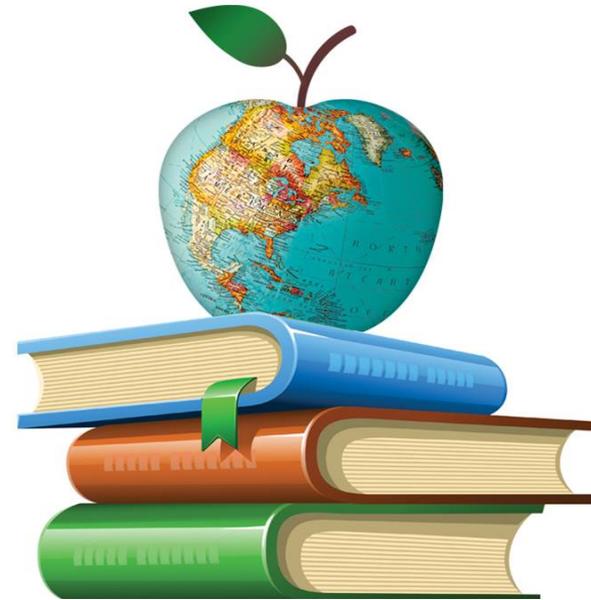


Gender and Sexual Orientation in the Schools: Legal Perspective

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OVERVIEW

Legal Issues Related to LGBT Students and Staff

- Applicable laws
- Privacy concerns
- Use of facilities
- Records
- Extracurricular activities
- Dress code
- Best practices

Title VII

- Federal law that prohibits discrimination in employment based on various protected classifications including sex/gender
 - Encompasses sex / gender “stereotyping”
 - Does not expressly include sexual orientation or transgender
 - Scope was extended to transgender employees by the EEOC in 2012

Title VII case law

- *Price Waterhouse v. Hopkins*: U.S. Supreme Court decision holding that Title VII prohibits employers from considering things like a woman's conformity with gender stereotypes for the purposes of employment, promotion, benefits, etc.
 - Ms. Hopkins was a candidate for partnership at Price Waterhouse. A partner advised her that she should walk, talk and dress more femininely in order to improve her chances.
- *Smith v. City of Salem*: 6th Cir. Ct. of Appeals decision holding that *Price Waterhouse* also prohibits considering a male employee's conformity with gender stereotypes.
 - Smith was born male and served for seven years as a firefighter while identifying as a man. Smith was diagnosed with Gender Identity Disorder and began transitioning to female, at which point he was terminated.
- *Macy v. Holder*: EEOC decision extending Title VII protections to transgender employees.
 - Macy interviewed for a position while still presenting as male. She confirmed several times that the position was hers, pending completion of background check. She then told the employer she was transitioning to female. The company told her the position was no longer available.

Title IX

- Federal law that prohibits discrimination based on gender in educational programs that receive and utilize federal financial assistance.
 - Applies to sexual harassment of LGBT students and employees
 - Applies to harassment based on a student or employee's failure to conform to gender stereotypes
- Case law
 - *Mathis v. Wayne Cty. Bd. of Edn.*: 6th Cir. Ct. App. affirmed the finding of the jury that the school officials were deliberately indifferent to sex or gender based harassment.
 - Basketball coach failed to take action against hazing in the locker room that included older boys putting younger ones in sexual positions and penetrating them with markers. School imposed a minimal suspension. The jury concluded the school was deliberately indifferent, awarding the Plaintiff students \$100,000 each.
 - Office of Civil Rights Guidance: The U.S. Department of Education has determined that schools have a duty under Title IX to protect all students (including LGBT students) from sexual violence.

