

TRANS* ISSUES FOR COLLEGES AND UNIVERSITIES: RECORDS, HOUSING, RESTROOMS, LOCKER ROOMS, AND ATHLETICS

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I. LANGUAGE ISSUES

The concerns of transgender persons and related issues are raising awareness in both the public and in higher education, and for many of us there is new language to learn. The language is ever evolving but it helps to have a common vocabulary. Here are a few terms and their meanings in the context of transgender issues. These are not exhaustive and are a bit simplified, but they should work as references for this article.¹

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.² 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.³

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.⁴ For transgender persons, their birth sex and their own internal sense of gender identity do not match.

1. These definitions are based primarily on those provided by the National Center for Transgender Equality. See *Transgender Terminology*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, (Jan. 2014), available at http://transequality.org/Resources/TransTerminology_2014.pdf. GLAAD provides an additional source for these and related definitions. See *GLAAD Media Reference Guide – Transgender Issues*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Nov. 6, 2014).

2. *Gender-variant* or *gender non-conforming* are also used, and will be used synonymously with *transgender* in this paper.

3. *A Word about Words*, GENDER SPECTRUM, available at <https://www.genderspectrum.org/images/stories/08%20a%20word%20about%20words.gender.pdf>.

4. Or neither gender, both genders, or no gender.

Genderqueer/genderfluid – *Genderqueer* is a term used by some individuals who identify as neither entirely male nor entirely female. *Genderfluid* describes individuals with a flexible range of gender identity or expression that may change, even from day to day, such as identifying as a female at times and a male at other times, or a combination.⁵ These terms will be used as rough equivalents for persons whose gender is not identifiable solely or exclusively within the male and female categories.

Gender Expression – This term describes the external manifestation of one’s gender identity, usually expressed through “masculine,” “feminine,” or gender-variant behavior, including 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 or female. At birth, infants are assigned a sex based on a combination of bodily characteristics including: chromosomes, hormones, internal reproductive organs, and genitals.⁶ Generally, this paper will use the term *birth sex* to refer to persons’ sex assigned at birth.⁷

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

5. *Transgender Terminology, supra* note 1.

6. NCTE doesn’t define “sex.” This definition is provided by GLAAD. The medical community typically defines sex and gender, distinctively. “Sex is biologically determined, whereas gender is culturally determined.” Shuvo Gosh, *Gender Identity*, MEDSCAPE, <http://emedicine.medscape.com/article/917990-overview> (last visited Nov. 5, 2014). Current gender theory and many in the trans community hold that sex is not binary, male, or female, but is a spectrum. Thus, the terms “sex” or “biological sex” for individuals are, at best, inaccurate. With this in mind, the term “birth sex” will be used.

7. For clarity, this paper may occasionally use the term “biological sex” instead of “birth sex.” As noted, we will use “birth sex” for the sex assigned to persons at birth. However, in common usage, court opinions, and in policies, the term “biological sex” frequently does not mean “the male or female designation assigned to a person at birth” – so “birth sex” is inaccurate. Rather, “biological sex” refers to a person’s biology or physiology. When using “biological sex,” a court or institution is frequently not attempting to identify a person’s assigned sex but is attempting to describe the person’s physical characteristics, i.e., whether they are “male” or “female bodied.” In those instances, this paper will follow the court or policy’s usage of the term “biological sex” to refer to typical male or female physiology that seems to be the underlying intent of the policy, argument or concern. In all other cases, “birth sex” will be used.

same time.⁸

II. TITLE IX AND TRANSGENDER STATUS

Public awareness of the lives and concerns of transgender persons has increased markedly over the past few years. As a number of public figures have come out as transgender and have been recognized in high-profile fields, a more accurate understanding of the transgender experience is presented in public media. Society is reassessing its understanding of gender and the concerns of transgender persons and, in turn, the courts are grappling with how such reassessment should be expressed in the law. A limited number of court decisions have been issued but a consensus on legal principles has not yet been established.

Although distinct from sexual orientation and from birth sex, gender identity is frequently “bundled up” with sexual orientation and birth sex in popular conceptions. The law, however, is struggling to determine if and how gender identity is distinguishable from these other concepts.⁹ To date, a number of federal courts and agencies under federal law, as well as state courts and administrative agencies under state and local law, have begun to recognize protections for transgender persons,¹⁰ while other federal and state courts have declined to do so.¹¹

A. Legal Protections

Thus far, nearly all of the case law relating to gender identity has been in the employment context. As early as the 1970s, federal courts have wrestled with establishing a framework for addressing the rights of transgender persons in the workplace. Though court analyses vary from considerations of the status of transgender persons as a class to evaluations of personal characteristics that subject transgender persons to gender stereotyping, courts have typically evaluated plaintiffs’ claims within the framework of

8. For example, transitioning often includes changing one’s first name, dressing and grooming differently (social transition), but may not include taking hormones or having surgery (medical transition), or changing identity documents, such as drivers’ licenses and Social Security records (legal transition).

9. For an excellent analysis on the state of the law for gender identity protection under Title VII, see Francine T. Bazluke & Jeffrey J. Nolan, *Because of Sex: The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J.C. & U.L. 361 (2005).

10. *E.g.*, *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600 (Me. 2014).

11. *E.g.*, *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001); *Hispanic Aids Forum v. Estate of Joseph Bruno*, 792 N.Y.S.2d 43 (App. Div. 2005).

sex discrimination (on the “basis of sex”) under Title VII.¹²

The federal appellate courts for the Sixth and Ninth circuits have each held that gender identity is a protected status as sex discrimination under Title VII.¹³

In *Smith v. City of Salem*,¹⁴ a transgender firefighter sued under Title VII for sex discrimination based on gender stereotyping. The Sixth Circuit asserted that prior court rationales that read Title VII as barring discrimination based only on biology or anatomy, but not on self-identified gender, were “eviscerated” by the *Price Waterhouse*¹⁵ decision. The court held that “sex discrimination” encompasses discrimination because of gender non-conforming conduct, including birth males presenting as females.¹⁶ Less than one year later, the Sixth Circuit reaffirmed *Smith* and held that transgender persons are a protected class under Title VII.¹⁷

In *Schwenk v. Harford*,¹⁸ a trans female prisoner filed a claim for sex discrimination under a state statute. The Ninth Circuit held that the state statute was analogous to Title VII and that Title VII prohibited discrimination “because one fails to act in the way expected of a man or woman . . . [specifically, Title VII] prohibit[s] discrimination based on gender as well as sex.”¹⁹ Thus, discrimination based on biology as well as self-identified gender is impermissible in the Ninth Circuit under Title VII.²⁰

However, not all federal courts have come to the same conclusion of including gender identity as impermissible discrimination “because of sex” under Title VII. In *Ulane v. Eastern Airlines*, the Seventh Circuit looked to congressional intent and held that “sex” under Title VII meant “biological sex” and not gender identity.²¹ Similarly, in *Etsitty v. Utah Transit Authority*, the Tenth Circuit held that Congress intended Title VII to apply tradi-

12. *E.g.*, *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Harford*, 204 F.3d 1187 (9th Cir. 2000); *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008); *see also infra* Section II (discussing these three cases in more detail).

