Demystifying the Transgender Laws: How to Prevent Bathroom Battles from Becoming an Issue in Your Municipality

International Municipal Lawyers Association
Personnel Law Committee Webinar
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What are we talking about, anyway?

• “Transgender” is the umbrella term that describes individuals whose gender given to them at birth does not match the gender that they truly feel that they are, regardless of whether they have had gender reassignment surgery.
Terms:

- “Assigned gender” – the gender given to everyone at birth based on physical anatomy
- Gender identity or “affirmed” gender – is a person’s deeply held sense of their own gender (regardless of body parts)
- “Transgender female” is a person born male who identifies as female
- “Transgender male” is a person born female identifying as a male
- NOTE: Courts use the word “sex” and “gender” interchangeably, but distinguish “gender identity”
Terms:

• “Transvestite” is a person who derives pleasure from dressing in the clothes of the opposite gender

• Reassignment surgery – the surgical procedure that an individual undergoes to conform their body to their gender identity

• “Gender nonconforming” – describes people whose gender expression differs from stereotypical societal expectations related to gender.
Transition

• “Transition” is the time when a person begins to live as the gender with which they identify instead of the gender with which they were born.
• Generally begins with a diagnosis of gender dysphoria
• First step is a court-ordered name change
• To change the gender marker on your IL driver's license,
  • either a certified copy of your amended birth certificate or
  • a letter or affidavit from your physician certifying that you have taken or are taking appropriate clinical steps to change your gender.
Laws on Transgender Rights

Local laws
State and federal legislation
Governmental edicts
Court guidance

A Boy’s Life
Laws on Transgender Rights

• Changing rapidly
• Tied in with developments in society
• Emotionally charged
• All over the board
• Starts with Title VII’s prohibition against discrimination on the basis of sex.
Chronology of Significant Transgender Events

1984
7th Circuit finds a transsexual pilot is not entitled to Title VII sex discrimination protection, interpreting sex discrimination as “against women because they are women and men because they are men.” “The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder.”
Ulane v. Eastern Airlines, Inc., 742 F.2d 1081

1989
U.S. Supreme Court rules in Price Waterhouse v. Hopkins that Title VII grants relief to a (non transgender) woman who is treated differently because she is “too masculine” and brash. 490 U.S. 228 (1989)

1993-2002
Certain courts do not interpret the holding of Price Waterhouse as applying to transgenders.

2004
In Smith v. Salem, the 6th Circuit holds that Title VII’s definition of “sex” extends to transgenders, and grants a transsexual firefighter protection. This is the first federal appellate ruling applying Title VII in this manner. 378 F.3d 566
The Illinois Human Rights Act is amended to include sexual orientation as a protected class. “Sexual orientation” is defined to include “gender-related identity.”
775 ILCS 5/1-103

Washington D.C. Office of Human Rights issues ban from labeling of single-occupancy bathrooms, although this is not enforced until 2013. Also adopts rule that individuals can use restrooms and other gender-specific facilities such as consistent with their gender identity or expression.

EEOC rules that Title VII’s definition of “sex” prohibits discrimination on the basis of gender identity or transgender status.
Macy v. Holder

Philadelphia enacts an Ordinance requiring all new City construction to include gender-neutral bathrooms and making it an “unlawful public accommodations practice” to deny a person access to a bathroom correlating with his/her gender identity.
Austin, Texas passes a gender neutral bathroom ordinance, requiring gender-neutral sign regulations for single use commercial restrooms.

U.S. Attorney General Eric Holder issues a memo that the DOJ takes the position that protections of Title VII extend to gender identity and transgender, notwithstanding conflicting federal appellate court rulings.

Caitlyn Jenner comes out as transgender during a 20/20 interview with Diane Sawyer.