Equal Protection Clause

- 14th Amendment guarantees that no state will “deny to any person within its jurisdiction the equal protection of the laws.” Civil liability for violating the law arises under 42 USC Section 1983.
- Case law
 - *Flores v. Morgan High Sch. Dist.*: 9th Cir. Ct. App. Case affirming denial of summary judgment, finding there was sufficient evidence for a jury to determine if the school deliberately violated students’ equal protection rights by failing to address harassment or discrimination once the school was aware of it.
 - Students targeted as LGBT complained repeatedly about physical and verbal harassment, and pornography and anti-gay notes stuck in lockers. School officials ignored the complaint and failed to respond in the same manner they would have for other complaints of harassment.

First Amendment

- Prohibits Congress or states from abridging the freedom of speech or expression or interfering with the right of people to peaceably assemble, including associating with whomever they choose.
- Students have the right, within dress code limits, to dress without regard to gender stereotypes.
 - Example: A school cannot require a female student to wear dresses or skirts as long as what she chooses to wear complies with the school dress code.
- Students have the right, within dress code limits, to wear clothing with certain anti-gay messages on it.

First Amendment case law

- *Pat Doe v. Yunits*: (Mass. Sup. Ct.) Though the case was filed because a female transgender middle school student was prohibited from dressing like a female, that claim was voluntarily dismissed without prejudice. The case proceeded under Massachusetts' state law governing disability discrimination. State law (unlike federal law) did not exclude gender identity disorders.
- *Zamecnik v. Indian Prairie Sch. Dist. #240*: 7th Cir. Ct. of App. agreed that the First Amendment allowed students to wear t-shirts that said "Be happy, not gay" because there was no evidence the shirt would cause a substantial disruption. The phrase did not arise to "fighting" words and was found to be "tepidly negative".

FERPA

34 C.F.R. Chapt. 99

- Prohibits schools from disclosing personally identifiable information about students except to the student or his/her guardian, unless the student or guardian consents.

Ohio's Anti-Bullying Law

O.R.C. 3313.666

- Requires schools to develop policies to prevent and punish bullying and harassment.

FERPA

- Records and communications related to sexual orientation or gender identity are protected personally identifiable information.

- Case studies
 - NYC Dept. of Ed. Guidelines: Clarifies a transgender student's status is personally identifiable information that cannot be disclosed to anyone, including other employees, unless that person has a legitimate educational need to know.

 - Raytown, Missouri: Presumably with the consent of a student's parents, a school district mailed a letter to all elementary school parents announcing that Adam would be returning to school as Jasmine, and asking parents to discourage their kids from bullying Jasmine. The letter made the local paper.

“Outing” a student

- “Outing” is disclosing a person’s gender identity or sexual orientation to someone who does not yet know that person’s gender/orientation.
 - Students do have some level of privacy interest in their gender identity and sexual orientation.
 - Disclosure by the student in one context does not waive the privacy right.
 - Subject to FERPA, administrators may reveal a student’s gender identity or sexual orientation in order to comply with due process requirements.

“Outing” case studies

- *Nguon v. Wolf* (C.D. Cal.): Principal was justified in outing a student to her mother when he did so in an effort to describe the offense for which the student was being suspended (repeated inappropriate public displays of affection).
- *Wyatt v. Kilgore Ind. Sch. District, et al.* (5th Cir. Ct. App.): Student’s right to privacy in her sexual orientation did not extend to keeping the information from her parent while the student was a minor.
- *Sterling v. Borough of Minersville* (3rd Cir. Ct. App.): The court affirmed the district court’s denial of summary judgment, finding a police officer could be liable when an 18-year-old high school student killed himself after the officer threatened to reveal the student’s sexual orientation to family members.

Restrooms, locker rooms and overnight trips

- Permit students to use whichever restroom or locker room corresponds to the gender with which they identify.
- Provide unisex, single-person options for any students who prefer them.
- Permit students to room on overnight trips based on the gender with which they identify.

