

Transgender Student Issues Six Months Later . . .
Where are We and What does the Future Hold?

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**Federal Law & the U.S.
Constitution**



- Equal Protection Clause, 14th Amendment, U.S. Constitution: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."
- Generally, protects students from discrimination on the basis of:
 - Race
 - Color
 - National origin
 - Religion
 - *Sex or Gender*
 - Age
 - Disability

**Discrimination/Harassment
Based on Sex**



- Title IV of the Civil Rights Act of 1964 (Title IV) prohibits discrimination on the basis of race, color, national origin, *sex*, & religion in public schools.
 - 42 U.S.C. § 2000, et seq
- Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex in schools receiving federal funding.
 - 20 U.S.C. § 1681(a)

Discrimination/Harassment Based on Sex



- Title IV & IX
 - Do not specifically prohibit discrimination on the basis of sexual orientation, gender identity, or gender expression.
 - Have evolved to address sexual or gender-based harassment in schools based on gender stereotypes.
 - Cases regarding Titles IV & IX are illustrative for Title VI and Sec. 504 as well.

Missouri Human Rights Act (MHRA)



- Missouri's discrimination law includes the same protected categories as federal laws.
- No current Missouri statutory or case law protects individuals from discrimination on the basis of "sexual orientation" or "gender identity" in public accommodations.
- But this could change (like in *Montgomery*).
- Currently, bullying laws in Missouri do not provide a private right of action against schools.

The Question of Disability



- Gender Identity Disorder (a.k.a. Gender Dysphoria) is currently a DSM-IV & V mental disorder.
- Per DSM-V, gender dysphoria is characterized by a marked incongruence between one's experienced/expressed gender and assigned gender manifested by at least 6 of 8 criteria.

Section 504 and the Americans with Disabilities Act

- Eligibility hinges on having a physical or mental impairment that substantially limits a major life activity. So,....

- If it is a DSM - IV & V mental disorder/impairment, could gender identity disorder be Section 504 or ADA disability?

Where Do We Stand Today?

- No active cases in Missouri.
- Threats of ACLU to challenge MCE Policy 2115 not at this point initiated.
- No active OCR Transgender challenges in Missouri.

No.

- Gender identity disorder, homosexuality, and bisexuality are specifically excluded as disabilities under Section 504 and the ADA.
 - 29 U.S.C. § 705(20)(F)
 - 42 U.S.C. § 12211

- But, for students, what about the...

Individuals with Disabilities in Education Act (IDEA)



- If not a disability under Section 504 and the ADA, could LGBT students be eligible for special education and related services under the IDEA?

G.G. v. Gloucester County School Board



- Gavin Grimm, a transgender male student filed a lawsuit against his school district asserting the board of education restroom and locker room policies were discriminatory and unconstitutional.
- The school's policy requires students to use the restroom and locker rooms of the biological sex. If there are students with gender identity issues, these students were provided an alternative private facility.
- On September 17, 2015, federal court dismissed the student's claims under Title IX and denied the student's motion for a preliminary injunction.
- Now on appeal to 4th Circuit. Arguments Heard. Awaiting decision.

R.M.A. v. Blue Springs R-IV School District



- Missouri's first case involving transgender student's use of the restroom
- Court denied writ of mandamus request of student-meaning the Court ruled in favor of the District and its policy of requiring students to use the restroom and locker rooms of their biological sex or a private restroom.
- Student's appeal was dismissed.

Guidance from Office of Civil Rights *Dear Colleague Letter (10/26/2010)*



▪ School districts may violate the civil rights statutes and the Department of Education's implementing regulations when *peer harassment based on* race, color, national origin, *sex* or disability is sufficiently serious that it *creates a hostile environment and* such harassment *is encouraged, tolerated, not adequately addressed, or ignored* by school employees.

Guidance from Office of Civil Rights *Dear Colleague Letter (10/26/2010)*



▪ When students are subjected to harassment on the basis of their LGBT status, they may also, be subjected to forms of sex discrimination prohibited under Title IX. *The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment.*

Guidance from Office of Civil Rights *Dear Colleague Letter (10/26/2010)*



▪ Harassing conduct was based in part on the student's failure to act as some of his peers believed a boy should act. The harassment created a hostile environment that limited the student's ability to participate in the school's education program.

