April 5, 2014), <http://komonews.com/news/local/transgender-student-files-sex-discrimination-complaint-against-george-fox-university>.

<sup>90</sup> *Id.*

<sup>91</sup> Nick DeSantis, *Christian College Wins U.S. Exemption in Dispute with Transgender Student*, THE CHRONICLE OF HIGHER EDUCATION (July 14, 2014), <http://chronicle.com/blogs/ticker/u-s-grants-christian-college-exemption-in-housing-dispute-with-transgender-student/81757>

<sup>92</sup> Nick Anderson, *Religious colleges get exemptions to anti-bias law; critics denounce 'hidden discrimination' against LGBT students*, The Washington Post (December 18, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/12/18/religious-colleges-get-exemptions-to-anti-bias-law-allowing-hidden-discrimination-against-lgbt-students/>

<sup>93</sup> See, e.g., Tenn. Code Ann. 68-3-203(d).

<sup>94</sup> See, e.g., 410 ILCS 535/17(1)(d).

<sup>95</sup> See, e.g., HRS 338-17.7 and Social Security Agency FAQs

(<https://travel.state.gov/content/passports/en/passports/information/gender.html>;

<https://faq.ssa.gov/link/portal/34011/34019/Article/2856/How-do-I-change-my-gender-on-Social-Security-s->

reality is that many transgender students will not be in a position during their time on campus to change their legal records.

## 2. Campus Policies Regarding Records

Given this complexity and in keeping with the guidance in the Letter, institutions could to develop campus policies and supporting procedures that allow students to select a preferred name for many uses and communications on campus, even if the student is not able to obtain a legal name change pursuant to state law.<sup>96</sup> Places in which a student's preferred name could be used could include class rosters, campus ID cards, and in automatically generated email communications.

Policies could also allow for a student to select a preferred gender or pronoun, to be used for particular purposes. Having such a policy would align with both the consistent treatment principle and the various privacy considerations articulated in the Letter. Below we offer a practical checklist for developing a campus policy addressing these issues and highlight some policies from various institutions. Developing and implementing a policy regarding preferred name and gender requires the coordinated and sustained efforts of numerous different university areas.

- a.) **Assemble a cross-functional group of relevant stakeholders.** Areas to be involved in the conversation could include Student Records, Financial Aid, Information Technology, Student Affairs, Facilities, Housing, Security, and the General Counsel's Office. This team will form a group of core subject matter experts who can inform various aspects of the policy as it is developed and implemented.
- b.) **Inventory when and how names and gender markers are used in university systems, communications, and processes.** This list will allow the group to see the universe that needs to be considered as the policy is developed.
- c.) **Assess whether this list can be streamlined.** In many instances, names and gender markers are used in non-essential ways. For example, many email communications could simply say "Dear Student," rather than inserting an individual's name. Likewise, while a gender marker may be necessary for housing assignments, perhaps swipe pads to enter bathrooms could simply require a valid university ID, rather than a gender-specific ID.

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[records](#)). See also 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); and <http://www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations>.

<sup>96</sup> Many schools designate these as "preferred name" policies and/or procedures. For ease of reference, we refer to them as such here, but note that a more inclusive approach may be to identify them as simply "name" policies and/or procedures, as discussed in Appendix B.



- d.) **Categorize those instances in which it would be possible to use a non-legal preferred name or a self-selected gender marker.** While legal names and genders must be used for certain purposes such as transcripts and financial aid records, preferred names and genders could potentially be used for many other purposes, such as class rosters and graduation programs.
- e.) **Draft a policy that clearly delineates the processes and criteria for selecting preferred names and changing gender markers.**
- f.) **Train employees who will interface with student regarding the areas discussed in the policy.** Numerous employees will be involved in supporting the various processes in which a student's preferred name or gender will be used. This could include faculty, front desk staff in the Registrar's Office, Campus Security, assignments staff in Housing, etc. Making sure that these populations are appropriately trained on the policy and its supporting processes will facilitate a seamless implementation of the policy. Employees may also be given specific resources, such as LGBTQ Student Services or senior staff in Student Records, to contact with further questions.