13. Adding to the matrix of laws limiting gender discrimination, in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), the Eleventh Circuit held that termination of an employee because of her *transition* from male to female was impermissible discrimination under equal protection principles. *Id.* at 1317.

14. 378 F.3d 566 (6th Cir. 2004).

15. In the seminal case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that gender stereotyping – discrimination based on a person’s conformity to societal expectations of gender – is impermissible discrimination under Title VII.

16. *Smith*, 378 F.3d at 573.

17. *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005).

18. *Schwenck v. Harford*, 204 F.3d 1187 (9th Cir. 2000).

19. *Id.* at 1202.

20. *But see* *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App’x 492 (9th Cir. 2009) (accepting employer’s assertion of safety reasons in denying trans female access to women’s restrooms as sufficient rationale to defeat *prima facie* case).

21. 742 F.2d 1081, 1085 (7th Cir. 1984).

tional concepts of “male and female” in disallowing sex discrimination.²²

Where the *Smith* and *Schwenck* courts read *Price Waterhouse* to disallow biology as the defining determinant of “sex” under Title VII, and the *Ulane* and *Etsitty* courts have held, contrarily, that biology is the defining determinant of “sex” under Title VII, a D.C. district court has held that even if biology is a permissible component of “sex” under Title VII, *transitioning* between one sex and another is protected.

In *Schroer v. Billington*,²³ a trans female applied for a job while presenting as a male. She was initially accepted but was then denied employment after informing the employer of her intent to transition to being a woman. In an insightful analogy, the district court reasoned that an employer could not avoid a discrimination claim under Title VII by arguing that it held no bias against Jews and Christians, but only “converts” from one religion to the other. In like manner, the court held that discrimination based on a change in a person’s sex is discrimination “because of sex” under Title VII.²⁴

The EEOC has also taken, and is enforcing, the position that gender identity and expression are protected under Title VII.²⁵

B. From Title VII to Title IX

Title IX analyses frequently follow Title VII,²⁶ so many transgender rights advocates are encouraged by the successes in the employment context of some federal jurisdictions and are applying similar arguments and rationales in the education context under Title IX²⁷ with occasional suc-

22. 502 F.3d 1215, 1222 (10th Cir. 2007).

23. 577 F. Supp. 2d 293 (D.D.C. 2008).

24. *Id.* at 303-09 (discriminating based on plaintiff’s plan to undergo transition “was literally discrimination ‘because of . . . sex.’”).

25. *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012) (affirming protections for transgender employees, stating, “Title VII prohibits discrimination based on sex whether motivated by hostility, desire to protect persons of a certain gender. . .or the desire to accommodate other people’s prejudices or discomfort.”).

26. *See, e.g.*, *Franklin v. Gwinnett Cty. 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). The court’s holding is in line with this reasoning, but doesn’t explicitly connect Title VII to Title IX within the opinion. *Id.*

27. *See, e.g.*, Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC’Y 301 (2013); Erin Buzuvis, “*On The Basis Of Sex*”: *Using Title IX to Protect Transgender Students From Discrimination in Education*, 28 WIS. J.L. GENDER & SOC’Y 219 (2013); Katherine Kraschel, Note, *Trans-cending Space in Women’s Only Spaces: Title IX Cannot Be the Basis for Exclusion*, 35 HARV. J.L. & GENDER 463 (2012); Tina Sohaili, Note, *Securing Safe Schools: Using Title IX Liability to Address Peer Harassment of Transgender Students*, 20 LAW & SEX. 79 (2011).

cess.²⁸ Although frequently complying with state discrimination laws and not Title IX precedent, some scholastic districts have begun including gender identity protection in their policies and decisions, and, in a number of high profile instances, transgender students have had success in obtaining protection and equal access in scholastic institutions.²⁹

According to Campus Pride, approximately 730 colleges and universities are also including gender identity (and frequently, gender expression) as protected categories in their policies.³⁰ Although Title IX has not historically been understood to include gender identity, the U.S. Department of Education Office of Civil Rights (OCR) issued a Dear Colleague Letter (“DCL”) in 2010 that addressed sexual harassment and bullying under Title IX and also attempted to provide guidance to institutions on the proper inclusion of gender identity (and transgender rights, generally) in higher education.³¹

Subsequently, in April of 2014 the OCR issued a *Questions and Answers on Title IX and Sexual Violence* (April 2014 Q&A).³² Although specifically addressed to sexual harassment and sexual violence the April 2014 Q&A included the following: “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. . . .”³³ On December 1, 2014 the OCR issued guidance addressing Title IX and gender segrega-

28. *Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000); *Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997).

29. See, e.g., Judy Harrison, *Maine Supreme Court Rules in Favor of Transgender Girl in Orono School Bathroom Case*, BANGOR DAILY NEWS, Jan. 30, 2014, <https://bangordailynews.com/2014/01/30/news/bangor/maine-supreme-court-rules-in-favor-of-transgender-girl-in-orono-school-bathroom-case/>; Sadie Whitelocks & Alex Greig, *Transgender Child, 6, Wins Civil Rights Case to Use the Girls Restroom at School in Colorado*, THE DAILY MAIL, June 24, 2013, <http://www.dailymail.co.uk/news/article-2347149/Coy-Mathis-Transgender-child-6-Colorado-wins-civil-rights-case-use-girls-bathroom-school.html>; Ruben Vives, *Transgender Teen to Play on Azusa High’s Girls’ Softball Team*, L.A. TIMES, Feb. 14, 2014, <https://latimes.com/local/lanow/la-me-ln-azusa-teen-first-transgender-softball-team-20140214,0,3667420.story>.

30. See *Colleges and Universities with Nondiscrimination Policies that Include Gender Identity/Expression*, CAMPUS PRIDE, <http://www.campuspride.org/tpc-nondiscrimination/> (last visited Nov. 17, 2014).

31. Letter from Russlyn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to the Staff of U.S. Dep’t of Educ. (Oct. 26, 2010), available at <http://www.ed.gov/ocr/letters/colleague-201010.html> [hereinafter Dear Colleague Letter]. The OCR also affirmed its position that such discrimination is impermissible gender/sex stereotyping.

32. *Questions and Answers about Title IX and Sexual Violence*, DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

33. *Id.* at 5.

tion in single-sex classrooms and extracurricular activities.³⁴ In *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (“December 2014 Q&A”), the OCR asserted its position on gender identity inclusion under Title IX by stating:

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 [of federal funding] generally must treat transgender students consistent with their gender identity in all aspects. . . of single-sex classes.³⁵

Despite the seemingly narrow application of the April 2014 Q&A to sexual violence and the December 2014 Q&A to single-sex classrooms and extracurricular activities (typically in secondary schools), the OCR is clearly signaling its intention to protect transgender students. Unambiguously, in the Q&As and the DCL, the OCR is asserting its position that discrimination on the basis of gender identity and gender expression is discrimination “on the basis of sex” under Title IX.