OSHA issues guidance for employers that “All employees, including transgender employees, should have access to restrooms that correspond to their gender identity.”
Chronology

August 10, 2015
Seattle passes a gender neutral bathroom ordinance for single occupancy bathrooms

November 2, 2015
U.S. Dept. of Education Office for Civil Rights finds that Palatine Township H.S.D. 211 violated Title IX by denying transgender student access to girls’ locker room. The parties’ settle by agreeing that the student may use the girls’ locker room, changing behind a privacy screen. OCR Case 05-14-1055

November 13, 2015
Evanston passes an ordinance requiring certain single-occupancy bathrooms to be designated as gender neutral, others to be labeled as “male” or “female” and not addressing which restrooms transgenders should use

March 23, 2016
North Carolina enacts House Bill 2 – Local boards of education shall not permit students to use multiple occupancy bathrooms or changing facilities designed for a sex other than the student’s biological sex.
The City of Highland Park passes an ordinance requiring single-occupancy restrooms in all new developments within the City be designated as gender neutral.

Target announces that transgenders can use the store’s bathrooms that match their gender identity.

The U.S. Court of Appeals for the Fourth Circuit rules in the case of G.G. v. Gloucester County School Board that the Gloucester County School Board violated Title IX by denying a transgender boy access to the boys’ restrooms.

The DOJ writes to the Governor of North Carolina informing him that H.B.2 violates Title VII and demands that the Governor remedy the violations by no longer implementing H.B.2.
<table>
<thead>
<tr>
<th>May 4, 2016 (same day)</th>
<th>May 9, 2016</th>
<th>Same Day</th>
<th>May 13, 2016</th>
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<td>51 families of students who attend Palatine Twp S.D. 211 file suit against the DOJ and the DOE challenging the settlement agreement and the DOJ/DOE’s interpretation of Title IX claiming “sex” does not equal “gender identity.” Students and Parents for Privacy v. U.S. DOE, et al., case no. 16 CV04945 N.D. IL</td>
<td>The Governor of North Carolina files suit against the DOJ seeking declaratory relief confirming that H.B.2 does not violate Title VII. McCrory v. USA, et al., case no. 5:16-cv-00238, U.S.D.C. E. Dist. of NC</td>
<td>The DOJ files suit the same day against North Carolina seeking declaratory relief confirming that North Carolina is in violation of Title VII and Title XI by complying with the provisions of H.B.2. USA v. State of North Carolina, Case no. 1:16-cv-00425 U.S.D.C. Middle Dist. of NC</td>
<td>The DOJ and DOE release a “Dear Colleague Letter” to schools across the country Title IX compliance when it comes to transgender students. It states schools must allow transgender students to use facilities consistent with their gender identity, and that a school may not require a transgender to use individual-user facilities when other students are not required to do so. It also states schools could lose federal funding unless they comply.</td>
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## Chronology

<table>
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<td>May 25, 2016</td>
<td>Eleven states file suit against the DOJ, DOE, EEOC &amp; DOL in Texas challenging the new interpretations of Titles VII and IX regarding gender identity. They allege that the new rules did not comply with the Fed. APA, which requires a notice and comment process before a federal agency may finalize a new rule. State of TX v. USA, Case 7:16-cv-00054, N.D. of Texas, Wichita Falls</td>
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<td>June 10, 2016</td>
<td>Highland Local School District in Ohio files suit against the DOE and the DOJ seeking to stop implementation of the DOJ and DOE guidance on transgender students. BOE of the Highland Local School District v. US Dept of Ed., case no. 2:16-cv-00524.</td>
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<td>July 8, 2016</td>
<td>Ten additional states sue the DOJ, DOE, EEOC, and DOL challenging new interpretations of Title VII and Title IX regarding gender identity on the grounds that these new rules violated the Federal APA and several other federal laws.</td>
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<td>July 28, 2016</td>
<td>The Seventh Circuit rules in Kimberly Hively v. Ivy Tech Community College that “sex” as used in Title VII does not include sexual orientation, urging the Supreme Court to clarify or Congress to act. Case No. 3:14-cv-1791</td>
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July 20, 2016

Caitlyn Jenner says it was harder to come out as Republican than transgender
The Supreme Court of the United States issues a stay of the Fourth Circuit’s ruling in G.G. v. Gloucester County School Board. The stay is granted pending the grant or denial of Gloucester County School Board’s petition for a writ of certiorari.

