

## Transgender students on college campuses

September 29, 2015

Navigating transgender issues can be confusing and overwhelming. The increasing visibility of transgender celebrities—Caitlyn Jenner on the cover of *Vanity Fair*, for example—has encouraged transgender youth, including students at the post-secondary level, and their advocates to fight for both public and institutional acceptance. As this area of law rapidly evolves, the higher education landscape across the country similarly continues to transform. This summer, Barnard College became the last of the traditional “Seven Sisters” women’s colleges to admit transgender women. In June, Harvard allowed a transgender male, one of the first openly transgender swimmers in NCAA history, to join its men’s swim team. Below are some tips to help your college or university avoid potential legal, compliance, and public relations issues.

- 1. Be familiar with the relevant law at the federal, state and local level.** Currently, there is no federal law that explicitly prohibits discrimination on the basis of transgender status. However, Title IX, the federal law that prohibits sex discrimination in education, has been interpreted to prohibit discrimination based on “gender non-conformity” or “sex-stereotyping.” [1] As most transgender students, by definition, do not conform to gender stereotypes, they may be protected by the nondiscrimination provisions of Title IX. Ohio state law also does not explicitly prohibit discrimination on the basis of transgender status, but it is important to be aware of any local laws, such as city ordinances, which may apply to your college or university.
- 2. Be familiar with your relevant policies and consider certain revisions to avoid the appearance of discrimination.** Some universities explicitly include “transgender identity” or “transgender status” in their nondiscrimination, anti-harassment, Title IX, and other similar policies, and it is important to be aware if this language is present in your own policies. In addition, you should revisit other policies which may implicate the rights of transgender students, such as those governing student groups, student housing, and other campus facilities, including bathrooms and locker rooms. If these policies (or other practices) appear to discriminate against or punish students for their gender nonconformity, they should be revised.
- 3. Be prepared.** One of the biggest challenges that transgender students have faced in the last ten years is that faculty and staff in higher education often have minimal knowledge and understanding of transgender issues. The best way to support transgender students attending your college or university is to educate yourself on the areas of campus life that are particularly problematic for them, such as housing, counseling, health care, bathrooms, locker rooms, documents and records, and standardized forms. Being aware of these common issues will help your college or university anticipate concerns before they arise and be able to respond proactively when necessary. Often, the sensitivity and support expressed by the first administrator to field the question—even if the answer is ultimately “no”—may be the difference between an unhappy student and an unhappy plaintiff.
- 4. Be a resource.** Transgender students often face a number of complicated issues, many of which are misunderstood. Encourage your academic advisors or student services personnel to refer transgender students to campus and community resources that will provide them with a sense of community. Some colleges and universities have LGBT support offices, which can be an invaluable resource for students. Identify your campus resources that may be useful for

transgender students, including your campus health or counseling center, and ensure that all students are made aware of these resources. In addition, offering training programs for students, faculty, and staff on gender sensitivity can have a positive effect on your college or university's overall climate.

5. **Be informed.** The law surrounding transgender issues is continually evolving and it is important to be aware of any changes that may affect your college or university. Staying informed will help you stay abreast of the types of issues other colleges and universities are facing and how those issues are being handled. Below are several recent case studies, which provide examples of situations involving transgender students and give you an idea of the issues that can arise when a student on your campus identifies as a transgender individual, and the very different ways in which they were decided:

- **Arcadia Unified School District (California, 2013):** OCR determined that the school district in this case had violated Title IX by barring a transgender student from sex-specific facilities and activities. The school district entered into a resolution agreement with OCR in which it agreed to provide the student with access to sex-specific facilities both at school and school-sponsored events. Colleges and universities should keep this case in mind, as it stands for the proposition that transgender students cannot be barred from facilities intended for one gender.
- **George Fox University (Oregon, 2014):** A transgender student requested to move from female on-campus housing to male on-campus housing for the next school year. The Christian university rejected the request and said the student could only live in a single apartment. The student petitioned to the U.S. Department of Education's Office for Civil Rights (OCR), which denied his petition and granted the university a religious exemption to Title IX, as the university's religious tenets related to transgender individuals conflicted with the law. The text of the decision is not available online, and it appears from the University website that they may have altered their [policy](#) since this decision.
- **Johnston v. University of Pittsburgh, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa. 2015):** A transgender male student was prohibited from using the university's restrooms and locker rooms designed for males. The student was arrested by campus police on several occasions for using the male facilities and was eventually expelled and lost his academic scholarship. Following his expulsion, the student sued the university in federal court, alleging discrimination under Title IX. The Court held that the university did not discriminate against the student in prohibiting him from using sex-segregated facilities, as Title IX protects against discrimination on the basis of sex and not on the basis of gender identity. The Court interpreted "on the basis of sex" only to mean the traditional concept consistent with one's birth or biological sex. This case is notable because it appears to go against the recent trend in case law, which has typically been expanding rights for transgender individuals, and is contrary to OCR's current position.

As you can see, the courts and OCR do not always approach transgender issues consistently or predictably. Since this is a rapidly evolving area of the law, it is important to follow these developments to help your institution comply with the law and reduce legal liability. It is also important to stay up-to-date on the types of issues that can arise related to your institution's transgender students in order to be able to respond appropriately and avoid discrimination claims. Treatment of transgender employees is another rapidly changing area that should carefully be monitored.<sup>[2]</sup>

---

[1] The U.S. Department of Education's Office of Civil Rights (OCR), the federal agency responsible for enforcing Title IX, has adopted this interpretation most recently in its "Questions and Answers of Title IX and Sexual Violence" (April 29, 2014). In addition, the U.S. Department of Justice recently stated that discrimination on the basis of sex, as prohibited by Title IX, includes gender identity and transgender status.

[2] The Occupational Safety and Health Administration recently released its "Guide to Restroom Access for Transgender Workers," available online [here](#).

# Authors

---

Copyright © 2023 Bricker & Eckler LLP. All rights reserved.