This, then, is the legal landscape that higher education institutions are navigating. Multiple federal appellate courts (and some state courts) have recognized transgender rights in the employment context, while other federal appellate courts have explicitly declined to recognize such rights. The OCR has taken the position that transgender rights are protected under Title IX; however, such a position is merely “guidance” at present, and it is not clear how this policy is to be applied in the context of transgender access versus sexual harassment, which is the primary framing of the DCL, or sexual violence, which is the primary framing of the April 2014 Q&A.³⁶ It is also unclear whether the OCR contemplates exceptions or limitations to gender identity inclusion for private and religious institutions³⁷ or in light of state laws that are inconsistent with the OCR’s position.³⁸

34. *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, DEP’T OF EDUC. OFFICE OF CIVIL RIGHTS (Dec. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

35. *Id.* at 25.

36. *Id.* at 8. Only one sentence in the DCL seems to go beyond the context of harassment: “Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.” *Id.*

37. Recently, the OCR has issued religious exceptions for religiously-affiliated institutions from providing transgender protections under Title IX. See Scott Jaschik, *Freedom of Religion or Free to Discriminate?*, INSIDE HIGHER ED (July 14, 2014), <http://www.insidehighered.com/news/2014/07/14/two-legal-cases-illustrate-growing-tensions-over-rights-transgender-students#sthash.NdB5hG7v.dpbs>.

38. See, e.g., Lance Richardson, *Should Sex Reassignment Surgery Be Required for Transgender High School Athletes?*, SLATE (Feb. 21, 2014), http://www.slate.com/blogs/outward/2014/02/21/virginia_s_transgender_high_school_athlete_policy_should_not_require_sex.html (detailing how the Virginia scholastic ath-

Given this landscape, the aim of this paper is to provide workable approaches to transgender issues where it can, and to highlight both practical and legal concerns when addressing these issues on campus.

III. RECORDS

Students routinely are required to identify themselves by name and sex on forms and documents. Transgender students identifying themselves by a gender other than their birth sex frequently adopt a name consistent with their self-identified gender. So which sex or gender, and which name, should a student use? This seemingly simple “document” problem can create unintended, but distressing, results.

Consider a recent confrontation on a college campus.³⁹ A trans female student was exiting a women’s restroom on her college campus when she was approached by a campus security officer and asked for ID to verify that she was a female student.⁴⁰ The officer began questioning the woman in the public hallway and called for backup.⁴¹ Four officers arrived and the student was questioned for 20 minutes before being escorted off campus.⁴² If the institution had a records policy that provided the student with a clear means of identifying herself for institutional purposes, this unfortunate event may not have occurred.⁴³

Presently, any number of government records are subject to differing rules from multiple agencies.⁴⁴ State and federal agencies are taking multitudinous positions on the changing of records.⁴⁵ Some states explicitly dis-

letics league policy requires participation based on birth sex or sex reassignment surgery); see also Lucinda Shen & Sarah Chaney, *University of North Carolina System bans gender-neutral housing*, DAILY TAR HEEL (Aug. 9, 2013), <http://www.dailytarheel.com/article/2013/08/5205267e7af4d>.

39. Nicole Hensley, *Female Transgender Student Suspended for Using Women’s Bathroom*, N.Y. DAILY NEWS, Apr. 4, 2014, <http://www.nydailynews.com/news/national/transgender-student-suspended-women-bathroom-article-1.1746243>.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* It should be noted that in this particular case, a good ID policy may not have been enough. The applicable state has made clear its position on gender-identity protections, and it is unclear that the student timely provided her ID.

44. See, e.g., 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).

45. For example, the U.S. Department of State implemented a passport policy allowing transgender people to change the birth identified on their passports upon presentation of a physician’s certification of gender transition, even if they have not undergone any hormonal treatment or surgery. *New Policy on Gender Change in Passports Announced*, U.S. DEP’T OF STATE (June 9, 2010),

allow changes to gender markers on governmental records, such as birth certificates,⁴⁶ while others require changes to governmental records upon meeting certain criteria.⁴⁷ Addressing these problems is beyond the scope of this article and is likely impossible. However, institutions may still be able to assist their students in this area.

A. Campus Records

A possible first step that bears minimal legal entanglements and accommodates the needs of transgender students is to address *campus records*. Institutions may want to work with their Registrar and Student Affairs Offices to establish a simple, one-stop procedure for students to change their name and/or gender on all of their campus records and documents.⁴⁸ Institutions may want to address the tension between campus records and governmental records that are outside of institutions' control through policy language such as the following:

The school shall maintain a mandatory permanent pupil record that includes a student's legal name and legal gender. However, to the extent that the school is not legally required to use a student's legal name and gender on other school records or documents, the school shall use the name and gender preferred by the student.⁴⁹

Additional options are set out in the *Promising Practices for Campus Records and Documents* created by the Pennsylvania State University LGBTQA Student Resource Center.⁵⁰ At a minimum, institutions should evaluate what institutional records can (and cannot) be changed to reflect a person's gender self-identification, and under what conditions the institu-

<http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm>.

46. E.g., OHIO REV. CODE ANN. § 3705.15 (LexisNexis 2006); IDAHO CODE ANN. § 39-250 (2005).

47. E.g., VT. STAT. ANN. Tit. 18, § 5112 (2011) (requiring an affidavit of gender transition from physician); MO. REV. STAT. § 193.215(9) (2006) (requiring a court order following surgery).

48. Genny Beemyn, *Ten Strategies to Improve Trans Inclusiveness on Campus*, in BEST OF THE BEST: AN OFFICIAL QUEER GUIDE TO HIGHER EDUC. (Alyson ed., 2006), available at <http://www.umass.edu/stonewall/uploads/listWidget/8764/improve%20trans%20inclusiveness.pdf>.

49. GAY LESBIAN & STRAIGHT EDUCATION NETWORK, *Model District Policy on Transgender and Gender Nonconforming Students* (2014), available at <http://www.umass.edu/stonewall/uploads/listWidget/25135/Model%20District%20Trans%20Policy.pdf>.

50. Emily Johnson & Allison Subasic, *Promising Practices for Inclusion of Gender Identity/Gender Expression in Higher Education*, PENN. STATE UNIV. LGBTQA STUDENT RESOURCE CENTER (2011), available at http://www.hendrix.edu/uploadedFiles/Student_Life/Student_Activities/Workshop%20Materials.pdf.

tion will (or will not) alter those records.

IV. HOUSING

Institutional housing departments typically assign on-campus housing based on students' birth sex.⁵¹ Most institutions then place the students in sex-segregated dormitory buildings, floors or rooms.⁵² Consequently, transgender students commonly have trouble finding suitable or appropriate housing options. Some institutions have created gender-neutral or gender-inclusive housing, as well as gender-neutral floors and/or suites, to address transgender students' needs.⁵³ Many institutions address this tension on a case-by-case basis upon the request of the individual student.

A common strategy is to provide individual or single-room housing for the transgender student. This may frequently be a positive outcome for a transgender student, but for a transgender student wishing to room with friends or with fellow students of the same gender, this option is unhelpful and may result in litigation.