The District Court for the N.D. of Texas issues a preliminary injunction enjoining the DOJ, DOE, EEOC, and DOL from enforcing the new guidance and rules interpreting Title VII and Title IX to protect discrimination based on gender identity.

The parents of several students who attend a Minnesota school district file suit against the DOJ and the DOE challenging the new guidance and interpretation of Title IX and alleging that the school district allowed a transgender girl access to the girls locker room based on the guidance contained in the May 13, 2016 “Dear Colleague Letter.”

Texas Attorney General Ken Paxton publicly urges Target to revise their new policy allowing transgender individuals to use bathrooms consistent with their gender identity in response to two recent incidents of males spying on females in Target restrooms.

The Supreme Court of the United States issues a stay of the Fourth Circuit’s ruling in G.G. v. Gloucester County School Board. The stay is granted pending the grant or denial of Gloucester County School Board’s petition for a writ of certiorari.
The NCAA announces that it will relocate all seven of its championships, including March Madness outside of North Carolina due to H.B. 2.

The Virginia Supreme Court agrees to hear an appeal of a case where the Fairfax County S.D. amended its anti-discrimination policy to include “sexual orientation,” “gender identity,” and “gender expression.” The circuit court had dismissed the suit.

The DOJ files a request for clarification in State of Texas v. USA, requesting that the District Court Judge clarify that his preliminary injunction order applies only to schools and not to workplaces.

The Atlantic Coast Conference (ACC) announces that they will pull all of their championship games out of North Carolina.
A judge in the Southern District of Ohio grants a preliminary injunction against Highland Local S.D. allowing a transgender female student access to the girls restrooms. The School District immediately appealed the decision to the Court of Appeals for the 6th Circuit.

The 7th Circuit vacates its July 26, 2016, Order in the case of Kimberly Hively v. Ivy Tech Community College, which held that “sex” as used in Title VII does not include sexual orientation, and granted a rehearing en banc.

A federal magistrate judge in Students and Parents for Privacy v. U.S. DOE recommends against granting a preliminary injunction prohibiting Palatine Twp. S.D. 211 from complying with the settlement agreement with the DOJ/DOE on transgender students access to locker rooms of their choice.

The District Court judge in State of Texas v. USA, confirms that his preliminary injunction against the DOE and DOJ from enforcing the new Title IX rules applies nationwide. The judge did not clarify if the injunction is limited to schools.
The DOJ files a notice of appeal to the 5th Circuit in State of Texas v. USA challenging the preliminary injunction preventing the enforcement of the new Title IX rules.

The U.S. Supreme Court grants the Petition for a Writ of Certiorari in G.G. v. Gloucester County School Board.

A judge in the Minnesota lawsuit challenging the DOJ/DOE new Title IX rules places the case on hold pending a ruling from the Supreme Court in G.G. v. Gloucester County School Board.

The 6th Circuit denies the request of Highland Local S.D. in Ohio for a stay of the injunction ordering the school district to allow a transgender female access to the girls restroom pending the outcome of the appeal.
Where does this leave us????

- Conflicting laws, court opinions and agency direction
- The real legal issues involve states’ rights + agency rulemaking
- High emotions on all sides
- Events are occurring almost daily
- Congress has not acted to amend Title VII or Title XI to include gender identity
April 19, 2016  Target announces transgender customers can use bathrooms and fitting rooms matching their gender identity

To date 1,420,336 people have signed a petition vowing to boycott Target as long as such policy is in place.

Target’s revenues drop by $10 million in the next seven weeks. CEO Brian Cornell says sales decline is due to “difficult retail environment.”

