

# School District Faces Government Sanctions under Title IX for Denying Transgender Female Student Access to Locker Rooms

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An Illinois school district has violated anti-discrimination laws by not allowing a transgender student who identifies as female and is on her high school's girls' sports team to change and shower in the girls' locker room, the United States Department of Education Office of Civil Rights ("OCR") has held.

The OCR released its findings on November 2, 2015, after completing an extensive investigation of a complaint for unlawful discrimination under Title IX of the Education Amendments of 1972 filed by a transgender female high school student against the Township High School District 211 in Palatine, Illinois. Title IX prohibits discrimination on the basis of sex in any federally funded education program or activity. An entity in violation of Title IX may lose some or all of its Title IX funding.

## Background

The Township High School District 211 denied a transgender female student access to three separate girls' locker rooms ("LR") (including the Physical Education ("PE") LR, the PE Swim LR, and the Athletics LR). The Student alleged the District discriminated against her based on sex by denying her access to the girls' locker rooms because of her gender identity and gender non-conformity.

## OCR Decision

The OCR found the District violated Title IX for excluding the Student from participation in and denying her the benefits of its education program, providing services to her in a different manner, subjecting her to different rules of behavior, and subjecting her to different treatment on the basis of sex.

"The evidence shows that as a result of the District's denial of access to the girls LRs, Student A has not only received an unequal opportunity to benefit from the District's educational program, but also has experienced an ongoing sense of isolation and ostracism throughout her high school enrollment." Other than access to the female locker rooms, the OCR found the District treated the Student consistently with her gender identity, including identifying her by her female name and with female pronouns, providing her with full access to girls' restrooms and allowing her to participate in girls' sports.

## Alternatives Not Acceptable

The District argued it offered the Student alternative changing options, such as permitting her to change with several female friends in an alternative restroom closer to the PE gym and offering her another restroom near the Swim LR.

The OCR found that the alternatives "continued or would continue to exclude [the Student] from the girls' locker rooms and set her apart from her female classmates and teammates," particularly as some of the proposed alternative facilities were not comparable to those provided for other girls. For example, unlike the other female students who used the PE class swim unit, the Student had access only to a rinse shower and was not able to dry her hair because there was no electrical outlet. Furthermore, by not having access to the PE locker room, she was subjected to stigma and different treatment, OCR said, because she occasionally had been late to class or missed class announcements that were made in the girls' locker room.

Finally, as a result of being denied access to the girls Athletics LR, the Student felt excluded from the team because she missed the informal huddle in the LR before matches, locker room "girl talk," and

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the female bonding in the LR. Accordingly, the OCR concluded the District denied the Student's Title IX rights.

### Privacy Concerns Unavailing

While acknowledging that it denied the Student access to the female locker rooms, the District argued that it had to balance the Student's rights and interests with two distinct privacy concerns of other female students:

1. the need to protect female students from "being observed in a state of undress by a biologically male individual," and
2. the "inappropriateness of allowing young female students to view a naked male in the locker room in a state of undress."

The OCR found both of these arguments unpersuasive as the District had installed five showers with privacy curtains and five restroom stalls in the girls PE LR, but had not provided private changing areas in the other two LRs.

"The District's installation and maintenance of privacy curtains in one locker room go a long distance toward achieving such a nondiscriminatory alternative because providing sufficient privacy curtain access to accommodate any students who wish to be assured of privacy while changing would allow for protection of all students' rights in this context. Those female students wishing to protect their own private bodies from exposure to being observed in a state of undress by other girls in the locker rooms, including transgender girls, could change behind a privacy curtain."

Given the Student's willingness to change privately, the OCR said, the District could have provided equal access to all three LRs if it installed additional privacy curtains for any student that wanted privacy.

### Recent Federal and State Enforcement Efforts

Schools districts, colleges, and private employers are increasingly at risk of transgender discrimination charges or complaints under laws enforced by the OCR, the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Occupational Safety and Health Administration as these agencies develop their policies on transgender issues. The EEOC, the DOL, and the DOJ have interpreted Title VII of the Civil Right Act's prohibitions on sex discrimination to bar employment discrimination based on gender identity.

On the employment front, in the *seven months* between October 2014 and April 2015, EEOC received 505 charges based on sexual orientation discrimination and 112 charges based on gender identity. Moreover, the EEOC's Strategic Enforcement Plan for 2012-2016 prioritizes the investigation and enforcement of LGBT (lesbian, gay, bisexual, and transgender) sex stereotyping claims. (See our articles, [EEOC Releases Aggressive Strategic Enforcement Plan Focused on Discrimination in Hiring and Recruitment](#) and [Title VII Prohibits Discrimination against Transgender Workers, EEOC Decides](#).)

Further, effective April 2015, the DOL's Office of Federal Contract Compliance Programs requires federal contractors subject to Executive Order 11246 to allow transgender employees to use the restroom and other facilities consistent with their gender identity. (See our article, [DOL Releases Regulations Extending Protections to Lesbian, Gay, Bisexual, and Transgender Employees, Applicants](#).)

Finally, the OSHA guidelines require all employers under its jurisdiction to provide a "safe and healthy working environment for all employees" and transgender employees "should have access to restrooms that correspond to their gender identity." OSHA recommends that companies implement written policies to ensure that all employees have "prompt access to appropriate sanitary facilities." The agency's best practices guide also recommends providing options from which a transgender employee may choose. These can include single-occupancy, gender-neutral facilities and the use of multiple-occupant, gender-neutral restroom facilities with lockable single-occupant stalls. (See our article, [Restroom Access Should Be Consistent with Employee's Gender Identity, OSHA Says in Workplace Safety and Health Update - Week of June 22, 2015](#).)

### Takeaways

Federal government agencies are increasingly examining the purported protections afforded to transgender students and employees, in both the public and private sectors. How to handle transgender issues is still a work-in-progress for the agencies and the entities they regulate. In this case, despite the District's accommodations and options to provide equal treatment to the Student in all respects other than access to the Locker Room, the OCR nevertheless held its efforts were insufficient. Moreover, in addition to the federal enforcement of LGBT rights, states also have enacted laws protecting LGBT individuals. (See our article, [Utah Governor Signs Landmark LGBT and Religious Expression Anti-Discrimination Bill](#).) To stay in compliance, employers must stay up-to-date on states' laws and regulations as well.

The following steps can help lower the risk of being under government scrutiny:

1. closely review and revise EEO (equal employment opportunity), harassment, and transgender policies;
2. ensure proper sensitivity training of administrators, faculty, and students to foster diverse and inclusive primary, secondary school, and campus environments to avoid stigmatizing transgender students;
3. ensure that accommodations for transgender students and employees provide equal access in all respects, as well as balance privacy concerns; and
4. view our free webinar, Sexual Stereotyping & Gender Identity in the Workplace: Recent Developments.

Because of the complexities involved in this area, school districts, colleges, and private sector employers would be well-served to regularly review their policies and practices with counsel to ensure they address specific organizational needs effectively and comply with applicable law. Jackson Lewis attorneys are available to answer inquiries regarding this and other developments.

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