Restrooms, locker rooms and overnight trips: Case studies

- *Doe v. Reg'l Sch. Unit 26* (Maine Sup. Ct.): School violated state prohibition on sexual orientation discrimination by forcing a transgender girl to use the boys' restroom.
- Fort Carlson School District (CO): School violated state anti-discrimination law by forcing a transgender girl to use either a staff restroom or a gender-neutral option in the nurse's office.
- Freemont School District (CO): Parents of non-LGBT students are trying to get the district to change a policy allowing transgender students to use the restroom that corresponds to the gender they identify with.
- California AB1266 (2013): Gives transgender students the right to choose which restrooms and locker rooms to use.

Official vs. Day-to-day

- O.R.C. Chapt. 1347 requires schools to maintain true and accurate records
- Official records: Use the student's legal name, legal sex and appropriate corresponding pronouns.
- Day-to-day references: Use the students' preferred name, gender and pronouns.
 - Examples: References to the student by teachers and other students, school ID badges, etc.
- Case study
 - NYC public schools use the distinctions listed above. The district will also adjust a student's official records if the student legally changes his/her name and/or sex. The district also maintains records with the original legal name and sex for clarity.

Interscholastic sports

- National Federation of State High School Associations suggests considering:
 - Whether the student is undergoing hormone therapy
 - Whether there is an appeals process and what it entails
 - What rules exist under your state's athletic association
- Also ensure athletes are accommodated at other schools when the teams travel.

Interscholastic sports: Case studies

- NCAA: (1) Female-to-male, chemically transitioning – may compete on a men’s team; (2) male-to-female, chemically transitioning – may continue on a men’s team and may not play for a women’s team until after one year of testosterone suppression treatment; (3) not transitioning yet – must play for birth gender’s team.
- OHSAA: (1) Female-to-male may compete on men’s teams; (2) male-to-female policy is not clear. The association is working on creating a comprehensive policy based on the NFHS suggestions and the model policies in the Griffin article.

Physical Education classes

- Allow students to choose the P.E. class that corresponds to the gender with which they identify.

Plays and drama classes

- Assign roles according to the gender with which each student identifies or without any regard to gender.

School dances

- Avoid policies or practice that seem to punish LGBT students for their choice of partner or to impose gender stereotypes. Consider:
 - Whether same-sex couples are eligible for couples discounts on tickets
 - Whether same-sex couples must get parental permission to attend together
 - Whether biological gender affects dress codes and/or selection of homecoming/prom courts.

STUDENTS: DRESS CODE

- Schools may impose reasonable dress codes.
- Students have the right to dress without regard to stereotypical gender-specific clothing, but still must comply with any reasonable dress code restrictions.
- Schools cannot require students who are biologically female to wear dresses instead of suits, or students who are biologically male to wear suits instead of dresses.

- FERPA does not apply to staff records

- Staff members' privacy in sexual orientation or gender identity is protected
 - “Outing” a staff member may violate that person’s privacy rights under the 14th Amendment.
 - The constitutional right to privacy includes “the individual interest in avoiding disclosure of personal matters.” *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977).
 - The U.S. Supreme Court has repeatedly held that information about an individual’s intimate relationships falls under the right to privacy, meaning government disclosure of that information (“outing”) may violate the 14th Amendment.

- Case study
 - *Wyatt, supra*: An adult’s sexual orientation is an inherently private matter. The considerations applied to the student in *Wyatt* (that she was a minor and the disclosure was to her parent), would not apply in the case of an adult who had been outed.

Restrooms and overnight trips/chaperoning

- Restrooms: Permit staff to use the restroom that corresponds to the gender with which they identify. Provide single-occupant, unisex options for anyone who prefers to use them.
- Overnight trips/chaperoning: Staff should be assigned gender-segregated chaperone duties based on the gender with which they identify.

Official vs. Day-to-day

- Official records: Use the employee's legal name, legal sex and appropriate corresponding pronouns.
 - Schools should change the employee's record if he/she legally changes his/her name and/or sex.