Target’s revenues for the second quarter fall to lowest level since 2014; Wal-Mart’s sales increase for the same period

August 17, 2016: Target announces it will spend $20 million installing single stall bathrooms in all stores
Bathroom issues
Let’s chat about body parts

Body parts + multi-stall bathrooms:
Gender reassignment surgery = who cares?
Male parts on transgender female + ladies’ room = inside stall
Female parts + transgender male + men’s room = inside stall
What is everybody afraid of?

• Haters gonna hate
• Deeply held gender identity beliefs v. deeply held privacy or religious beliefs
• Many instances of non-transgenders abusing transgender-friendly laws to gain access to facilities for perverted reasons
Man strips in front of girls in locker room, says transgender law allows it

SEATTLE, Washington, February 18, 2016 (LifeSiteNews) - A man twice entered the changing room of a swimming pool and began disrobing, once in front of a young girls’ swim team, saying transgender policies gave him the right to do so.

The unidentified man entered Evans pool in Seattle near Green Lake last Monday, February 8, and began taking off his shirt in front of female patrons.

When asked what he was doing, he said, “The law has changed and I have a right to be here.”

“Seeing this individual in the locker room, parents of swim team members (girls) and women who had paid for lap swim became alarmed and alerted our front desk staff,” said Seattle Parks spokesman David Takami in a statement. “In response, an Evans pool staff member entered the women’s locker room and asked the man to leave.” They offered both the man and the girls the opportunity to use a family changing room.

He left, only to return during a later youth lap swim, Takami said.

Officials said he had made no attempt to present himself as a woman, nor to identify as transgender when he checked in. By all appearances, he was a man.
What is everybody afraid of?

- A few instances of transgenders doing the same
- Fear of the unknown
Municipal issues

• Labeling of bathrooms
• Locker rooms
  – Police
  – Fire
  – Parks Departments or Recreation Programs
“The End of Girls’ Sports...”

• Her dreams of a scholarship shattered, your 14-year-old daughter just lost her position on an all-girl team to a male, and now she may have to shower with him.

*a full page newspaper ad placed by the Minnesota Child Protection League after the Minnesota State High School League voted to allow transgender student athletes to play on the team with which they identify*
How to Comply With Transgender Protections

- Workplace - employees
- Public services - patrons
Best practices

• Have a policy before it becomes a problem
• Have a policy for employees and a policy for patrons
Workplace

- EEOC advises implementing a policy against discrimination
- Policy should address the following issues:
  - Terminology
  - Prohibition on discrimination
Workplace

– Who to complain to about violations
– Rights of transgender individuals in the workplace
  • Privacy rights
  • Name to be used – Be careful of pronouns
Workplace

• Employee responsibilities to respect
• Employer responsibilities to enforce
• Responsibilities of transitioning employees
• Dress code
• Complaints by co-workers
• Transgender employees
• Educate, educate, educate!
For Patrons It’s a Bit More Complicated

- EEOC and DOJ advise to have a policy which prohibits discrimination and addresses the following:
  - Restrooms – ideally gender neutral otherwise according to gender identity
  - Locker rooms – according to gender identity but private area for transgender and other individuals who do not want to change in a group setting
For Patrons It’s a Bit More Complicated

– The best practice is to accommodate those who feel uncomfortable, whether or not they are transgender themselves
What about gender specific programs, especially sports?

- More complicated
- This needs to be addressed on a case by case basis, considering the following factors:
  - age of the participant
  - sport or program
  - gender identified on legal documents
Other Supporting Information

- Physician statement (including psychiatric reports)
- Court ordered change of name
- Requirements of sponsoring organization (most require some confirming documentation)
- Whether the minor is pre or post pubescent
- Current medical treatments
Your To Do List

• Be aware of the developing trends and law on transgender rights

• Adopt policies for employees/patrons/participants
More To Do List

• Create gender neutral bathrooms and private areas in locker rooms
• Train employees
Collective bargaining obligations