Sample model policies are available for review at the University of Wisconsin,<sup>97</sup> New York University,<sup>98</sup> and Washington University in St. Louis.<sup>99</sup>

## **B. Restrooms and Locker Rooms**

Appropriate restroom access is critical in the evaluation and creation of a safe environment for all students. In the 2011 report from the Institute of Medicine, the lack of access to safe and accessible restrooms are a fundamental priority when addressing issues of gender identity on campus.

Transgender and gender fluid students may schedule their days with trips back to safer restrooms or even limit much needed timely bathroom usage to avoid interactions with the “restroom police”. This pattern of regulation can lead to psychological and physiological stress as well as medical concerns.

Campus policies regarding restroom and locker room use vary widely. It can be expected that these policies will likely standardize, given the clear guidance in the Letter that “schools may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so.”

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<sup>97</sup> University of Wisconsin Preferred Name Policy: [https://registrar.wisc.edu/preferred\\_name.htm](https://registrar.wisc.edu/preferred_name.htm).

<sup>98</sup> New York University Change of Student Information Policies: <http://www.nyu.edu/life/resources-and-services/nyu-studentlink/registration-records-and-graduation/forms-policies-procedures/change-of-student-information/change-of-student-information-policies.html>.

<sup>99</sup> Washington University in St. Louis Preferred Name Policy Student Information: <http://registrar.wustl.edu/student-records/ssn-name-changes/preferred-name-policy/preferred-name-policy-student/>.

New legislation in states such as North Carolina leaves many unanswered questions about how these states intend to verify appropriate access as required by federal statutes such as Title IX. Indeed, the Department of Education has affirmatively informed the University of North Carolina (UNC) Board of Governors that it is in violation of federal law based on its compliance with the new laws.<sup>100</sup> Some advocates in these states have compared the ability to seek civil penalties against an individual for using the restroom that does not confirm to a person's biological sex to a bounty placed on transgender and gender fluid people that will escalate already prevalent restroom harassment.<sup>101</sup>

Potentially, the issue could be addressed from a gender free lens, using options such as increased privacy curtains, single use changing stalls and showers, and lockable doors.

Additionally, there is also an effort at many institutions to increase the availability of single occupancy restroom spaces that do not have a gender marker. This approach, providing the easiest access for transgender and gender fluid students, also serves people with disabilities and families with small children. However, various legal, financial, or physical barriers can make it physically or financially impossible to retrofit single occupancy restrooms. On March 24, 2016, San Francisco city legislators introduced a bill that would require business to make single occupancy gender inclusive. The argument is that these spaces would be best to serve not only transgender individuals but parents, senior or disabled residents and women who face longer lines for restrooms. A greater effort has also been placed on communicating the location of these restroom, usually in an online map and notations at gendered restrooms as to the next closest gender inclusive restroom. Campus planning departments could also consider the opportunity in all new construction and remodeled spaces for the inclusion of single occupancy restrooms.

Not only do campus policies regarding restrooms and locker rooms vary widely, what varies even more are how those policies are implemented in practice. For example, two students on two different campuses could have a very different experience based on whether locker room attendants are trained appropriately on how to respond to concerns related to usage and whether a well-published policy exists and is disseminated.

### **C. Housing**

Student housing presents some unique issues with respect to transgender students. Balancing the needs of all students, with an eye to legal compliance as well as practical management can be challenging.

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<sup>100</sup> See May 4, 2015 Letter from Vanita Gupta to Margaret Spellings, et al.

<sup>101</sup> Committee on Lesbian, Gay, Bisexual, and Transgender Health Issues and Research Gaps and Opportunities, Board on the Health of Select Populations, Institute of Medicine. (2011). *The Health of Lesbian, Gay, Bisexual, and Transgender people: building a foundation for better understanding*. National Academies Press. ISBN 9780309210652. Herman, J. (2013) *Gendered restrooms and minority stress: the public regulation of gender and its impact on transgender people's lives*. Journal of Public Management and Social Policy. Retrieved from <http://williamsinstitute.law.ucla.edu>.