▪ **NOTE:** Student did not identify the harassment as sex discrimination. Nonetheless, the school should have recognized that the student had been subjected to gender-based harassment covered by Title IX.

More OCR Guidance

Dear Colleague Letter (10/26/2010)



- Bullying & Harassment Defined:
 - Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Bullying and harassment do not have to involve repeated incidents.

Why the OCR Silence in Missouri?



- [Township High School District 211 \(Illinois\) Resolution Agreement](#)
- Biologic male provided access to "female student locker and limited to private changing area."
- Same for "away" events.
- Limited access to assigned name and gender.
- Subsequent requests access to locker rooms
 - Student locker in nearby area
 - Variety of similar options
- Creation of individual student support teams, including a medical professional.
- Annual review of student/parent satisfaction.
- Open ended reporting and supervision (See Agreement to Resolution)

Good News and Bad News



- OCR has first time acknowledged their "Dear Colleagues" and "Advisory Letters" are not enforceable.
 - Implications for every area of OCR jurisdiction (i.e. special education).
- But,
- Outcomes of Presidential Election will determine where we go.
- Democratic victory could allow OCR to transform "Advisory" and "Dear Colleague" letters may be published for comment and enacted as binding regulations.
 - So,
 - Locker/shower facilities
 - Restrooms
- Republican victory will result in ?

More OCR Guidance



How to respond to a complaint

- Avoid shaping a response based on how the victim labels or identifies the incident. Instead determine whether the nature of the conduct implicates the student's federal civil rights.
- Look beyond simply disciplining the perpetrators. If a hostile environment exists, districts must take a systemic approach to address the unique effect that the misconduct had on school climate.

More OCR Guidance



- Once a district is on notice of frequent abuse and/or harassment:
 - Work closely with the parents and the student and develop a method that enables them to bring complaints of such abuse to district staff in a timely way.
 - Maintain a record of all such complaints and the district's response to each complaint.
 - Consider whether systemic action to address harassment needs to be taken.
 - staff training or student educational programs
 - Inform the parent of the right to file a grievance.

In the Meantime . . .



- Adopt a Policy
 - 2115 or similar language
- Initial Meeting with Parents
- Identify a Staff Member to Monitor Absence of Bullying Areas
- Locker Rooms/Change Areas
- Apparel
- Name and Gender Designation

Questions?

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Student Welfare**Transgender Students**

The Board of Education believes that all students are entitled to a quality education in a safe environment. This belief extends to the growing number of transgender students, that is, students who self-identify with a gender that is different from their biological sex.

The Board seeks to balance the privacy needs of all students with the preferences of transgender students and their parents/guardians. This policy sets forth the practices that are in place for the welfare of all of our students. This policy does not anticipate every situation that might occur with respect to transgender students, and the needs of each transgender student must be assessed on a case-by-case basis.

Student Identity

Transgender students are permitted to select a first name and pronoun that more closely matches their gender identity. This chosen name shall be used by District staff to communicate verbally and electronically other than in official school records. Changes of name shall not be permitted to exceed one name change per school year.

Official school records shall continue to list the birth name and biological sex of the student. The student or their parents/guardians may obtain a name change through the court system. In such case, the District will amend its official school records to comply with the court order.

Restrooms

The District, when requested, will designate a gender neutral restroom(s) in each building with the appropriate signage.

All students, regardless of their gender identity will have the option of using the gender neutral restroom, or the restroom designated for their biological sex.

Locker Rooms/Showering Facilities

Elementary students are not required to change into PE uniforms and, hence, do not require showering.

In District secondary schools, students who elect to participate in physical education classes that require access to locker rooms or showering facilities will be expected to use those facilities designated for their biological gender. However, upon request of a transgender student and/or their parents, alternatives will be considered. In consultation with the student and parents, the alternative will include, but not be limited to, on-line PE courses, independent study; scheduling adjustments to include early access to change and showering facilities; separate enclosed change

and shower room within the locker room. Each such request would be considered on a case-by-case basis. However, if consensus cannot be reached with the student/parents, the District will select an option that is in the best interest of all students.

Apparel

Transgender students are permitted to dress in the same manner as the gender with which they identify. However, all students are required to dress consistently with the school's dress code.

