

Parent Information Session Transgender Student Policy

March 29, 2016
Pascack Hills High School

Superintendent: P. Erik Gundersen
Board of Education Attorney: Rodney T. Hara, Esq.

Agenda

Introductory Remarks – Mr. Gundersen

“Knowing the Rights of the Transgender Student” – Mr. Hara

Questions & Answers – Mr. Gundersen & Mr. Hara



Introductory Remarks

Not a Board of Education Meeting

Development of a policy

Information Session with Q & A Opportunities

First Reading – April 4, PVHS, 4 p.m.

Second Reading – April 11, PVHS, 7 p.m.



Knowing the Rights of Transgender Persons

Terminology

Gender Identity

- An individual's deeply held sense or psychological knowledge of their own gender, regardless of how they were assigned at birth.

Transgender

- Individuals whose gender identity or expression is different from that traditionally associated with their gender assigned at birth.

Gender Expression

- The way a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms.

Gender Non-Conforming

- Refers to gender-related identity and/or gender expression which does not conform to the social expectations or norms for a person of the gender assigned at birth.

Transition

- Refers to the process in which a person goes from living and identifying as one gender to living and identifying as another.

Common Issues

- ▶ Which restrooms and locker room can be used?
 - ▶ Can a transgender student participate in a sport played by students of the gender with which the student identifies?
 - ▶ How should a transgender person be addressed—name, pronoun?
 - ▶ Privacy and Student Records.
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The Law

Title IX

- Prohibits discrimination on the basis of sex in any education program or activity operated by recipients of Federal financial assistance.
- The United States Department of Education's Office for Civil Rights has issued guidance recognizing that Title IX protects transgender students against discrimination based on their gender identity.

Title VII

- Title VII makes it unlawful for a covered employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment, or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of, *inter alia*, sex.
- The Equal Employment Opportunity Commission interprets the statute's sex discrimination provision as prohibiting discrimination against employees on the basis of gender identity

The Law

New Jersey's LAD

- New Jersey's Law Against Discrimination ("LAD") prohibits, amongst other things, discrimination based on a person's gender identity or expression.
- The LAD specifically prohibits discrimination in places of public accommodation, and mandates that in sex-segregated public accommodations, such as bathrooms or locker rooms, a person must be allowed to use the facility consistent with their gender identity or expression.
- The LAD defines public schools as places of public accommodation covered under the law.

Anti-Bullying Bill of Rights Act

- The Anti-Bullying Bill of Rights Act in New Jersey sets forth provisions regarding awareness and prevention of Harassment, Intimidation and Bullying in schools, includes protection on the basis of gender identity and expression.

The Law

First Amendment

- The First Amendment to the United States Constitution has been construed to protect gender expression on the basis of “freedom of expression.”

FERPA – Student Records

- The Family Educational Rights and Privacy Act, 20 U.S.C.A. § 1232g (hereinafter referred to as “FERPA”), addresses the maintenance of and access to student information.
- Under FERPA, a current or former student has the right to request that their school change their name and gender marker on their school records if the student (or parent if the student is under 18) feel the records are incorrect, misleading, or violate the student’s privacy.

How Common Issues Should be Addressed

- ▶ Which restrooms and locker room can be used?
 - ▶ Under the law, **transgender employees and students** must be permitted to use the restroom or locker room in accordance with his or her gender identity.
 - ▶ A transgender person who expresses a need or desire for increased privacy should be provided reasonable alternative arrangements.
 - ▶ However, the use of a “gender neutral” restroom, if available, shall be a matter of choice by a transgender student.
- ▶ Can a transgender student participate in a sport played by students of the gender with which the student identifies?
 - ▶ Transgender students should be permitted in physical education classes in a manner compatible with their gender identity.
 - ▶ With regard to athletic competitive activities, the New Jersey Interscholastic Athletic Association, which oversees a large segment of high school athletics, has developed a set of policies for allowing transgender athletes to participate in interscholastic athletics in accordance with their gender identity.



How Common Issues Should be Addressed

- ▶ How should a transgender person be addressed – name, pronoun?
 - ▶ At the request of the employee or student and/or parents, the school and district staff should address the employee and/or student by the name and pronoun corresponding to the person's gender identity that is consistently asserted at school.
- ▶ Privacy and Student Records
 - ▶ Transgender employees have the ability, to discuss and express their gender identity and expression openly and decide when, with whom, and how much of their private information to share with staff members. This, of course, will also apply to transgender students.
 - ▶ Student records are required to be maintained in accordance with Federal law, State statutes and regulations should indicate the student's legal name and biological gender.
 - ▶ However, the school district should use the name and pronoun requested by the student and/or parents for internal and/or unofficial school records, such as grade books.