## 1. Gender Neutral Housing

While not legally required, many schools have adopted a practice of designating at least some portion of their housing options as "gender neutral." Gender neutral housing is student housing in which roommates are assigned without regard to gender. Gender neutral housing would be available to all students. Gender neutral housing is often considered a good practice for addressing gender identity issues for several reasons. First, though securing safe and comfortable housing is important for all students, transgender students face discrimination that can make finding such housing extraordinarily difficult. Second, gender-neutral housing helps students who do not identify with either gender feel welcome and included. Third, gender-neutral housing respects student privacy with regard to a matter that can be extremely personal. In short, gender neutral housing creates a simple and straight forward way to create an environment in which a student's gender simply does not enter into the housing equation.

That said, the notion of having student housing segregated by gender is deeply rooted in society and, for a multitude of reasons—from student and parental expectations to hall management to religious beliefs—many institutions would find it difficult to convert even a portion of their housing to a gender neutral system.

## 2. Individualized Approach

Given these realities, a more common approach to addressing issues of gender non-conformity in the halls and working with transgender students to ensure safe and equitable housing opportunities is to take a case-by-case approach with respect to each student.

An individualized approach recognizes that each transgender person's experience is unique.<sup>102</sup> A housing arrangement that works for one transgender student may not work for another student. Taking an individualized approach allows the institution to carefully and completely address the needs of each particular student.

Importantly, an individualized approach does not mean an ad hoc approach. Institutions should have underlying principles that guide their work in this area, as well as established and transparent processes for addressing student's requests and needs. However, an individualized approach allows an institution to appropriately address the needs of each student with appropriate flexibility, considering the particulars of a given student's situation.

Some key components of an individualized approach include:

- a.) **Make information about options readily available.** Information about options for housing for transgender students, as well as information about whom to contact in order to discuss such options in further detail, could be included in application and marketing materials and on websites. Providing information upfront not only sends a welcoming message to both current and

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<sup>102</sup> See, e.g., *Trans\* Issues for Colleges and Universities: Records, Housing, Restroom, Locker Rooms, and Athletics* 41 JCUL 45, at 61-62.

prospective transgender students, but also affords guidance to faculty and staff who may be contacted by students.

- b.) Be clear about confidentiality.** As emphasized in the Letter, ordinary privacy concerns are intensified for transgender individuals. Moreover, the inherent intimacy of communal living raises these concerns to an even higher level. As such, transgender students should be assured at the start of their housing experience that the university will, to the best of its ability, keep all information relating to their gender identity confidential. Sample language might state:

*Confidentiality*

The University respects the privacy of its students and recognizes that transgender students may be especially concerned about privacy and confidentiality. Housing Services will consistently recognize and respect the gender identity that the student has established with Housing Services in good-faith. Transgender students may self-identify to Housing Services if they wish to receive extra housing assistance, but are by no means obligated to do so. If a student does self-identify and request assistance, Housing Services will not require that the student provide more information than the student is comfortable with providing. Furthermore, all information will be kept strictly confidential and will only be used for purposes designated by the student.

- c.) Creatively consider all options, within the boundaries of the consistent treatment principle detailed in the Letter and the disclosure requirements detailed in the Letter, and aligned with general aim of providing the transgender student with the agency to determine the extent to which they utilize sex-segregated spaces according to their self-identified gender.** Options could include priority placement in single-occupancy rooms, for transgender students who request to not have a roommate; priority guarantees of roommate requests, if a transgender student has requested to live with a particular individual; or, for transgender students who are comfortable with sharing their status, seeking out roommates who are aware of the student's status and have indicated a willingness to be placed with the student. Creative options could also include customized bathroom arrangements, again driven by the wishes of the transgender student.

## **D. Academics**

### **1. General Issues Involving Transgender Students in Academics**

Particular considerations for transgender students can emerge both in the classroom and in other academic experiences such as clinical placements, internships, professional training, and research.

These considerations could include, for example:

- Preferred name and pronoun use in the classroom;
- Academic conversations on issues related to gender and gender-identity, and how those conversations may impact transgender students in the classroom;
- Privacy considerations for students in experiential education settings; and
- Employment rules for students in employment-based experiential education settings.

Having well-established policies and supporting procedures in place for addressing issues such as these will encourage consistent practices that are both welcoming to all students and that simultaneously minimize legal risk. As discussed further above, these practices could include, for example, a preferred name and/or preferred pronoun policy that imports a student's preferred name and pronoun onto class rosters.

