



*New England School Development Council*

28 Lord Road, Marlborough, MA 01752 ➤ Tel: 508-481-9444 ➤ [www.nesdec.org](http://www.nesdec.org)

## **Transgender Issues and Bathroom Access: A Continuing Hot Issue for School Districts**

**By: Jeanne M. Colachico, Esq.**

Current events, the election campaign cycle, and court challenges in recent days and months have resulted in an ever thickening quagmire on the issue of transgender identity; the rights and obligations of employers, public accommodations, and school districts; and, most recently, bathroom and locker room access for transgender employees and students. In an effort to provide some clarity to these issues, the Equal Employment Opportunity Commission has issued a new fact sheet which focuses on bathroom access and reminds all employers that discrimination based on transgender status is sex discrimination in violation of Title VII of the Civil Rights Act, and any contrary state law (such as North Carolina's HB-2, Mississippi's HB 1523, and Oxford, Alabama's Ordinance) is not a defense to transgender claims filed under Title VII.

This Fact Sheet reviews the EEOC's 2012 and 2015 decisions. in which it held that:

- denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination;
- an employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; and
- an employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it).

The fact sheet explains that "transgender" refers to people whose gender identity or expression is different from the sex assigned to them at birth (e.g., the sex listed on an original birth certificate). The term "transgender woman" typically is used to refer to someone who was assigned the male sex at birth but who identifies as a female. Likewise, the term "transgender man" typically is used to refer to someone who was assigned the female sex at birth but who identifies as male. A person does not need to undergo any medical procedure to be recognized as a transgender man or a transgender woman; while not stated in the fact sheet, neither does a transgender person need to provide proof of a legal name change, but rather, the EEOC and many other local and state jurisdictions recognize, an individual is recognized as transgender as long as "he, she, they, ze, hir (or other preferred personal pronouns)" consistently presents as the gender different from the individual's biological sex assigned at birth.

Further, the EEOC states that gender-based stereotypes, perceptions, or comfort level must not interfere with the ability of any employee to work free from discrimination, including harassment. As the Commission observed in 2015, "[S]upervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort."

With respect to educational settings and students, the EEOC also notes that the federal appeals court in Richmond reached a similar conclusion by deferring to the Department of Education's position in a very recent finding that the prohibition against sex discrimination under Title IX requires educational institutions to give transgender students restroom and locker access consistent with their gender identity. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. April 19, 2016). A similar decision was reached in November 2015 in a Chicago case in which the Department of Education Office of Civil Rights held that an Illinois school district 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.

Additionally, the EEOC states that, like all non-discrimination provisions, these protections address conduct in the workplace, not personal beliefs. Thus, these protections do not and should not require a change in sincerely-held religious or moral beliefs. Rather, the agency seeks to ensure appropriate workplace treatment so that all employees may perform their jobs (and students may enjoy the benefits of educational programs) free from discrimination.

Continuing a growing trend in this area, other federal government agencies also have issued guidance on transgender employees that is applicable to any workplace. The Occupational Safety and Health Administration (OSHA) issued "[A Guide to Restroom Access for Transgender Workers](#)" in 2015, and the U.S. Office of Personnel Management issued "[Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace](#)." The guidance from those agencies is consistent with these provisions.

The fact sheet is issued as lawmakers in states and municipalities across the United States continue to consider measures to proscribe or to protect bathroom use by transgender people and as the public discourse on these topics continues. In the upcoming months, school districts will need to stay apprised of expanding protections in this area and ensure that their anti-discrimination and anti-retaliation policies comply with new laws. As such, school districts should take the following actions:

- Closely review new guidance relating to transgender employees and students to be apprised of new trends and rulings;
- Regularly review and update district equal employment opportunity (EEO), harassment, and transgender policies and practices to ensure compliance and to be sure they address specific organizational needs effectively;
- Ensure awareness and sensitivity to transgender and as well as other diversity-related issues by appropriate training of administrators, teachers, and students to foster diverse and inclusive primary and secondary school environments to avoid stigmatizing transgender students; and
- Ensure that accommodations for transgender students and employees provide equal access in all respects, while balancing privacy concerns.

NESDEC will continue to update its members on this and other important legal trends impacting school districts. For questions about this or other lesbian, gay, bisexual, and transgender (LGBT) legal issues, please contact the NESDEC office.