- Day-to-day references: Use the staff member's preferred name, gender and pronouns.
 - Examples: References to the teacher by staff and students, school ID badges, mailbox labels, etc.
 - Includes the name of the teacher that is provided to parents and students

STAFF: EXTRACURRICULAR ACTIVITIES

To the extent staff supervision of extracurricular activities is assigned by gender, an employee should be assigned based on their asserted gender.

- Schools may establish reasonable dress codes for staff.
- Staff members have the right to dress without regard to stereotypical gender-specific clothing, but still must comply with any reasonable dress code restrictions.

- Case studies
 - *Price Waterhouse v. Hopkins*: Prohibiting Employers may not consider things like whether a woman dresses in traditionally feminine clothes, wears makeup, styles her hair, etc. in assessing her promotion potential.
 - *Smith v. City of Salem, Ohio*: If employers cannot discriminate against women for *not* wearing makeup, then employers cannot discriminate against men *for* wearing makeup.

BEST PRACTICES AND STRATEGIC SUGGESTIONS

- Develop a policy
- Accommodate without segregating
- Identify students and staff by the name and gender they prefer (to the extent legally possible)
- Prepare a public response in anticipation of questions that protects privacy rights
- Bring in reputable outside experts to train staff and students
- Include the LGBT population in any existing bullying or harassment programs
- Partner with the family and student to develop a plan to address anticipated issues

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2014
SCHOOL LAW
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**OSBA CAPITAL CONFERENCE
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APPLICABLE LAWS

Note that Ohio does not have any laws specifically prohibiting discrimination based on sexual orientation or gender identity, so all applicable laws are federal. (Eighteen states and the District of Columbia do have laws that prohibit discrimination based on sexual orientation and gender identity.)

A. Title VII

1. Title VII is the federal law that prohibits discrimination based on sex-stereotyping and gender non-conformity. While sexual orientation is not specifically listed as a prohibited basis for discrimination under the statute, the Supreme Court has held that “sex stereotyping” constitutes sex discrimination and sexual harassment under Title VII.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989): A woman senior manager was up for partner at Price Waterhouse. Many of the partners and clients she worked with praised her professional style and leadership abilities. A few partners, however, seemed to think she acted too masculine, calling her “macho” and suggesting she need “a course at charm school,” as well as to behave in a more “feminine” manner. The Court held that Title VII prohibits employers from considering gender stereotypes, such as whether a woman dresses in traditionally feminine clothes, wears makeup, styles her hair, etc. in assessing her promotion potential.

2. The Sixth Circuit Court of Appeals has held that if employers cannot discriminate against women for not wearing dresses or make-up, “[i]t follows those employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination.” *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574 (6th Cir. 2004). The plaintiff in Smith was a firefighter who was biologically male but began transitioning after seven years on the job. Smith’s supervisor disclosed Smith’s transgender status to others in the department against Smith’s wishes. The department then suspended Smith. The Sixth Circuit upheld Smith’s Title VII gender discrimination claim.
3. The Equal Employment Opportunity Commission specifically extended Title VII’s protections to transgender employees in 2012. *Macy v. Holder*, Appeal No. 0120120821, E.E.O.C. Decision (2012).¹

B. Title IX

1. Title IX of the Education Amendment Acts of 1972 prohibits discrimination based on gender in educational programs that receive and utilize federal financial assistance – this includes classroom, course offerings, athletics, extracurricular activities, and employment. U.S. Dept. of Edn. Office of Civil Rights, “Questions and Answers on Title IX and Sexual Violence” (April 29, 2014).²

¹ <http://www.pcc.edu/programs/paralegal/documents/macy-v-holder.pdf>

² http://www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf

2. The U.S. Department of Education advised in 2001 that Title IX prohibits sexual harassment toward LGBT students, as well as harassment based on a student's failure to conform to gender stereotypes.
3. School districts may be liable for deliberate indifference to sex or gender based harassment. In *Mathis v. Wayne Cty. Bd. of Edn.*, 496 Fed. Appx. 513 (6th Cir. 2012), a group of 8th grade boys sexually harassed 7th grade boys on their basketball team. The 8th graders would turn off the lights in the locker room and grind against the 7th graders, make the 7th graders do sit-ups that ended with the sitting boy's face against a standing boy's bare butt, and at one point penetrated a 7th grader with a marker. Although the coach heard about the incident, he did not punish the 8th graders, and the school merely suspended them for 10 days. The Sixth Circuit found the district liable on a deliberate indifference theory under Title IX.