• Remember that these issue may have collective bargaining implications
Frequently Asked Questions

KEEP CALM AND ASK QUESTIONS
Question 1

• Transgender rights only apply to individuals who have undergone reassignment surgery.
False! One aspect in the demystification of transgender individuals and rights is understanding what it means to be transgender. The word transgender is an umbrella term for people who identify with the gender that does not conform to the one assigned to them at birth. This may mean that a transgender person has undergone or is undergoing gender reassignment surgery, or it may mean that a person is simply living as the gender with which they identify without surgical reassignment.
Question 2

• If most co-workers are uncomfortable with a transgender co-worker, the comfort of the majority comes first.
Answer 2

• In fact, the opposite is true. Who uses which bathroom, for instance, is currently a huge topic of debate in some places. OSHA and EEOC have issued guidelines on the subject of bathrooms (as has President Obama to schools) which clearly state that while gender neutral, single bathrooms are best, if an individual complains about a transgender person’s use of the bathroom that they use, it is the one who complains who should be offered an alternative facility – not the transgender individual.
Question 3

• A public body can comply with the law if it provides a separate facility to the transgender individual.
Answer 3

• Perhaps, if there is an agreement with the parties about this. Be careful in making something like a privacy screen in a locker room a mandatory requirement.
Question 4

- Transgender employees must use their legal name at work.
Answer 4

- It is true that employers must report earnings to the IRS and Social Security Administration under an employee’s legal name, even if that name does not conform to the employee’s gender identity, but a transgender employee must be allowed to use at work any name they have chosen to match their gender identity. Repeated or malicious use of a name or pronoun which does not match an employee’s preferred name may be considered harassment under the law.
Question 5

• Employers do not have to have a separate policy for transgender issues.
While this might be technically true, the best practice is to establish a policy or procedures for addressing transgender issues in the workplace. First of all, a solid policy and procedures will aid in defense of any claims of discrimination. Secondly, these issues are still new and unfamiliar to many in the workforce. Policies, procedures and training demystify many questions that people ask about transgender rights in the workplace.
Question 6

- If a member of public asks about the gender of a patron or participant, what should you do?
Patron and program participant information, like that of employees is private. It is no more appropriate for someone to ask about a person’s gender assignment or identity than it is to ask about their marital status, their home address or their social security number. If ever asked this question or one similar to it, simply respond that the Village does not release any private information about participants or patrons but if they have any concerns about programs or services, you would be happy to assist them.
Question 7

• Our village offers a summer camp and we just learned that we are going to have a transgender camper. What should we do?
Answer 7

• First, speak with the camper or the campers’ parents. They may have a clear idea of how particular issues or concerns that may arise should be handled – and their proposals may eliminate problems in advance.
Question 8

• A co-worker announces he or she is transitioning to the opposite gender, you would like to talk about it with him or her. Is that okay?
Answer 8

• Yes, it is okay to ask about a co-worker’s transition provided they are comfortable speaking with you about it. Remember to follow their lead as to how they want to be treated, what name they want to be called and how private they want to keep the information.
Question 9

• You strongly suspect that a patron is pretending to be transgender as a joke or to mock those that really are or to have access to gender specific areas for criminal motive. How do you handle this?
Answer 9

- This is the biggest fear of all with concerns about misuse of transgender rights. Any good faith suspicion that someone is pretending to be transgender for any of these reasons should be handled like any other misconduct by employees, patrons or participants.
Question 10

• When transgender participants are using the facility that corresponds to their gender identity, what do we do about open spaces such as changing areas?
Answer 10

- The transgender person has the right to be in the locker room. If they are comfortable changing in the open, then that’s where they should change. If anyone is uncomfortable with this, then they will need to be accommodated.
Question 11

- What if a parent, participant or patron has a bona fide religious belief which does not agree with our gender identity policy?
Answer 11

- The idea is to accept people as they are. Bona fide religious beliefs should be accommodated by providing an alternative restroom or locker room for that person.
Questions

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