A. Religious Exemption

Consider a recent occurrence at George Fox University. In preparation for returning to college for his sophomore year, a transgender male student approached student housing officials about rooming with his male friends.⁵⁴ The university has only sex-segregated housing on campus and the student did not want to live in individual housing.⁵⁵ The university met with the student and the student's parents multiple times and eventually decided that it could not accommodate the student on campus but would allow him to use off-campus housing to room with male friends.⁵⁶ The student subsequently filed a complaint with the Department of Education

51. David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51 (2011).

52. There have been a rising number of schools allowing coed dorm rooms over the past few years. Michelle R. Smith, *Colleges are Allowing Coed Dorm Rooms*, USA TODAY, Mar. 2, 2008, http://usatoday30.usatoday.com/news/education/2008-05-02-coed-rooms_n.htm.

53. *Colleges and Universities that Provide Gender-Inclusive Housing*, CAMPUS PRIDE, <http://www.campuspride.org/tpc-gih/> (last visited Apr. 25, 2014). But, some states explicitly disallow gender-inclusive housing. *E.g.*, Shen & Chaney, *supra* note 38.

54. Bob Heye, *Transgender Student Files Sex Discrimination Complaint against George Fox University*, KOMO NEWS NETWORK (Apr. 6, 2014), <http://www.komonews.com/news/local/Transgender-student-files-sex-discrimination-complaint-against-George-Fox-254042331.html>. See discussion *infra* Section VI (outlining the "identity plus" model that could describe George Fox University's model).

55. *Id.*

56. *Id.*

against the university.⁵⁷ In this instance, the claim was denied following the university's application and the OCR's recognition of a religious exemption from trans protections under Title IX.⁵⁸ The same religious exemption has been requested and issued for a number of religiously-affiliated institutions.⁵⁹

In light of the OCR's assertion, the DCL and the Q&As that gender identity is a protected category under Title IX, the position of the OCR for all institutions without such an exemption appears predictable: institutions must allow the trans students to live on campus in housing facilities associated with their self-identified gender. A recent settlement with Arcadia Unified School District, discussed below, confirms this expectation as well as sets forth the OCR's expectations for institutions to provide support for trans students and training for staff and students regarding trans rights under Title IX. Without such an exception, institutions would likely need to litigate such matters in order to establish their right to make contrary housing decisions.

B. OCR-Arcadia Settlement Agreement

In July of 2013, the OCR reached a settlement with the Arcadia Unified School District of Arcadia, California over the District's treatment of a transgender male middle school student ("Arcadia Settlement").⁶⁰ The District was prohibiting a transgender male student from using the boys' restrooms and locker rooms at school.⁶¹ Additionally, while on a school-sponsored camping trip, the District housed the student in a cabin alone with an adult chaperone rather than with the gender with which the student identified (male).⁶² The settlement agreement required the District to allow the transgender student to participate in all sex-segregated school activities consistent with his self-identified gender, including restrooms, locker rooms and housing.⁶³

57. *Id.*

58. *See Transgender Student and Housing at George Fox University*, GEORGE FOX UNIV., <http://www.georgefox.edu/transgender> (last visited Apr. 25, 2014); *see also* Nick DeSantis, *Christian College Wins U.S. Exemption in Dispute with Transgender Student*, CHRON. OF HIGHER EDUC., July 14, 2014, *available at* <http://chronicle.com/blogs/ticker/u-s-grants-christian-college-exemption-in-housing-dispute-with-transgender-student/81757>.

59. *See GLSEN Calls on Dept. of Ed. for Further Title IX Guidance*, GAY LESBIAN & STRAIGHT EDUCATION NETWORK, <http://glsen.org/article/glsen-calls-dept-ed-further-title-ix-guidance> (last visited Nov. 10, 2014).

60. Resolution Agreement, Arcadia Unified School District, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013), *available at* <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>.

61. *Id.*

62. *Id.*

63. *Id.*

The DCL and the April 2014 Q&A make clear that the OCR's position applies equally to institutions of higher education.⁶⁴ In the Arcadia Settlement, the OCR has moved beyond the harassment and bullying concerns it addressed in the 2010 DCL and sexual violence addressed in the April 2014 Q&A and is now addressing equal access based on gender identity.⁶⁵ Moreover, the OCR has further asserted its position that accommodations resulting in the segregation of the student *in contravention of the student's wishes* are impermissible.⁶⁶

So, until the courts clarify the inclusion of gender identity under Title IX and the extent of those protections, while addressing transgender needs on a case-by-case basis is generally useful and fitting, in light of the Arcadia Settlement and the George Fox University OCR filing, institutions should carefully consider the risks of OCR investigations and subsequent litigation when these situations arise.

Proactive measures, including such useful practices as staff training and publicizing the contact information of trans-knowledgeable individuals within Housing and Student Affairs Offices, can be found in the *Promising Practices* attachment and at CampusPride.org.⁶⁷

V. RESTROOMS

The most common daily difficulty for a transgender student on campus is restroom usage. An inclusive policy for restroom access might very well be the most practical benefit an institution can provide to its transgender students. These students frequently face discomfort and sometimes harassment, no matter which restroom they choose – the one matching their birth sex or the one corresponding to their gender identity.⁶⁸

As noted above, a trans female student exiting a women's restroom was publicly questioned by campus police and then escorted off campus.⁶⁹ Though few are arrested or subjected to extensive interrogations in public, transgender students are recurrently shamed, shunned, or harassed when

64. See generally Allie Grasgreen, *Equal Access at All Levels*, INSIDE HIGHER EDUC. (July 29, 2013).

65. Resolution Agreement, *supra* note 60.

66. *Id.* at II.A.1. See generally, Katherine A. Womack, Comment, *Please Check One - Male or Female?: Confronting Gender Identity Discrimination in Collegiate Residential Life*, 44 U. RICH. L. REV. 1365, 1378–79 (May 2010).

67. E.g., Karen M. Williamsen-Garvey & Steve Wisener, *8 Steps to Improve Campus Housing for LGBT Students*, CAMPUSPRIDE, <http://www.campuspride.org/tools/8stepstoimprovestudenthousing/> (last visited Apr. 25, 2014).

68. See generally Jill D. Weinberg, *Transgender Bathroom Usage: A Privileging of Biology and Physical Difference in the Law*, 18 BUFF. J. GENDER L. & SOC. POL'Y 147 (2010).

69. Hensley, *supra* note 39.

using public restrooms. Many trans students choose to avoid sex-specified restrooms, including foregoing using any restroom, to avoid these difficulties. A common problem on institutional campuses is older buildings with only sex-specific restrooms, especially in high-use spaces such as classrooms, student centers, and dining areas.

While some states have enacted legislation specifically protecting gender identity, including the provision of adequate restroom access, the majority have not. In the absence of legislation, the courts have been asked to address the issue of restroom access.

A. Case Law

Much of the case law arising from claims for access to restrooms has arisen in the employment context. As noted above, employment discrimination based on transgender status under Title VII has been the most fertile ground for claims for gender identity protections. In relatively recent cases, higher courts have taken two different, somewhat inconsistent, approaches.

