



Knox McLaughlin Gornall & Sennett, P.C.
120 West Tenth Street | Erie, Pennsylvania 16501-1461
814-459-2800 | 814-453-4530 fax | www.kmgslaw.com

Timothy M. Sennett
tsennett@kmgslaw.com

Julia M. Herzing
jherzing@kmgslaw.com

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Aldo R. Jackson, Ph.D., Director
Erie County Technical School
8500 Oliver Road
Erie, PA 16509

RE: Transgender Youths

Dear Dr. Jackson:

In response to a recent inquiry, and in advance of the September 24, 2015 executive session on this issue, we were asked to provide a legal opinion regarding transgender students in public schools. More specifically, we were asked to address the issue of transgender students' use of gender-specific restrooms and the rights of both the transgender student(s) and other, non-transgendered students in those situations. As set forth more fully below, the current majority view is that transgender students are protected against discrimination under existing laws prohibiting discrimination on the basis of sex and/or sexual orientation and that rules barring a transgender student from using the bathroom aligning with his or her gender identity may be discriminatory. Accordingly, schools are encouraged to allow transgender students to use the restroom of the gender with which the student identifies or a gender-neutral bathroom, whichever the student prefers. Similarly, we would recommend allowing other students the option of using the gender-neutral bathroom if they are uncomfortable using the gender-specific bathroom for any reason, including discomfort with transgendered students' use of the same facilities. A summary of the current law in this area is provided below.

Overview

At this time, neither federal nor Pennsylvania law expressly prohibit discrimination against transgender students on the basis of gender identity or sexual orientation. There also are not federal or state laws specifically designed to govern the use of gender-specific restrooms or related issues schools frequently encounter, such as the use of preferred pronouns or the students' participation in sports and other gender-specific activities. Despite the apparent lack of law in this area, however, many argue that existing gender discrimination laws extend to gender identity issues. In addition, it is important to note that the law in this area is still developing. Lawmakers have proposed new legislation for the future which, if passed, would more directly apply in these situations. Erie County also has a local law which does specifically recognize gender identity and sexual orientation as protected characteristics.

Existing Legislation and Enforcement

Title IX of the Education Amendments of 1972 protects students from gender or sex based discrimination in education programs or activities which receive federal financial assistance. Title IX does not specifically address discrimination on the basis of sexual orientation or gender identity. Nonetheless, recent cases considered by the Office of Civil Rights (OCR), the Department of Justice (DOJ), and the federal courts suggest that Title IX's prohibition on sex discrimination in public schools may apply to transgender and other gender identity cases. For example, in an April 29, 2014 guidance document created by the OCR, titled "Questions and Answers on Title IX and Sexual Violence," OCR addressed the reaches of the prohibition on sex discrimination and opined 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 and OCR accepts such complaints for investigation. (See Q&A B2). OCR delivered a similar message at a School Law Seminar held in New Orleans in April 2014. According to an article covering the event, both the OCR Chief and the DOJ Education Section Head addressed issues relating to transgender students in the schools.

When questioned about a district's obligation to honor requests by a transgender student to use the restroom of the gender with which the student identifies, the unequivocal response by OCR/DOJ was that districts must grant such requests or be subject to claims of discrimination, and that an offer for the student to use a private restroom which is not otherwise provided to all students would not suffice to meet legal obligations.

(www.connecticuteducationlawblog.com, April 17, 2014). While no case law currently exists directly on point, the above suggests that the OCR and DOJ are taking the position that Title IX's sex discrimination prohibition should be interpreted to cover transgender and gender identity issues.

In addition to Title IX, local and state law prohibitions against discrimination may be construed to apply in cases involving gender identity. In particular, the local Erie County Human Relations Ordinance prohibits discrimination on the basis of sexual orientation. Article 3 of Ordinance 039-2007 of the Erie County Council ("Ordinance") establishes the Erie County Human Relations Commission and includes the following prohibitions against discrimination:

The opportunity for an individual to obtain employment for which he/she is qualified, and to obtain all the accommodations, advantages, facilities, and privileges of any public accommodation and of any housing accommodation and commercial property without discrimination because of race, color, familial status, religious creed, ancestry, age, sex, **sexual orientation**, national origin, disability of the person, the use of guide or support animals because of the disability of the person, or because the person is a handler or trainer of support or guide animals is hereby recognized as and declared to be a civil right which shall be enforceable as set forth in this Ordinance.

The Ordinance defines “sexual orientation” as “male or female heterosexuality, homosexuality, bisexuality, or **any other gender identity...**” (Article IX (FF)). The Ordinance also defines “public accommodation” as the:

Provision of service; or any place which is open to, accepts, or solicits the patronage of the general public; or offers goods or services to the general public; the Commonwealth of Pennsylvania and all political subdivisions, authorities, boards and commissions, thereof, including the County of Erie. The term “public accommodation” shall not include any accommodations that are in their nature distinctly private, personal, and confidential.