Extra-Curricular/School Activities

Similarly, all students are permitted to wear apparel associated with their gender or gender identity. On occasion, student activity groups schedule overnight trips. Students will be assigned rooms, with sponsor approval, mutually agreed upon by student roommates. The District is a member of the Missouri State High School Activities Association (MSHSAA). As such, the District is required to adhere to MSHSAA regulations regarding athletic participation by transgender students.

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AGREEMENT TO RESOLVE

Between Township High School District 211 and
the U.S. Department of Education, Office for Civil Rights
OCR Case # 05-14-1055

In order to resolve the issues in the above-referenced complaint filed with the U.S. Department of Education, Office for Civil Rights (OCR), under Title IX of the Education Amendments of 1972 (Title IX), Township High School District 211 (District), without admitting any violation of federal law or regulations, agrees to take the actions outlined in this Resolution Agreement.

TERMS OF THE AGREEMENT

I. EXPERT CONSULTANT

- A. No later than thirty (30) calendar days after execution of this Agreement, the District will engage one or more third-party consultants with expertise in child and adolescent gender identity, including transgender and gender nonconforming youth, to support and assist the District in implementing this Agreement. The District may propose as its consultant a current employee of the District, if it currently employs an individual with the required expertise and experience.

- B. The consultant(s) will be agreed upon by both the District and OCR.

Reporting Requirement: Within 30 calendar days of the execution of this Agreement, the District will provide OCR with a written summary of the expert consultant it proposes to engage, including that individual's application and resume and/or documentation concerning the individual's previous position(s), employer(s) or professional affiliation(s).

Within 30 calendar days of OCR's approval of the nominee, the District will provide OCR with written documentation that it has engaged the expert consultant.

- C. The District will promptly notify OCR if it intends to retain additional or alternative consultants during the term of this Agreement for purposes of implementing this Agreement.

- D. The District will be responsible for all costs, if any, associated with the retention of expert consultants.

Reporting Requirement: Within 30 days of any determination to retain additional or alternative consultants, the District will provide OCR with a written summary of the expert consultant it proposes to engage, including that individual's application and resume and/or documentation concerning the individual's previous position(s), employer(s) or professional affiliation(s).

Within 30 calendar days of OCR's approval of the nominee, the District will provide OCR with written documentation that it has engaged the expert consultant, the contact information of each

additional consultant retained by the District in connection with this Agreement, as well as the start and end dates of each individual's services.

II. INDIVIDUAL MEASURES

A. For the duration of Student A's enrollment in the District:

1. based on Student A's representation that she will change in private changing stations in the girls' locker rooms, the District agrees to provide Student A access to locker room facilities designated for female students at school and to take steps to protect the privacy of its students by installing and maintaining sufficient privacy curtains (private changing stations) within the girls' locker rooms to accommodate Student A and any students who wish to be assured of privacy while changing;
2. the District will coordinate with hosts of off-campus, District-sponsored activities to arrange that Student A is provided access to facilities designated for female students in a manner consistent with item II.A.1. The District will work with Student A to honor her requests for facility accommodations in the least disruptive manner possible for Student A; and
3. the District will continue to ensure that any school records containing Student A's birth name or reflecting Student A's assigned sex, if any, are treated as confidential, personally identifiable information; are maintained separately from Student A's records; and are not disclosed to any District employees, students, or others except as allowed by state and federal laws governing the release of student record information.

Reporting Requirement: By January 15, 2016, the District will provide OCR with written documentation of its compliance with item II.A, including but not limited to, any and all documentation relating to Student A's access to girls' locker rooms and a copy of Student A's registration and enrollment materials confirming her name and preferred gender identity. The District will provide OCR with a monitoring report describing its ongoing compliance with item II.A on October 1 and February 1 of each year that this Agreement is in force.

B. If any student requests additional privacy in the use of sex-specific facilities designed for female students beyond the private changing stations described in item II.A.1, the District will provide that student with access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.

Reporting Requirement: By January 15, 2016, the District will provide OCR with written documentation of any request made pursuant to Item II.B. and a description of the steps taken by the District to accommodate that request.