Even more, successfully handling issues as they arise depends on making sure that all faculty are well-trained—not only regarding policies and procedures, but also more generally about gender identity, and the specific needs and concerns of transgender students. Moreover, faculty should be made aware of the institutional resources available to them to assist them with addressing complex situations as they arise. This could include LGBTQA Student Services, Student Affairs, Human Resources, the General Counsel's Office, and others.

One successful approach is to use an embedded resource model in which select faculty in each academic unit receive more extensive training and then are designated as resources for other faculty in their local academic unit regarding issues of inclusion, including for transgender students.

## **2. Study Abroad**

Student abroad programs are keenly aware of the issues transgender students traveling internationally. Students may self-select out of traveling to countries because of their strict gender codes or punishments for transgressing gender norms. They may face harassment from host families and faculty for their gender expression. In some countries not complying with strict gender norms could have criminal implications. Some transgender students may also not be able to access passports due to the incongruence of their birth certificate and other ID gender markers.

## **3. Transgender Conversations and Academic Freedom**

Finally, as issues of gender identity and gender nonconformity become more commonly discussed on a broader scale, institutions are likely to see complex issues of academic freedom intertwined with transgender issues.

For example, in Fall 2015, students and faculty at Oklahoma State University publicly objected to a decision by the University to postpone and relocate a theater production that grappled with gender identity and gender politics.<sup>103</sup>

Significant controversy has also surrounded the writings of Professor Paul McHugh, a psychiatry professor at the Johns Hopkins University School of Medicine. Professor McHugh is one of the authors of a contentious position statement from the American College of Pediatricians urging the rejection of "all policies that condition children to accept as normal a life of chemical and surgical impersonation of the opposite sex."<sup>104</sup>

Situations such as these raise difficult issues involving speech and expression, academic freedom, public relations, and numerous legal considerations. Each must be addressed and managed with care by various university areas as appropriate.

## **E. Athletics**

To the extent applicable, approaches to athletics related to gender identity typically refer directly to NCAA policies as well as the guidance from the International Olympic Committee. A comprehensive approach must also look to the governing bodies of other collegiate sports entities NAIA, NJCAA, and other sport specific governing groups, all viewed in accordance with the guidance in the Letter.

### **1. National Collegiate Athletics Association (NCAA)**

The NCAA provides comprehensive guidance on transgender student-Athlete participation, hormonal treatment, mixed gender teams, and a student and school's responsibilities in these situations. Available in the NCAA document: NCAA Inclusion of Transgender Student-Athletes (August 2011), the organization reframes this effort. Moving away from the philosophy that we must deal with the problem of transgender student-athletes based in a medical model of exclusion, a more forward thinking, socially aware and inclusive efforts exists to engage college athletic programs in inclusive excellence.

The NCAA materials are limited however in their guidance in situations where students do not meet criteria around physical transition, hormone suppression/usage, and partial gender confirming surgical efforts. The perceived barrier of the influence of the "physical advantage/disadvantage" in collegiate competition still lingers in these policy limitations. Many other governing bodies like the National Junior College Athletic Association (NJCAA) follow this same pattern.<sup>105</sup>

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<sup>103</sup> See <https://www.insidehighered.com/news/2016/02/22/oklahoma-state-professor-says-play-censored-over-transgender-identity-themes>.

<sup>104</sup> See <http://www.acpeds.org/the-college-speaks/position-statements/gender-ideology-harms-children>.

<sup>105</sup> NCAA Inclusion of Transgender Student-Athletes (August 011)  
[https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf).