C. Equal Protection Clause

1. A school may be liable for failing to protect an LGBT student if it fails to address harassment or discrimination aimed at the student. In *Flores v. Morgan High Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003), the court found the school violated students' equal protection rights when the school failed to respond to repeated complaints by various students of harassment based on their real or perceived sexual orientation in violation of the district's anti-harassment and anti-discrimination disciplinary policies. Students complained repeatedly about pornography and anti-gay notes stuck in their lockers, and school officials told the complaining students that the material was "disgusting" and that if they were not gay, then it should not bother them.

D. First Amendment

1. LGBT students' rights: Students have the right, within the bounds of a school's dress code and code of conduct, to behave and dress how they choose, without regard to their gender or any gender stereotypes.
2. Other students' rights: Students have the right to wear clothing with certain anti-gay messages on it. In *Zamecnik v. Indian Prairie Sch. Dist. #240*, 636 F.3d 874 (7th Cir. 2011), the Seventh Circuit upheld a student's right to wear a shirt to school that said, "Be happy, not gay." The court concluded there was no evidence that the shirt would substantially disrupt the school environment, and the fact that gay students and their supporters might speak out against the shirts was not sufficient cause to ban them.

E. Family and Educational Rights and Privacy Act (FERPA), 34 C.F.R. Chapt. 99

1. Under the Family Educational Rights and Privacy Act, schools are generally prohibited from disclosing students' educational records/personally identifiable information to anyone aside from the student or his or her parent/guardian without the consent of the student or his or her parent/guardian.

- F. Ohio's anti-bullying law, O.R.C. 3313.666
 - 1. Ohio requires schools to have policies in place to prevent and punish bullying and harassment. This would include bullying or harassing behavior directed at a person's gender/sexual orientation.

STUDENTS

I. PRIVACY CONCERNS

Issues of sexual orientation and gender identity implicate student privacy and a school's obligation to protect private student information.

- A. FERPA, 34 C.F.R. Chapt. 99
 - 1. Communications and records related to a student's sexual orientation or preferred gender identity is personally identifiable information and should not be disclosed without a student's or parent/guardian's consent.
 - 2. Case studies
 - a. The New York City public schools have a policy in place that prohibits employees from disclosing a transgender student's status to anyone, including other school employees, unless that person has a legitimate educational need to know. "Transgender Student Guidelines," NYC Dept. of Edn.³
 - b. An elementary school in Raytown, Missouri, sent a letter to all parents of children in the school announcing that a student formerly known as Adam would be returning to school as Jasmine. The letter asked parents to discourage their children from bullying Jasmine. It seems Jasmine's parents consented to the disclosure, but schools should be sure to obtain parental consent before taking a similar approach. Michael Mahoney, "Raytown School Notifies Parents about Student's Gender Change" KMBC (May5, 2014).⁴
- B. "Outing" a student: Outing involves disclosing a person's sexual orientation or gender identity to someone who does not yet know the person's orientation or identity.
 - 1. Courts have held that students do have a privacy interest in their sexual orientation or gender identity, and that their decision to disclose that information in limited contexts does not waive the privacy right.
 - 2. Subject to FERPA, administrators may disclose the objective facts of a situation to third parties, including parents in order to properly comply with due process requirements, even if that means "outing" a student. However, administrators should consider whether the information that would reveal a student's sexual

³ <http://schools.nyc.gov/RulesPolicies/TransgenderStudentGuidelines/default.htm>

⁴ <http://www.kmbc.com/news/raytown-school-notifies-parents-about-students-gender-change/25820100>

orientation or gender identity is necessary to carry out the administrator's responsibilities.