(Article IX (BB)). Under the Ordinance, public schools are likely to be viewed as public subdivisions providing “public accommodations.” Accordingly, transgender students attending public schools located in Erie County are protected against discrimination on the basis of their sexual orientation, defined to include gender identity, and may point to this local law in arguing for access to restrooms that align with their gender identity.

Proposed Legislation

In addition to the laws mentioned above, recently proposed legislation at the state and federal levels would amend laws prohibiting discrimination in employment, housing and public accommodations to expressly include sexual orientation and gender identity. Earlier this year, a member of the Pennsylvania House of Representatives introduced proposed legislation to address transgender discrimination, including a bill to amend the Public School Code to eliminate gender-based restrictions and prerequisites. The Transgender Students Rights Act proposes to require schools to allow transgender students to use the bathroom which aligns with their stated gender identity upon providing documentation to that effect. No action has been taken on this proposed legislation at this stage.

Similar laws also are being reviewed at the federal level. The Student Non-Discrimination Act of 2015 was introduced in the Senate on February 10, 2015 and seeks to prohibit sexual orientation and gender identity discrimination in schools nationwide. No action has been taken at this time.

Recent Cases – In the News and In the Courts

Issues related to transgender students’ use of restrooms or participation in gender-specific activities have become increasingly prevalent, both in the news and in the courts. In *Doe v. Regional School Unit 26* (2014), for example, Maine’s highest state court considered a case brought under Maine law alleging that a school district discriminated against a transgender student, who was born male, by barring the student from the girls’ restroom, despite the student identifying as female. The student brought suit under a Maine state law prohibiting discrimination in public accommodations based on “sexual orientation,” similar to the prohibition in the Erie County Ordinance discussed above. The Maine court ruled in favor of the student, finding that the state law barred discrimination

on sexual orientation, which it interpreted to include gender identity. According to the decision, the school discriminated against the student when it barred her from using the girls' restroom and instead required her to use a unisex, single stall staff bathroom.

The *Doe* case and the OCR/DOJ guidance discussed above appear to represent the majority approach to the bathroom issue for transgender students. In other words, the majority of guidance and cases in this area suggest that transgender students should be permitted to use the bathroom which aligns with their gender identity. Although a school may provide a gender neutral bathroom as an option, forcing the transgender student to use the gender neutral bathroom puts the school at risk for discrimination claims, as can be seen from the Maine case.

It is worth noting that not all courts have adopted the majority approach. Earlier this year, the United States District Court for the Western District of Pennsylvania issued an opinion in *Johnston v. University of Pittsburgh*, Civil Action No. 3:13-213 (W.D. Pa. 2015), a case involving a transgender male, who brought sex and transgender discrimination claims against the University of Pittsburgh. The Court's introduction to the opinion summarizes the case succinctly:

This case arises from Plaintiff Seamus Johnston's allegations 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 designed for men... [T]his case presents one central question: whether a university, receiving federal funds, engages in unlawful discrimination, in violation of the United States Constitution and federal and state statutes, when it prohibits a transgender male student from using sex-segregated restrooms and locker rooms designated for men on a university campus. The simple answer is no.

Johnston brought five separate discrimination claims against the University of Pittsburgh, including claims under the Equal Protection Clause of the Fourteenth Amendment, Title IX, the Pennsylvania Human Relations Act, the Pennsylvania Fair Education Opportunities Act, and a breach of contract claim. Ultimately, the court rejected all of Johnston's arguments. The case is currently on appeal to the Third Circuit Court of Appeals.

Although the *Johnston* case was decided in the Western District of Pennsylvania, schools in this area should nonetheless be cautious about following the University of Pittsburgh's lead when dealing with transgender students. The case was dismissed by Judge Gibson, a district judge appointed by former President Bush and who sits on the Johnstown division of the court. Judge Gibson brought a conservative view point to her decision, one which may not be shared by the district judges in Erie and Pittsburgh. We also do not yet know whether Judge Gibson's decision will be upheld by the Third Circuit. It also is important to stress that the plaintiff in *Johnston* sued under state and federal laws which do not currently include an express prohibition against discrimination on the basis of sexual orientation and/or gender identity. However, the Erie County Human Relations Ordinance does include a prohibition on sexual orientation discrimination and would be available to a plaintiff in Erie County.

Conclusion

As the above suggests, this area of the law is still evolving and we expect to see new legislation and/or cases develop over the months and years to come. Until the law is clarified, either by legislation or judicial interpretation, there will continue to be some grey areas when it comes to the rights of transgender students and various gender-specific issues, such as bathrooms, class activities, and sports. Based on the position taken by the OCR and DOJ, and on the majority view expressed in other cases, we recommend that schools allow transgender students to use the bathroom which aligns with their gender identity. We also think it is advisable for schools to make a gender-neutral bathroom available for the transgender student to use if he or she is uncomfortable with using a gender-specific bathroom. Similarly, if other students or parents express concerns with using the gender-specific bathrooms, we would suggest those students be given permission to use the gender-neutral bathroom.

Very truly yours,

KNOX McLAUGHLIN GORNALL &
SENNETT, P.C.



Timothy M. Sennett



Julia M. Herzing