1. Gender identity (and not birth sex) may be sufficient criterion for restroom access.

In *Cruzan v. Special School District*, a case heard by the United States Court of Appeals for the Eighth Circuit, a female teacher alleged that the school district discriminated against her on the basis of her religion and her sex by allowing a transgender co-worker to use the women's faculty restroom.⁷⁰ The court determined that the plaintiff failed to express a bona fide religious belief, and didn't suffer an adverse employment action because of it. More importantly, the court held that the plaintiff failed to meet the requirements for a hostile work environment claim based on sex discrimination. The court stated, "To make this showing, Cruzan had to establish the school was 'permeated with discriminatory intention, ridicule, and insult.'"⁷¹ Based on the totality of the circumstances – including Cruzan's access to other restrooms and the absence of any claim of inappropriate conduct by the transgender co-worker—the court held that allowing a transgender employee to use the bathroom associated with his or her gender identity does not create a hostile work environment.⁷²

2. Birth sex (and not gender identity) may be sufficient criterion for restroom access.

In *Goins v. West Group*, the Supreme Court of Minnesota denied a claim

70. *Cruzan v. Special Sch. Dist.*, No.1, 294 F.3d 981 (8th Cir. 2002).

71. *Id.* at 984.

72. *Id.*

of sexual orientation discrimination under the state human rights law that protected sexual orientation from employment discrimination.⁷³ Goins, a trans female employee, had consistently used the female restrooms while at work. After receiving complaints, the employer mandated that restroom use must be consistent with a person's "biological gender."⁷⁴ When Goins complained, the employer provided a single-occupancy restroom. The court held that relegation to a single-occupancy restroom was not a sufficient basis for a hostile work environment claim.⁷⁵ Following *Goins* reasoning, a New York district court has held that a restroom designation based on biological sex, rather than gender identity, is not discriminatory.⁷⁶

In a 2007 case, *Etsitty v. Utah Transit Authority*, an employer terminated a trans female employee after discovering that she was using female restrooms. Etsitty brought a claim under Title VII, asserting that she was terminated (1) because of her sex, and (2) because she failed to adhere to traditional gender norms.⁷⁷ Citing a long line of cases, the Court of Appeals for the Tenth Circuit held that ". . . discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII."⁷⁸ Summary judgment was granted to the defendant employer.

B. Developing Policy

Institutions have taken varying paths when developing restroom policies. Most institutions do not have a specific policy, but in practice require students to use restrooms consistent with their birth sex, or their self-identified gender provided no third party complaints. With the publically questioned student as an example, continuing with this approach is rife with legal concerns for institutions. In the past, institutions attempting to accommodate

73. 635 N.W.2d 717 (Minn. 2001).

74. *Id.* at 721.

75. *Id.* at 723. The court further held that "[t]o conclude that the MHRA contemplates restrictions on an employer's ability to designate restroom facilities based on biological gender would likely restrain employer discretion in the gender designation of workplace shower and locker room facilities, a result not likely intended by the legislature. We believe, as does the Department of Human Rights, that the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender." *Id.*

76. In *Hispanic Aids Forum v. Estate of Bruno*, 792 N.Y.S.2d 43 (N.Y. App. Div. 2005), a group of transgender plaintiffs brought a claim under state and city human rights laws, alleging that they were excluded from bathrooms based on their gender identities. The court determined that the individuals were not excluded from all restrooms, but were restricted to the restrooms corresponding to their biological sex, like every building tenant. *Id.* at 47–48.

77. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (detailing how the plaintiff based much of her claim on the "sex stereotyping" line of reasoning found in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

78. 502 F.3d 1215, 1221 (10th Cir. 2007).

transgender students have allowed access to restrooms consistent with gender identity only after an individual has proved some level of gender reassignment surgery or hormone therapy. This requirement places demanding and potentially unwanted requirements on transgender students. Gender reassignment surgery is a long process involving hormone therapy, significant cost, and substantial health risks.⁷⁹ Another option commonly employed by institutions is allowing access to facilities consistent with an individual's government issued ID, or possibly an institutionally issued ID. A policy based on governmental IDs (and institutional IDs that mirror governmental ID only) creates a potential equal protection claim, but is likely a more legally secure position.

When possible, institutions may want to consider converting existing restrooms to single-stall ("family"-style) restrooms or to gender-neutral restrooms, and publishing a map or website locating these restrooms. Other options are available in Pennsylvania State University's *Promising Practices* and *Recommended Best Practices for Supporting Trans Students*.⁸⁰

VI. LOCKER ROOMS

Locker rooms, even more than restrooms, present difficulties for transgender students. Where most bathrooms have individual stalls, locker rooms often do not provide such privacy. Although contested by some transgender advocates,⁸¹ this comparative lack of privacy in the locker

79. See Libby Adler, *T: Appending Transgender Equal Rights To Gay, Lesbian And Bisexual Equal Rights*, 19 COLUM. J. GENDER & L. 595, 607 (2010).

80. *Promising Practices for Inclusion of Gender Identity/Gender Expression in Higher Education*, PENN. STATE UNIV. LGBT STUDENT RESOURCE CENTER, <http://www.umass.edu/stonewall/uploads/listWidget/25137/promising-practices.pdf> (last visited Nov. 10, 2014); *Suggested Best Practices for Supporting Trans* Students*, CONSORTIUM OF HIGHER EDUC. LGBT RESOURCE PROF'LS, http://www.lgbtcampus.org/index.php?option=com_content&view=article&id=81:suggested-best-practices-for-supporting-trans—students&catid=21:press-releases&Itemid=124 (last visited Nov. 10, 2014); see also, Daniella A. Schmidt, Note, *Bathroom Bias: Making the Case For Trans Rights Under Disability Law*, 20 MICH. J. GENDER & L. 155 (2013); Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133 (2010).

81. Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-segregated Facilities for Transgender Students*, 28 WIS. J. L. GENDER & SOC'Y 301, 317 (2013). Such advocacy seems to emphasize the needs of the transgender student's privacy while simultaneously dismissing any privacy rights in gender conforming students, i.e., "[b]eing forced to use gender-inappropriate or segregated facilities is humiliating for [transgender] students" and "instills extraordinary anxiety about how they are seen and treated by peers." *Id.* at 306. However, gender-conforming persons' anxiety about their bodies being seen by others including gender-non conforming persons is "rooted in unfortunate cultural bias and stereotypes regarding transgender people." *Id.* at 317. Moreover, if the mere knowledge of the nature of a person's anatomy is a constitutionally protected privacy interest, it seems legally incongruous that visual assessment by others is not.

rooms counsels against treating locker rooms and bathrooms by the same policy. Specifically, the existence of nudity and the lack of privacy in locker rooms present distinct challenges for both transgender persons and institutions.⁸²

To the extent possible, creating individualized spaces in locker rooms, like those available in most restrooms, provides privacy for all students.⁸³ Importantly, it reduces the risk of harm, embarrassment or harassment to the transgender student, and also nullifies the most powerful argument (privacy) by potentially objecting students.⁸⁴ When this is possible, a clear benefit is the ability of the institution to avoid the seemingly impossible task of balancing different individual's interests. When creating such individualized spaces is not possible, institutions must make policy choices regarding access to sex-segregated spaces by gender non-conforming students.