3. Case studies

- a. *Nguon v. Wolf*, 517 F. Supp. 2d 1177 (C.D. Cal 2007): A female student was suspended for repeatedly violating the school's public display of affection policy with her girlfriend. The student was open about her sexual orientation at school, but had not come out at home. When the principal met with the student's mother to explain her suspension, he told her mother that the student had violated the PDA policy with another girl. The court held the administrator's disclosure was borderline, but acceptable given the need to explain to the parent why the student was suspended.
- b. *Wyatt v. Kilgore Ind. Sch. District, et al.*, 718 F.3d 496 (5th Cir. 2013): Softball coaches pulled one of their high school players into a room and questioned her about a suspected relationship with an adult female. The coaches then informed the player's mother of the relationship, which was the first the mother knew her daughter was gay. The Fifth Circuit overturned the District Court's decision (see below), holding that the coaches had not violated a clearly established right to privacy, because the Fifth Circuit has never recognized a minor's right to keep his or her sexual orientation private from a parent.

The District Court (2011 BL 302422 (E.D. Tex. Nov. 30, 2011)) had ruled in favor of the student on the theory that any person (including minors) has a reasonable expectation of privacy in his/her sexual orientation because:

- Being "out" in one context (i.e., school) may be different from being "out" in another (i.e. home).
 - There is a recognized right to privacy in matters related to intimate personal relationships.
 - Courts have recognized that a person's sexual orientation is highly personal and "one of the most private details of [a person's] life."
- b. *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000): A police officer arrested two high-school aged boys when he found them together in a parked car. The officer lectured the boys on how sinful homosexuality was and threatened to tell one boy's grandfather that he was gay. The boy killed himself later that day. His family won a lawsuit against the officer for unnecessarily threatening to disclose the boy's sexual orientation.

II. USE OF SCHOOL FACILITIES

In a 2012 report by the Gay, Lesbian and Straight Education Network (GLSEN), more than one-third of LGBT students in grades 6 through 12 reported avoiding restrooms and locker rooms at school because

the students felt unsafe.⁵ Transgender students in particular present complicated questions for school administrators to address when it comes to using school facilities.

A. Districts should proactively develop policies for:

1. Use of restrooms and locker rooms: Make accommodations that will allow students to use whichever corresponds to the gender with which they identify. Provide unisex, single-person options for any student who feels uncomfortable using the restroom or changing in front of other students.
2. Rooms on overnight trips: Make accommodations that will allow students to room based on the gender with which they identify. Where the district is aware of a relationship between same-sex couples, the district may separate same-sex couples in overnight situations to the same extent the schools would separate opposite-sex couples.
3. Open communication with the student and parent/guardian is critical in problem-solving.

B. Case studies

1. *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Maine 2014): A school had developed a plan for allowing a male-to-female transgender student to use the girls' bathroom in her elementary school. When the student got to sixth grade, another student began complaining and the school abandoned the policy, forcing the girl to use the boys' bathroom. The court held that the school violated Maine's prohibition on sexual orientation discrimination (5 M.R.S. § 4592).
2. Fort Carlson School District case (Colorado 2013): At first, a school allowed a first-grade male-to-female transgender student to use the girls' bathroom, then reversed course. The girl's parents filed a complaint with the state civil rights commission, which found district violated the Colorado anti-discrimination law.⁶
3. Freemont School District case (Colorado 2014): Parents of two non-LGBT students are currently trying to change the district's policy of allowing a male-to-female transgender student to use the girls' restroom.⁷
4. California AB1266 (2013): California passed a law last year giving transgender students the right to choose which restrooms and locker rooms they prefer to use.