## **2. National Association of Intercollegiate Athletics (NAIA)**

The NAIA continues to review its inclusion policy for transgender athletes. The NAIA stated in their 2016 Programming, Policy & Legislation Preview (March 18, 2016) that for the past three years they have studied and reviewed participation by transgender student athletes in NAIA programs. The organizational statements about this process indicate a focus on “student welfare” and “medical aspects only”. This may signal a significantly different framing from the inclusion position of the NCAA. No formal policy has been published as of this NAIA briefing in December 2015.<sup>106</sup>

## **3. Club Sports/Intercampus Athletic Competition**

Numerous campuses across the country have a series of athletic opportunities that fall somewhere between NCAA/NAIA type competitions and intramural sports programs. Often referred to as Club Sports or Intercampus Athletics, these programs face an unusual challenge. Two institutions may compete and yet be operating under two very different participation policies for transgender student-athletes. Some of these teams do have sport specific guidance from regional or national governing boards like the National Intramural- Recreational Sports Association (NIRSA) which serves much of soccer, flag football, basketball, golf, tennis, and volleyball for example. These groups usually organize and manage regional and national championship events. A challenge in this structure is that transgender student-athletics may be able to participate in regular season events but may be excluded from post season competition.<sup>107</sup>

## **4. Intramural Sports**

Intramural sports provides an opportunity for campus communities to potentially create the most inclusive and adaptable policies for transgender athletics and those who identify as gender fluid. Working from the guidance in the Letter in this area, campus decision makers could engage the campus community in a dialogue about policy development and implementation. Campus leaders must also insure that there is a process for addressing conflicts, sports performance education, and teams that are not limited only to gendered participation.<sup>108</sup>

## **F. Campus Activities**

Collegiate campus activities celebrate a rich tradition in the lives of students. These “co-curricular” activities are seen as the experience of college and an important part of the cultural education in a college degree. Student activities represent a broad spectrum of topics like student leadership, clubs and organizations, student government, Greek organizations, civic and community engagement, religious and spiritual traditions, campus traditions like homecoming and parent visit days. A critical examination of these programs show an interesting presence of the gender binary embedded in many of the events. Colleges still hold mother and father visits

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<sup>106</sup> 2016 NAIA Programming, Policy & Legislation Preview

[http://www.naia.org/files/27900/1NAIA/legislative/docs/NAIA\\_2016ConventionProgrammingPolicyLegislation.pdf](http://www.naia.org/files/27900/1NAIA/legislative/docs/NAIA_2016ConventionProgrammingPolicyLegislation.pdf)

<sup>107</sup> National Consortium of LGBT Resource Professionals. (2014). *Suggested best practices for supporting trans\* students*. Retrieved from: [www.lgbtcampus.org](http://www.lgbtcampus.org). NIRSA: *Leaders in College Recreation*. Retrieved from nirsa.net.

<sup>108</sup> *Id.*

days, king and queen selections, and awards for top senior men and woman as just a few examples. The binary systems is so engrained in fraternities and sororities that they are provided a specific exception to Title IX.<sup>109</sup>

Within each of these areas exists and opportunity to examine the influence of gender on the program and explore ways to reframe and recreate. A few noteworthy examples are mentioned below:

### **1. Greek Organizations**

While Title IX allows for an exception for these organizations, the organizations are permitted to set their own policies regarding gender identity and certainly nothing prohibits Greek organizations from readily accepted students of all gender identities. For example, at least three Greek Chapters at the University of Oregon now specifically invite transgender men in their recruitment and membership policies.<sup>110</sup>

### **2. Homecoming and King/Queen Events**

Many campuses have adapted this historic college event in one of three ways. The first is to allow any student to be a part of either the king or the queen category based on personal identity. The next option, some college have moved to having a royal court or a group of students named after the school mascot. Selection is not based on gender and focuses more on leadership, scholarship, and community service as part of the criteria. Other schools have eliminated the event entirely, either because they were not willing to make it more inclusive or in some cases the lack of current student participation indicated the need to put limited funds into other programming.

These are just a few examples of the many situations involving gender identity that arise in student activities. In some cases the existence of the gender binary is so subtle that it has been part of the culture for years without acknowledgement. These are some of the most challenging areas to address because the argument of traditions can be compelling and may activate very vocal stakeholders like donors and alumni.<sup>111</sup>

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<sup>109</sup> 20 U.S.C. § 1681(a)(6)(A); 34 C.F.R. § 106.14(a).

<sup>110</sup> *Register Guard* (February 12, 2016) Retrieved from <http://registerguard.com/rg/news/local/34075683-75/2-uo-frats-to-increase-outreach-to-transgender-students.html.csp>.