Higher education institutions are “all over the board” in addressing access to locker rooms and similar spaces – from no policies to written policies with birth or biological sex requirements to written policies of full inclusion based on self-identity. Some school districts and other scholastic agencies are at the forefront of crafting policies to follow state or local law requirements, or OCR settlements, such as the Arcadia Settlement.⁸⁵ Some have enacted a broad policy of transgender inclusion based solely on gender self-identity;⁸⁶ others have required inclusion based on gender self-

82. See, e.g., *Compliance Guidelines to Prohibit Gender Identity Discrimination*, CITY AND COUNTY OF SAN FRANCISCO HUMAN RIGHTS COMMISSION, <http://sf-hrc.org/compliance-guidelines-prohibit-gender-identity-discrimination> (last visited on Apr. 25, 2014).

83. The model policy of GLSEN for school districts proposes that increased privacy be provided to *any* student, regardless of the underlying reason. “Any student – transgender or not – who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative changing area such as the use of a private area (e.g., a nearby restroom stall with a door, an area separated by a curtain, a[n] . . . office in the locker room, or a nearby health office restroom), or with a separate changing schedule (e.g., using the locker room that corresponds to their gender identity before or after other students) In no case shall a student be required to use a locker room that conflicts with the student’s gender identity.” *Model District Policy*, *supra* note 49, at 8–9.

84. “These facilities not only serve the needs of transgender students, but also parents with children of a different gender than themselves, people with disabilities who require the assistance of an attendant of a different gender, and anyone desiring greater privacy.” Brett-Genny J. Beemyn, TRANSGENDER L. & POL’Y INST., *Ways that U.S. Colleges and Universities Meet the Day-to-Day Needs of Transgender Students*, available at <http://www.transgenderlaw.org/college/guidelines.htm>.

85. See discussion *infra* Section IV(B) (discussing OCR-Arcadia Settlement Agreement); see also Dear Colleague Letter, *supra* note 31.

86. “A transgender student should not be required to use a locker room or restroom that conflicts with the student’s gender identity.” *Transgender Student Guidelines*, N.Y.C. DEP’T OF EDUC.,

identity with exceptions or on case-by-case bases.⁸⁷

Self-identity policy. Some institutional determinations regarding the standard that will be used to establish self-identity may need to be made but, once established, granting access under a broad gender “self-identity” policy is fairly straightforward in application, if not in consequences. Under such a policy, a university would allow access to locker rooms in the same manner it allows access to other university facilities and activities, based solely on gender self-identity.

Identity-plus policy. A gender self-identity policy with either exceptions or additional considerations, an “identity-plus” policy, would require an institution to establish the exceptions to the general policy of access or the factors that it would apply in granting access on a case-by-case basis. Common factors used in the establishment of exceptions or in a case-by-case analysis under an identity-plus policy might include: the requesting student’s preference, protecting all students’ and facility users’ privacy, protecting the safety of the students involved, the availability of private space for the transgender students or other students and facility users, the presence of children, the relative importance of sex-segregation to particular areas (such as areas with the high likelihood of nudity or harassment), and consistency with other institutional policies (such as equal opportunity to participate for all students, or religious traditions of the institution).

A. Applying a Gender-Identity Policy

In late 2012, a seventeen-year-old girl was using the locker rooms at the local college as part of her high school swim club. When she entered the sauna area of the locker rooms, she encountered a person sitting in the sauna with male genitalia exposed. She immediately reported the incident to the facilities director of the college’s recreation center.⁸⁸

Under a self-identity policy, the facilities coordinator would presumably need to determine the gender identity of the person, and then allow a self-identifying female to use the facilities regardless of physical anatomy or the discomfort of others. This position would consider any discomfort of the public irrelevant (if not irrational) in such circumstances. The benefit of the self-identity policy is that it provides the greatest accommodation to

<http://schools.nyc.gov/RulesPolicies/TransgenderStudentGuidelines/default.htm> (last visited April 25, 2014).

87. “If an individual’s gender identity does not fit within the binary framework of man/woman or the person is in the process of transitioning to a different gender, participation in a particular gender designated activity will be handled on a case by case basis.” *Intramural Participant’s Guide*, UNIVERSITY OF MASSACHUSETTS, AMHERST, <http://www.umass.edu/campusrec/intramurals/participantsguide/index.html#III> (last visited Nov. 10, 2014).

88. Police Report, Evergreen State College Police Services (Sept. 27, 2012) (on file with author).

gender non-conforming persons. Moreover, this is the current position of the OCR.⁸⁹

Under an identity plus policy, the university would need to determine the gender identity of the person, and then determine whether an exception applied. If an exception did not apply, the university would then attempt to balance identified interests. Clearly, performing a balancing test on the spot, as the facilities coordinator would have to do (though maybe not alone), could be quite difficult. The case-by-case approach is the most common approach⁹⁰ in higher education institutions and will likely be successful in most cases, as the institution and the student work through options. However, much like the housing situation at George Fox University, this approach makes institutions susceptible to an OCR complaint.

B. Identifying Gender

As shown by this example, under both self-identity and identity-plus policies an institution will need to determine the gender of an individual.⁹¹ The institution should determine, specifically, what criteria it will use to recognize the gender identity of students. Common standards include: “genuinely asserted,” “consistently asserted,” and “consistently and exclusively asserted” gender, as well as “sex/gender assigned at birth.”⁹² These can be thought of as most inclusive to least inclusive, respectively.

A “genuinely asserted” gender standard would require limited evidence of gender identity. Supposedly, some informal documentation (such as an ID), the affirmations of family or friends, or possibly the gender expression

89. See Dear Colleague Letter, *supra* note 31.

90. Campus Pride identifies only seven institutions with self-identity (“trans-inclusive intramural”) policies. Colleges and Universities with Nondiscrimination Policies, *supra* note 30.

91. The issue of identification is fraught with difficulties. Having a consistent, thought-out policy on gender identity records would be a very good first step, allowing the student to quickly and easily identify themselves, such as providing a student ID. Note, however, that requesting that a student identify their gender is, itself, contentious. Burdensome requirements for identification verification could easily move the “self-identity” policy to an “identity plus” policy. See controversy surrounding Central Piedmont Community College student, Andraya Williams where Williams’ lawyer “questioned why a student should be quizzed about her gender and asked for identification for using a bathroom.” Scott Jaschik, *Questioned for Being Transgender?*, INSIDE HIGHER EDUC., <https://www.insidehighered.com/news/2014/04/02/debate-central-piedmont-over-transgender-student-rights> (last visited Nov. 13, 2014).

92. Board of Education Administrative Regulation 5163a, SFUSD, http://www.sfusd.edu/en/assets/sfusd-staff/_site-wide/files/Non-Discrimination%20for%20Students%20and%20Employees%20AR%205163a.pdf (last visited Apr. 24, 2014); Memorandum from Ray Avila, Assoc. Superintendent for Pacifica Sch. Dist., to Wendy S. Tukloff, Superintendent for Bd. of Trs. School District, (Nov. 20, 2013), available at <http://www.pacificasd.org/boardpackets/2013/11-20-13/11b.pdf>.

of an individual could each be sufficient evidence of gender. A standard of “consistently asserted” gender would seemingly require a bit more evidence over some period of time, and seems to imply an exclusive commitment to either a male or female gender identity.⁹³ A “consistently and exclusively asserted” standard would seem to formalize the requirement of a commitment to a single gender identity by including an “exclusive” requirement which may not acknowledge ambiguous gender expressions, such as genderqueer and genderfluid identities. Finally, “sex (or gender) assigned at birth” (or its corollary, sex/gender identified on a particular document, such as a birth certificate) is clearly the most restrictive and least ambiguous, and thus the easiest to administer.