⁵ Joseph G. Kosciw, et al., "The 2011 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools," GLSEN (2012), www.glsen.org/research.

⁶ Dan Frosch, "Rights Unit Finds Bias Against Transgender Student," N.Y. TIMES (June 23, 2013), http://www.nytimes.com/2013/06/24/us/agency-says-district-discriminated-against-transgender-student.html?_r=2&

⁷ Carol McGraw, "Transgender Student Prompts Group to Ask Colorado School to Alter Restroom Policy," THE GAZETTE (Jan. 17, 2014), <http://gazette.com/transgender-student-prompts-group-to-ask-colorado-school-to-alter-restroom-policy/article/1512791#yf6gWsG8glcQeYUx.99>.

III. RECORDS

Schools have an obligation under Ohio Rev. Code Chapter 1347 to maintain true and accurate records for any person who is subject to the district's personal information system (i.e. students, employees, parents). This presents problems for transgender students, whose legal sex may not match the gender they identify with.

Districts should distinguish between official records and day-to-day references to students in order to comply with both the statute and non-discrimination requirements.

- A. Official records: Use the student's legal sex, legal name and appropriate corresponding pronouns.
- B. Day-to-day references: Ensure that teachers, staff and classmates refer to the student by his or her preferred name, gender and pronouns. School IDs should be issued in the student's preferred name and gender.
- C. Case study: The New York City policy uses the standards listed above. In addition, the district adjusts official records if the student undergoes a legal name/sex change, although the student's original name and sex will remain in his or her file to avoid confusion.

IV. EXTRACURRICULAR ACTIVITIES

Participation in school extracurricular activities is often segregated by sex. Districts should consider and develop policies to address transgender students' participation in:

- A. Interscholastic sports:
 - 1. Factors to consider (courtesy of 2014 National Federation of State High School Associations Summer Meeting Workshop):
 - a. Whether the student is undergoing hormone therapy or whether they simply self-identify as transgender.
 - i. Any physical advantages a transgender athlete may have. Note: their biological gender disappears after about a year of hormone treatment.⁸
 - ii. There is not clear scientific evidence that all transgender athletes have any competitive advantage at all in their chosen gender.
 - b. An appeals process.
 - c. Rules set up by the state athletic associations.
 - 2. Individual schools and districts should also consider how to ensure that their athletes are accommodated at other schools when the teams travel.

⁸ Dr. Pat Griffin and Helen J. Carroll, "On the Team: Equal Opportunity for Transgender Student Athletes," National Center for Lesbian Rights, Women's Sports Foundation and It Takes a Team!, (2014).

3. Case studies

- a. NCAA: (1) Female-to-male, chemically transitioning – may compete on a men’s team; (2) male-to-female, chemically transitioning – may continue on a men’s team and may not play for a women’s team until after one year of testosterone suppression treatment; (3) not transitioning yet – must play for birth gender’s team.
 - b. OHSAA: (1) Female-to-male may compete on men’s teams (because women always have the option to play on men’s teams); (2) male-to-female – policy is not clear. The association is working on creating a comprehensive policy based on the NFHS suggestions and the model policies in the Griffin article.
- B. Physical Education classes: Transgender students often have difficulty if gym classes are segregated by gender. As with restrooms and locker rooms, schools should make accommodations that will enable students to participate in gym classes according to the gender they identify with.
- C. Plays and drama classes: Assigning gender-specific roles in school plays, and even informal play readings in classes, can be a source of stress for transgender students. Schools should be sensitive to this and try to assign roles according to the gender a student identifies with, or without regard to gender at all.
- D. Dances: School dances are often stressful for any students, but LGBT students face additional barriers at some schools. Schools should avoid policies or practices that seem to punish LGBT students for their choice of partner or to impose gender stereotypes. According to the 2012 GLSEN survey, some problematic policies schools have imposed include:
1. Requiring parental permission before a student may bring a same-sex date to a school dance.
 2. Denying a “couples discount” to same-sex couples.
 3. Requiring opposite-sex couples on homecoming or prom courts.
 4. Allowing only biologically male students to run for male titles on dance courts and only biologically female students to run for female titles.