<sup>111</sup> National Consortium of LGBT Resource Professionals. (2014). *Suggested best practices for supporting trans\* students*. Retrieved from: [www.lgbtcampus.org](http://www.lgbtcampus.org).



# LGBTQIA+ Terms

These terms are presented as an opportunity to use a shared language. Not every person may prefer or identify with these terms. The most important definition is how someone defines themselves.

**Asexual people (or Aces):** Individuals who generally do not experience sexual attraction to others of any gender. Some do experience romantic attractions. Asexuality differs from celibacy in that celibates have a sexual attraction, but choose to abstain from sex.

**Aggressives (or AGs):** Lesbians who express themselves in a masculine manner, such as by binding their breasts. They are also called studs. The terms are more commonly used in communities of color.

**Agender people:** Individuals who identify as not having a gender. Some describe themselves as genderless, while others see themselves as gender neutral.

**Allosexual people:** Individuals who experience sexual attraction to others of any gender (i.e., people who are not asexual).

**Androgynes:** Individuals who identify androgynously. They have a gender which is both feminine and masculine, although not necessary in equal amounts.

**Androsexual people:** Individuals who experience sexual attraction toward men, males, and/or masculinity, regardless of whether they were assigned male at birth.

**Aromantic people (or Aros):** Individuals who experience little or no romantic attraction to others of any gender.

**Bisexual people (or Bi):** Individuals who experience sexual, romantic, and/or emotional attractions to people of more than one gender.

**Bigender people:** Individuals who experience their gender identity as two genders at the same time or whose gender identity may vary between two genders.

**Biromantic people:** Individuals who are romantically, but not necessarily sexually, attracted to people of more than one gender.

**Bois:** Individuals assigned female at birth who identify their gender as nonbinary. Because they are not male-identified, they are “bois” and not “boys.”

**Butches:** Individuals of any gender or sexual identity who present and act in traditionally masculine ways, which could include being the “dominant” partner in sexual relationships.

**Cisgender people (or Cis people):** Individuals who identify with the gender that was assigned to them at birth (i.e., people who are not transgender).

**Crossdressers:** Individuals who, at times, wear clothes traditionally associated with people of a gender different from one’s own.

Terms adapted from NASPA Presentation: Gender Justice Forum. Dr. Genny Beemyn and Dr. Chicora Martin (2016)

**Demigender people:** Individuals who feel a partial connection to a particular gender identity. Examples of demigender identities include demigirl, and demiboy, and demiandrogyny.

**Demiromantic people:** Individuals who do not feel romantic attraction to someone unless they have already formed a strong emotional bond with the person.

**Demisexual people (or Demis):** Individuals who typically do not feel sexual attraction to someone unless they have already formed a strong emotional bond with the person.

**Dyadic people:** Individuals who are born with chromosomes, a reproductive system, and a sexual anatomy that fit into the prevailing standard for “female” or “male” individuals (i.e., people who are not intersex).

**Dyadism or binarism:** The societal, institutional, and individual beliefs and practices that assume that there are only two “biological” or “natural” sexes—female and male. Dyadism/binarism privileges dyadic people and leads to prejudice and discrimination against people with intersex variations.

**Femmes:** Individuals of any gender or sexual identity who present and act in traditionally feminine ways, which could include being the “subordinate” partner in sexual relationships.

**Gay men:** Men who experience sexual, romantic, and/or emotional attractions to other men.

**Gender binary:** The social system that sees only two genders and that requires everyone to be raised as a man or a woman, depending on the gender assigned to them at birth.

**Gender fluid people:** Individuals whose gender varies over time. A gender fluid person may at any time identify as male, female, agender, or any other non-binary identity, or some combination of identities.

**Gender-nonconforming people:** Individuals who do not to adhere to the traditional gender expectations for appearance and behavior of people of their assigned gender. Some identify as transgender, but others (like butch lesbians) do not.

**Genderism or cissexism:** The societal, institutional, and individual beliefs and practices that assume that there are only two genders and that gender is determined by one’s sex assignment at birth. Genderism/cissexism privileges cis people and leads to prejudice and discrimination against trans and gender-nonconforming people.

**Genderqueer people:** Individuals who identify as neither male nor female (but as another gender), as somewhere in between or beyond genders, or as a combination of genders.