It is important to note that these standards are not sufficient in themselves. Each institution would need to determine what factors it will consider when evaluating conformity with the given standard. Factors may include: how long a student has asserted a particular gender identity, what documentation from a medical or other care provider (if any) will be required,⁹⁴ or whether the gender identity is consistently asserted across all or multiple settings.⁹⁵

A Model Policy recommended by GLSEN for school districts proposes that increased privacy be provided to *any* student, regardless of the underlying reason.⁹⁶ When this is possible, a clear benefit is the ability of an institution to avoid the seemingly impossible task of balancing different individual’s interests. As with other access issues, institutions should think through the risks and stakeholder interests when determining their policy.

93. *But see generally*, Julia Baird, *Neither Male nor Female*, N.Y. TIMES, Apr. 6, 2014, <http://www.nytimes.com/2014/04/07/opinion/neither-female-nor-male.html?hp&ref=opinion>.

94. We will presume that medical transition would never be required except, if at all, in limited circumstances in athletics. *See infra* Part VII: Athletics. Thus, we understand supporting documentation from a care provider would likely involve evidence from a medical doctor, therapist, social worker, counselor or possibly a religious minister of students’ sincerely held belief that they understand themselves to be the self-identified gender. To the extent such documentation is one factor among others, the students’ parents or even self-identification (e.g., in instances of estrangement from parents) may be sufficient in light of other factors.

95. For example, what if a student chooses to identify for social purposes as a female, but as a male for athletics and for work? *See, e.g., infra* Part VII: Athletics; *see also infra* notes 105–06.

96. “Any student – transgender or not – who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative changing area such as the use of a private area (e.g., a nearby restroom stall with a door, an area separated by a curtain, a[n] . . . office in the locker room, or a nearby health office restroom), or with a separate changing schedule (e.g., using the locker room that corresponds to their gender identity before or after other students). . . In no case shall a student be required to use a locker room that conflicts with the student’s gender identity.” *Model District Policy*, *supra* note 49, at 8–9.

VII. ATHLETICS

Various athletic organizations have dealt with transgender athletes' participation in athletics. There appear to be three distinct approaches taken: (1) gender self-identity plus body modification and hormone treatment (the International Olympic Committee approach), (2) gender self-identity plus consideration of biological sex and hormone usage (the NCAA approach), and (3) gender self-identity alone (the scholastic approach).⁹⁷ In the higher education context, the latter two approaches are of special concern for colleges and universities.

A. NCAA

The National Collegiate Athletics Association has both recommendations and policies for the inclusion of transgender athletes in competitive athletics over which it has authority. The policies of the NCAA are set out in the *NCAA Policy on Transgender Student-Athletes Participation*⁹⁸ (NCAA Transgender Handbook), and state, in part:

1. A trans male (FTM) student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men's team, but is no longer eligible to compete on a women's team without changing that team status to a mixed team.⁹⁹
2. A trans female (MTF) student-athlete being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or transsexualism, for the purposes of NCAA competition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.

Any transgender student-athlete who is not taking hormone

97. See Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 21–28 (2011).

98. NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES (Apr. 2010), available at http://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf [hereinafter NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES.]

99. NCAA rules regarding mixed teams is beyond the scope of these materials, but one significant effect is that the team may not be eligible for championship title recognition. For example, a women's basketball team with a non-transitioning trans woman student-athlete would be deemed a "mixed team," and would be ineligible for a women's NCAA championship. *Id.* at 13; see also NAT'L COLLEGIATE ATHLETIC ASS'N, 2014-15 NCAA DIVISION I MANUAL, Art. 18 & 20, *et seq.* (2014) [hereinafter NCAA DIVISION I MANUAL].

treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.¹⁰⁰

- A trans male (FTM) student-athlete who is not taking testosterone related to gender transition may participate on a men's or women's team.
- A trans female (MTF) transgender student-athlete who is not taking hormone treatments related to gender transition may not compete on a women's team.

This policy enables a transgender man who is not taking testosterone to compete on a women's team. Though he identifies as a man, he is female-bodied and has no unfair competitive advantage over non-transgender women. He may instead choose to compete on the men's team. However, because of testosterone production, a male-bodied transgender woman who is not taking estrogen may not compete on a woman's team.¹⁰¹ Whether a transgender student-athlete is competing on a men's or women's team, his or her gender identity should be respected by using the name and pronouns that student has chosen.¹⁰²

How does this look practically? In 2011, Kye Allums competed as a self-identified male on the George Washington University women's basketball team.¹⁰³ This was permissible because Allums was (1) assigned female at birth (and identifying as male), and (2) not taking male hormones. Taking each in turn, regarding his assigned sex, if he had been assigned male at birth (and identifying as a male), then, as is common, he would be required to play on the men's team. Regarding hormones, if he was assigned male at birth and was legally taking male or female hormones, he could only play on the men's team. If he was assigned female at birth and was taking male hormones, then he may play on the men's team, but not on the women's team.¹⁰⁴

100. By "assigned birth gender" the NCAA means the sex designation on a student's birth certificate. Since some states allow amendment of assigned sex on birth certificates, there is some ambiguity about birth certificates that have been amended, especially as the standards for amendment (e.g., physical or hormonal requirements) many vary among states. Those cases should be submitted to the NCAA's Office of Inclusion for determination.

101. NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 98, at 13.

102. *Id.* at 21.

103. Erik Brady, *Transgender Male Kye Allums on the Women's Team at GW*, USA TODAY, Nov. 4, 2010, http://usatoday30.usatoday.com/sports/college/womens-basketball/atlantic10/2010-11-03-kye-allums-george-washington-transgender_N.htm?csp=digg.

104. The taking of male hormones in these examples is presumed to be *legally* permitted, e.g., prescribed and taken under a doctor's care.

Compare this to an institution's intramural policy, discussed below, that states, "On sex-segregated teams, a student will compete on the team associated with the student's *consistently asserted gender identity*." The likely outcome would be that a trans male, such as Allums, would need to compete on the men's intramural team, regardless of hormone treatment or birth sex.¹⁰⁵

Note that the NCAA policies do not address a number of possible scenarios, such as treatment of genderqueer, socially (but not physically) transitioned,¹⁰⁶ or partial-medically transitioned student-athletes. For example, a trans female may elect to have an orchiectomy to remove both testes but choose not to take either hormone (testosterone) suppressors or estrogen. The NCAA's policy would disallow this athlete from competing on the women's team unless she was taking the testosterone suppressors (for one year or more). If an institution encounters a similar scenario, the school should contact the NCAA for a definitive answer given its particular facts.

In discussions regarding transgender athletes, the NCAA's Office of Inclusion emphasized that its committee would look to the underlying purpose of its rule (transgender inclusion balanced with competitive fairness) in deciding these cases. So, in this example, the student-athlete's lack of testes might be reviewed as an equivalent of "hormonal suppression" under the formal policy, thus allowing the transgender athlete to play on the women's team.