V. DRESS CODE

Schools may always impose reasonable dress codes. However, it is problematic if a school requires male students to wear only traditionally masculine attire and female students to wear only traditionally female attire.

Students should be permitted to dress according to the gender with which they identify, but otherwise comply with the school’s dress code.

- A. *Pat Doe v. Yunits*, 15 Mass. L. Rep. 278 (Mass. Super. Ct. Feb. 26, 2001): Trial court in Massachusetts said prohibiting a male-to-female transgender student from dressing as a girl violated her First Amendment rights and was sex discrimination.
- B. Attire at school dances: In a 2011 survey of students in grades 6 through 12, many reported school policies that required female students to wear dresses (rather than suits or tuxedos) to school dances. Those types of policies could raise gender and sexual orientation discrimination issues, as well as problems under the First Amendment.

STAFF

I. PRIVACY CONCERNS

Although FERPA does not apply to staff records, common law privacy rights do apply, so the same issues schools should consider before “outing” a student apply to outing a staff member. In addition, the right to privacy under the 14th Amendment also applies to staff. The district court’s conclusion in *Wyatt*, *supra* at p. 5, that a person’s sexual orientation is an inherently private matter has been upheld as applied to adults, and the Fifth Circuit’s decision as to the minor in *Wyatt* did not change that calculation.

II. USE OF SCHOOL FACILITIES

As with students, LGBT staff should be accommodated without being segregated.

- A. Restrooms: Staff should be permitted to use the restroom that corresponds to their asserted gender. Schools should provide unisex, single-person options for anyone who chooses to use them.
- B. Overnight trips/chaperoning: Staff should be assigned gender-segregated chaperone duties based on their asserted gender.

III. RECORDS

Schools should treat staff records as they do student records for the purposes of identifying a staff member’s name and gender.

- A. Official records: Official records must still have the employee’s legal name and sex. If the employee legally changes his or her name and/or his or her sex, those changes should be reflected on the official records.
- B. Day-to-day references: School ID badges, mailboxes and other day-to-day materials should identify the employee by his or her preferred name and the gender he or she asserts. Day-to-day references as applied to staff would include the name of a teacher that is presented to parents and students.

IV. EXTRACURRICULAR ACTIVITIES

To the extent staff supervision of extracurricular activities is assigned by gender, an employee should be assigned based on their asserted gender.

V. DRESS CODE

As with students, a school may set forth general dress code requirements for staff, but may not require that staff conform to gender stereotypes in the way they dress.

- A. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989): Employers may not consider things like whether a woman dresses in traditionally feminine clothes, wears makeup, styles her hair, etc. in assessing her promotion potential.
- B. *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004): If employers cannot discriminate against women for *not* wearing makeup, then employers cannot discriminate against men *for* wearing makeup.

BEST PRACTICES AND STRATEGIC SUGGESTIONS

1. Develop a policy: Having a written policy ahead of time on how your district will address issues facing LGBT students and staff will prevent accusations that the district applies different standards for different people.
2. Accommodation without segregation: Policies related to LGBT students and staff must address the special issues they face without singling them out for separate treatment or increased focus.

Example: Have single-occupancy restroom and changing areas available, but do not mandate that all transgender students or staff use those facilities. Allow anyone who is more comfortable using that option to do so.
3. To the extent legally possible, consistently identify students and employees by the name and gender they prefer.
4. Be prepared with a public statement in anticipation of questions from staff, parents and other students.
5. Bring in reputable outside experts to train staff and students on the unique issues related to LGBT students and staff.
6. Be sure your programs related to prohibited bullying and harassment include the LGBT population.
7. Partner with the family and student in developing a plan to address anticipated issues.