- C. No later than thirty (30) calendar days after execution of this Agreement, the District will notify Student A and her parents that they may, at any point during Student A's enrollment in the District, request the District to establish a support team to ensure Student A has access and opportunity to participate in all programs and activities, and is otherwise protected from gender-based discrimination at school. If the District receives such a request, it will form a support team that will:
1. include, at a minimum, Student A, her parents, an advocate or representative of the parents' choice (if any), a medical professional of the parents' choice (if any), and relevant District personnel familiar with Student A;
 2. develop a student-specific support plan to provide Student A with access to all school and District facilities and activities, addressing any particular issues raised by Student A or her parents;
 3. document its meetings, recommendations, and decisions, including, but not limited to, the date and location of each meeting, the names and positions of all participants, the basis for its recommendations and decisions, and supporting third-party opinions and information considered and/or relied upon in the meeting; and
 4. at least once each school year and at any time upon the request of Student A or her parents, review Student A's circumstances to determine whether existing arrangements related to Student A's gender identity, gender transition, or transgender status are meeting her educational needs and ensuring that Student A has access and opportunity to participate in the District's education programs and activities. Once constituted, the support team will be in place for the remainder of Student A's enrollment in the District or until her parents request in writing that it be terminated.

Reporting Requirement: Within 30 calendar days of the execution of this Agreement, the District will provide OCR with written documentation of its compliance with item II.C, including but not limited to, documentation of the request for the formation of the team, the names and positions of the team members, date(s) the team met, and any documentation of its meetings, recommendations, and decisions. The District will provide OCR with a monitoring report describing its ongoing compliance with item II.C on October 1 and February 1 of each year that this Agreement is in force.

III. NON-DISCRIMINATION NOTICE

- A. By January 15, 2016, the District will draft and submit to OCR for review and approval a revised notice of nondiscrimination on the basis of sex that meets the requirements of the Title IX regulation, at 34 C.F.R. § 106.9, including, but not

limited to, stating that the District does not discriminate on the basis of sex in its educational program or activities, stating that inquiries about sex discrimination may be referred to the Title IX Coordinator or OCR, and including the name or title and contact information (address, email address, and telephone number) for the District's Title IX Coordinator, as required by the Title IX regulation, at 34 C.F.R. § 106.8. The following statement will satisfy this requirement and be approved by OCR:

Township High School District 211 does not discriminate on the basis of sex in its educational programs or activities, and is required by Title IX not to discriminate in such a manner. This prohibition extends to employment and admission. The following employee(s) have been designated to address questions or complaints about discrimination: Title IX Coordinator, [Name or Title], [Address], [Email Address], [Phone Number]. Inquiries concerning the application of Title IX may be referred to the Title IX Coordinator or to OCR.

- B. Within 30 days of OCR's approval, the District will publish the revised notice of nondiscrimination on its website and as otherwise required by the Title IX regulation, at 34 C.F.R. § 106.9.

Reporting Requirement: By January 15, 2016, the District will provide OCR with draft revised notice of nondiscrimination for OCR's approval pursuant to item III.A. Within 60 days of OCR's approval, the District will publish the revised notice of nondiscrimination on its website, as well as in each announcement, bulletin, catalog, or application form which it makes available, as required by the Title IX regulation, at 34 C.F.R. § 106.9.

IV. MONITORING AND REPORTING

- A. The District will provide documentation of its compliance with this Agreement through written compliance reports, which will be produced to OCR, as described above. In addition, to demonstrate its compliance with this Agreement, Title IX and its implementing regulation, by June 1, 2016, the District will provide the following documentation:
 - 1. a copy or detailed description of all gender-based discrimination or harassment complaints or incidents that occurred during the reporting period, including documentation or a detailed written description of the District's response to each incident;
- B. The District will provide all reports, documents, and information required to be produced to OCR pursuant to this Agreement in electronic form, usable by OCR, or in written form if the data in electronic form would not be usable, in accordance with the timelines set herein

Based on the terms and reporting requirements of this Agreement, OCR anticipates closing its monitoring of this Agreement by June 30, 2017.

The District understands that OCR will not close the monitoring of this Agreement until OCR determines the District has fulfilled the terms of this Agreement and is in compliance with the regulations implementing Title IX, 34 C.F.R. §§ 106.9 and 106.31, which were at issue in this case.

The District understands that by signing this Agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this Agreement. Further, the District understands that during the monitoring of this Agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this Agreement and is in compliance with the regulations implementing Title IX, 34 C.F.R. §§ 106.9 and 106.31, which were at issue in this case.

The District understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings, including to enforce this Agreement, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

Signed:

Date:

/s/

December 2, 2015

Township School District 211