B. NAIA

In late 2013, the Gender Equality Committee of the National Association of Intercollegiate Athletics (NAIA) submitted a Transgender Policy recommendation to the NAIA Council of Presidents. As of the date of this paper, the NAIA does not have a policy directly addressing the eligibility

105. One objection to this result might be that such a policy is unnecessarily restrictive on trans students, effectively creating a disparate impact. See PAT GRIFFIN & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER ATHLETES 22 (2010), available at <http://www.nclrights.org/wp-content/uploads/2013/07/TransgenderStudentAthleteReport.pdf>. However, recognizing the self-identity of an individual may mean requiring the individual to commit, within the context of athletics, to the student's self-identified gender. In most circumstances, this is exactly what trans students are committed to doing. Note, however, that is not always the case. *E.g.*, "Allums said he would like to receive the treatments but had held off because he did not want to jeopardize his spot on the team." Katie Thomas, *Transgender Man is on Women's Team*, N.Y. TIMES, Nov. 1, 2010, <http://www.nytimes.com/2010/11/02/sports/ncaabasketball/02gender.html>.

106. For example, a socially transitioned student-athlete who is declining or delaying medical transition. See *supra* note 105; see also NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 98, at 11 (quoting a Bates College trans male athlete who chose "to forego any medical transitioning to remain on [the] women's team.").

status of transgender student-athletes.

C. NJCAA

The National Junior College Athletic Association (NJCAA) policy is similar to the NCAA's policy. A transgender male student-athlete "who has received a medical exception for treatment with testosterone for gender transition" may compete on a men's team but is no longer eligible to compete on a women's team. A transgender female student-athlete "being treated with testosterone suppression medication for gender transition" may continue to compete on a men's team but may not compete on a women's team until completing one calendar year of documented testosterone-suppression treatment. The NJCAA is otherwise silent.¹⁰⁷

D. Intramurals

Intramural athletics occupy a unique position somewhere between the NCAA's acknowledgment of biological distinctions in highly competitive intercollegiate sports and the inclusion-focused policies of interscholastic sports. Are intramural athletics more like NCAA competitions or more like high school sports?

Interscholastic institutions have been at the forefront of transgender inclusion in athletics and in school activities, generally. This may be the result of a confluence of causes: new state statutes including gender identity and/or expression, OCR's 2010 announced position and subsequent enforcement efforts, and an increase in the number of gender non-conforming students asserting rights to facility access or activity participation.¹⁰⁸

A number of states have passed gender-identity legislation and/or guidelines that establish the right of transgender athletes to participate on sex-segregated teams consistent with their gender-identities and not their birth sex.¹⁰⁹ In resolving the tension between inclusion and competitive fairness,

107. See *Eligibility Rules of the National Junior College Athletic Association*, NAT'L JUNIOR COLL. ATHLETIC ASS'N (effective Aug. 1, 2014), available at http://www.njcaa.org/njcaaforms/140714_2_Eligibility%20Pamphlet%2014-15.pdf.

108. E.g., Ruben Vives, *Transgender Teen to Play on Azusa High's Girls' Softball Team*, L.A. TIMES, Feb. 14, 2014, available at <http://latimes.com/local/lanow/la-me-ln-azusa-teen-first-transgender-softball-team-20140214,0,3667420.story> (reporting on high school baseball player switching to girls' softball team).

109. E.g., 2013 Cal. Legis. Serv. 85 (A.B. 1266) (West) (to be codified at CAL. EDUC. CODE §221.5); *2014 Constitution and Bylaws*, CALIFORNIA INTERSCHOLASTIC FEDERATION at 300(D), available at http://www.cifstate.org/governance/constitution/300_Series.pdf; *Proposed Bylaw 300(D) Gender Identity Participation*, CALIFORNIA INTERSCHOLASTIC FEDERATION (Nov. 1, 2012), available at <http://www.cifccs.org/meetings/Documents%20Winter/2012-2013/gender%20identity%20participation.pdf>; WIAA HANDBOOK: ELIGIBILITY, WASH. INTERSCHOLASTIC ACTIVITIES ASS'N §18.15.0 (2013), available at <http://www.wiaa.com/ConDocs/Con1287/Eligibility.pdf>. *But see*,

these policies prioritize inclusion based on the lack of substantial physiological differences in young athletes and the inclusive principles overriding scholastic education.¹¹⁰

Along with Title IX's acknowledgement and sometimes support of sex distinctions, institutions may want to assess the nature of their respective intramural programs. Are they participation focused, akin to interscholastic competition? Or are they highly competitive sex-segregated associations that necessitate biological distinctions on the basis of competitive fairness?

Some scholastic and higher education institutions have attempted to balance these interests, and their policies may be useful. Bates College is one such example. The college allows participation of trans students in intramural sports solely in accordance with their self-identity, but includes the NCAA approach (inclusion plus hormone usage) for both NCAA and club sports.¹¹¹ Similarly, one Canadian school district requires inclusion on the basis of self-identity, "subject to safety considerations."¹¹² For institutions whose intramural programs are focused more on participation, the scholastic model may be preferable.

VIII. CONCLUSION

Although the law is currently unsettled, institutions can avoid costly litigation and serve their transgender students by taking proactive, accommodating measures akin to other civil rights protections. Institutional counsel should make themselves aware of any state and local laws applicable to their institutions, and any case law applicable in their respective federal circuit. As transgender issues continue to increase on campuses, including those mentioned in this article, institutional counsel should be ready to ad-

e.g., Wisconsin and Virginia policies, respectively, which are similar to the NCAA policy in valuing competitive equity. *Transgender Participation Policy*, WIS. INTERSCHOLASTIC ATHLETIC ASS'N, http://media.wix.com/ugd/2bc3fc_95ec28cdb3ee4df89ee624229b9caa48.pdf (last visited Apr. 25, 2014); Richardson, *supra* note 38; *but c.f.*, Transgender Student Guidelines, *supra* note 86 (noting where New York City requires participation with "consistently asserted" identity in sports but allows for case-by-case exceptions for "competitive athletic activities and contact sports").

110. See Elizabeth M. Ziegler & Tamara Isadora Huntley, *It Got too Tough to Not Be Me: Accommodating Transgender Athletes in Sport*, 39 J.C. & U.L. 467, 470 (2013); see also, Resolution Agreement between the Arcadia Unified School District, U.S. Dep't of Educ., Office for Civil Rights, & U.S. Dep't of Justice, Civil Rights Div. (July 23, 2014) (addressing access for all extracurricular activities according to self-identified gender).

111. *Transgender Inclusion Policies*, BATES COLL., <http://athletics.bates.edu/transgender-inclusion-policies> (last visited Nov. 13, 2014).

112. "Transgender and transsexual students . . . shall, subject to safety considerations, be permitted to participate in any gender-segregated activities in accordance with their consistently asserted gender identity, if they so choose." EDMONTON PUB. SCH., SEXUAL ORIENTATION AND GENDER IDENTITY ADMINISTRATIVE REGULATION (Nov. 13, 2012), available at <http://www.epsb.ca/ourdistrict/policy/h/hfa-ar/>.

vise their policymakers, help lead institutional discussions and, hopefully, propose positive resolutions.