**Graces, gray A’s, or gray asexuals:** Individuals whose sexual attraction exists within the gray area between sexual and asexual. They experience sexual attraction infrequently or not very strongly. Other terms that are used to describe this identity are semisexual, asexual-ish, and sexual-ish.

**Gray romantics:** Individuals whose romantic attraction exists within the gray area between romantic and aromantic. They experience romantic attraction infrequently or not very strongly.

**Gynesexual/gynosexual people:** Individuals who experience sexual attraction toward women, females, and/or femininity, regardless of whether they were assigned female at birth.

Terms adapted from NASPA Presentation: Gender Justice Forum. Dr. Genny Beemyn and Dr. Chicora Martin (2016)

**Heteroflexible people:** Individuals who are primarily attracted to people of a different sex and who typically identify as heterosexual, but who may engage in same-sex sexual activity in certain situations. As it is defined by the Urban Dictionary, “I’m straight but shit happens.”

**Heterosexism:** The societal, institutional, and individual beliefs and practices that assume that all people are heterosexual. Heterosexism privileges heterosexual people and leads to prejudice and discrimination against asexual, lesbian, gay, bisexual, pansexual, and other people with non-heterosexual sexual identities.

**Heteroromantic people:** Individuals who are romantically, but not necessarily sexually, attracted to people of a gender different from themselves.

**Heterosexual people:** Men who experience sexual, romantic, and/or emotional attractions attraction to women, and vice versa. Also known as “straight.”

**Homoflexible people:** Individuals who are primarily attracted to people of the same sex and who typically identify as lesbian or gay, but who may engage in sexual activity with people of a different sex in certain situations.

**Homoromantic people:** Individuals who are romantically, but not necessarily sexually, attracted to people of a gender similar to themselves.

**Intersex:** An umbrella term used to describe a wide range of natural biological variations of individuals who are born with a chromosomal pattern, a reproductive system, and/or sexual anatomy that does not fit typical binary notions of male or female bodies.

**Lesbians:** Women who experience sexual, romantic, and/or emotional attractions to other women.

**Masculine of center (MoC) people:** Lesbians, queer women, and non-binary trans people who tend toward the masculine in their gender expression. The term is more commonly used in communities of color.

**Monosexism:** The societal, institutional, and individual beliefs and practices that assume that all people are attracted to only one other sex or gender—that one is either exclusively heterosexual or exclusively lesbian/gay. Monosexism privileges people with binary sexual identities and leads to prejudice and discrimination against bisexual, pansexual, queer, and other people with non-binary sexual identities.

**Neutrois people:** Individuals who identify their gender as neutral or null. They may also identify as “agender.”

**Non-binary gender, gender creative, and gender expansive people:**

- Umbrella terms for individuals who do not fit into traditional “male” and “female” gender categories.
- Includes individuals who identify as agender, bigender, gender fluid, genderqueer, and various other genders.

**Pangender people:** Individuals whose gender identity and/or gender expression is numerous, either fixed (many at once) or fluid (moving from one to another, often more than two).

**Panromantic people:** Individuals who are romantically, but not necessarily sexually, attracted to others regardless of their gender identity or biological sex.

Terms adapted from NASPA Presentation: Gender Justice Forum. Dr. Genny Beemyn and Dr. Chicora Martin (2016)

**Pansexual people:** Individuals who are attracted to others regardless of their gender identity or biological sex.

**Polysexual people:** Individuals who are attracted to more than one gender and/or form of gender expression, but not to all.

**Queer:** An umbrella term to refer to all LGBTQ+ people. It is also a non-binary term used by individuals who see their sexual orientation and/or gender identity as fluid.

**Queerplatonic:** Non-romantic relationships that involve close emotional connections that are often deeper or more intense than what is traditionally found in friendships.

**QPOC and QTPOC:** Queer people of color, and queer and trans people of color.

**Same-gender loving people:** Individuals who experience same-gender attraction. The term originated within communities of color as an alternative to “lesbian” and “gay,” which they feel does not speak to their cultural heritages.

**Sapiosexual people:** Individuals who are attracted to people based on intelligence, rather than gender identity or biological sex.