Section 504 and ADA Accommodations

- ▶ School districts need to be very careful about not putting gender identity issues in the category of disability.
- ▶ Indeed, ADA specifically excludes “gender identity disorders not resulting from physical impairments.”
- ▶ If a transgender student is eligible under Section 504 based on a disability, keep accommodations for the student based on her transgender needs outside of the Student’s 504 Plan.
- ▶ The Section 504 Plan or IEP should focus solely on the disability issues.



Recent Decisions

Doe v. Regional Sch. Unit 26

Maine Supreme Court (2015)

▶ Facts

- ▶ A transgender student, who identified as a female, was initially permitted access to the girls' restroom. However, after a male student followed her into the bathroom in a protest that he should also be allowed to use the girls' restrooms, the Superintendent terminated the transgender student's access to the girls' restroom and was forced to use a staff restroom.
- ▶ The student's parents claimed that the school district discriminated against her when they denied public accommodations and failed to accommodate the student's transgender status.

▶ Decision

- ▶ The Court held that under the Maine Human Rights Act, the school district discriminated against the student.
- ▶ The Court opined that, where it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination.



Johnston v. Univ. of Pittsburgh*

Western District of Pennsylvania (2015)

▶ Facts

- ▶ Plaintiff claimed that defendants discriminated against him based on his sex and transgender status by prohibiting him from using sex-segregated locker rooms and restrooms that were designated for men.
- ▶ The University said that if the Plaintiff wanted to use the men's facilities he had to change the sex designation on his student records, by way of a court order or a new birth certificate reflecting his current gender.
- ▶ The University filed a motion to dismiss.

▶ Decision

- ▶ The Court granted the University's motion to dismiss.
- ▶ The Court held that under the Equal Protection Clause, because transgender status was not a suspect classification, the University's need to ensure the privacy of its other students to disrobe and shower outside the presence of members of the opposite sex was rationally related to the University's actions, and thus did not violate the Plaintiff's equal protection rights.
- ▶ Also, the Court further held that Title IX's prohibition on discrimination "on the basis of sex" only referred to the traditional binary conception of sex consistent with one's birth or biological sex, and that reading is supported by legislative history and federal regulations.

▶ * An appeal has been filed with the Court of Appeals for the Third Circuit.

United States Department of Justice

▶ Virginia – Gloucester County Schools

- ▶ At a public school in Virginia, a transgender male sought the right to use the school's communal restrooms and not "alternative" facilities reserved for transgender students.
- ▶ However, the board voted to restrict the girls' and boys' bathroom to students of corresponding biological genders.
- ▶ The Justice Department sided with the student and explained that:
 - ▶ "allowing transgender students to use the restrooms consistent with their gender identity will help prevent stigma that results in bullying and harassment and will ensure that the District fosters a safe and supportive learning environment for all students, a result that is unquestionably in the public interest."



United States Department of Education Office for Civil Rights (“OCR”)

▶ Illinois – Township High School District

- ▶ A transgender female student entering the high school requested to change in the girls’ locker room, in an area such as a restroom stall. The Superintendent refused this request, but the District presented several alternatives.
- ▶ Instead, the District required the student to use separate restroom facilities, including facilities that are not comparable to those provided to other students; and the student has also used the nurse’s office.
- ▶ The OCR found that the District’s denial of access to the girls’ locker room, not only provided the student with an unequal opportunity to benefit from the District’s educational program, but that the student has also experienced an ongoing sense of isolation and ostracism.
- ▶ The OCR concluded that the District could satisfy its Title IX obligations as well as protect the potential or actual student privacy interests by installing privacy curtains in one locker room to accommodate any student who wish to be assured of privacy while changing, which would allow for the protection of all students’ rights.



Lusardi v. McHugh, Secretary, Dept. of the Army

Equal Employment Opportunity Commission (“EEOC”) (April 2015)

▶ Facts


- ▶ The supervisor of agency of the Department of the Army refused to allow a transgender woman employee to use the women’s restroom because he stated that a significant number of women would probably be extremely uncomfortable with sharing a restroom with this transgender woman employee. In addition, a team leader consistently and intentionally referred to the this employee as her former male name, by male pronouns, and as “sir.”

▶ Decision

- ▶ The EEOC concluded that this agency discriminated against the employee under Title VII and created a hostile work environment.
- ▶ The EEOC held that supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment, and that equal access to restrooms is a significant, basic condition of employment.
- ▶ Also, the EEOC stated that, supervisors and co-workers should use the name and gender pronoun that corresponds to the gender identity with which the employee identifies in employee records and in communications with and about the employee.



Q & A



▶ Additional Information: www.pascack.k12.nj.us

▶ Please email commentary to:
BoardMembers@pascack.k12.nj.us

Must identify the writer and town of residence