**Sexually fluid people:** While many people will experience changes in their sexual orientation over their lifetimes, individuals who are sexually fluid experience changes in their sexual orientations more frequently.

**Skoliosexual people:** Individuals who are sexually attraction to people with non-binary gender identities.

**Studs:** Lesbians who express themselves in a masculine manner, such as by binding their breasts. They are also called AGs or aggressives. The terms are more commonly used in communities of color.

**Trans, trans\*, or transgender people:**

- Umbrella terms for individuals whose gender identity and/or expression is different from the gender assigned to them at birth.
- Trans people include transsexuals; individuals who cross-dress or who present androgynously; agender, demigender, and genderqueer individuals; and others who cross or go beyond traditional gender categories.

**Trans men:** Female-to-male (FTM) transsexual people or transsexual men -- individuals assigned female at birth who identify as male.

**Trans women:** Male-to-female (MTF) transsexual people or transsexual women -- individuals assigned male at birth who identify as female.

**Two spirit people:** A Native American term for individuals who blend the masculine and the feminine. It is commonly used to describe individuals who historically crossed genders. It is also often used by contemporary LGBTQIA Native American people to describe themselves.

Terms adapted from NASPA Presentation: Gender Justice Forum. Dr. Genny Beemyn and Dr. Chicora Martin (2016)

**APPENDIX B:**  
**INCLUSIVE USE OF LANGUAGE AND TERMS**  
**Dr. Chicora Martin**

The language and terms used in the discussion of gender identity policy and practice in higher education are complex and evolving. There are several key concepts that help to frame policy and language and definitions. The first is the core value of self-identification. The ability for an individual to self-identify should be the most fundamental principle when exploring any policy or practice. One should be able to challenge the common practice of assuming individuals cannot use self-identification options due to what are cultural norms and not legal guidance. A center point of understanding privilege is acknowledging that one's viewpoint should not always be the point from which decisions are made and normalized. Situations where individuals trivialize or refuse to use the correct pronoun because it is too hard to remember is one such example. Continued self-education and openness to the changing landscape of identity and language is fundamental to inclusive and forward thinking policy development.<sup>1</sup>

The second principle is that context is key. Language is highly contextual, regional, generational, and influenced by cultural identities like race, ethnicity, and nationality. In one community terms like "preferred first name" may be the appropriate way to talk about naming policies that offer flexibility in campus systems. However, at another campus the concept of "preferred" may be highly problematic. In these communities the rationale is that using a name that fits one's identity is not a preference. Their name, chosen or given at birth, is who they are and should be respected. A better term in these situations may be "name" policies. Even in one community you may find individuals who openly identify as transgender men, while another person with a seemingly similar situation identifies as gender fluid. This is symbolic of the complexity of gender identity and of the importance to the first key concept of self-identification.<sup>2</sup>

The last concept is person first language and most important when talking about a specific person versus a group or category of people. The concept of person first language is not limited to gender identity and is an important way to acknowledge the whole person and centering identity as self-described. Some examples of person first language are provided below. You can also use this tool to describe when you are the one making the assumptions about identity.

**Person First Language**

a person who identifies as transgender  
a person who identifies as a trans man  
a person with a disability

**Non- Person First Language**

a transgender person  
a trans man  
a disabled person

**Language to acknowledge our assumptions about identity**

a person who I am identifying as a man  
a person who seems to present as a woman

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<sup>1</sup> Beemyn, G. & Rankin, S (2011) *The lives of transgender people*. New York: Columbia Press.

<sup>2</sup> Nestle, J., Howell, C. & Wilchins, R. (2002) *Genderqueer: voice from beyond the sexual binary*. New York: Alyson Books.

a person who I am assuming may identify as transgender<sup>3</sup>

Laws in each state govern the terms needed in legal documents; however the requirement to mirror that language in policy documents should be critically examined for more inclusive and campus specific options. An effective practitioner should at minimum understand core concepts like sex assigned at birth, sexual orientation(s), gender identity, gender expression, transgender/trans, gender fluid, gender queer, transition, and the gender binary.

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<sup>3</sup> Tillman, L. & Scheurich, J.J. (2013) *Handbook of Research on Educational leadership for equity and diversity*. New York: Routledge. p. 301.