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TRANSGENDER STUDENTS' USE OF BATHROOMS AND LOCKER ROOMS

Protections for Transgender Students Generally

Safe use of bathrooms and locker rooms in schools and colleges is essential for any student—particularly transgender students, who can face unique challenges. Transgender people are individuals who have a persistent and deeply held identification with a gender that is different from that which they were assigned at birth. Like everyone else, transgender students deserve to use bathrooms and locker room facilities with assurances for their safety and dignity.

In addition, Massachusetts law prohibits public schools and colleges from discriminating against transgender students, including on the bases of sex and disability.¹ For example, in Pat Doe v. Yunits², a Superior Court found that a transgender student who was forbidden by her school from wearing clothing that comported with her female gender identity could bring a discrimination action against the school district.

Recent interpretations of state and federal law by courts and government agencies in related contexts make clear that transgender students are protected by existing law. For example, sex discrimination laws have been determined to protect transgender people in employment and credit.³ The same is true for disability protections in both school and employment settings.⁴

¹ See Mass. Gen. L. c. 76, sec. 5 (prohibiting discrimination “in obtaining the advantages, privileges and courses of study” on account of sex); Mass. Const. Pt. 1, Art. I, X and CXIV (state constitutional prohibition of unequal treatment based upon sex and disability).

² 2001 WL 664947 (Mass. Super. Ct. Feb. 26, 2001).

³ See Millett v. Lutco, 2001 WL 1602800 (Mass. Comm’n Against Discrimination) (Massachusetts law prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals); Rosa v. Parks West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (a transgender person denied a bank application for a loan could sue under the Equal Credit Opportunity Act’s sex discrimination protections).

⁴ See Pat Doe, 2001 WL 664947 at *5 (finding that state constitutional disability protections covered a transgender student seeking to wear clothing that comported with her female gender identity); Jette v. Honey Farms, 2001 WL 1602799 (Mass. Comm’n Against Discrimination) (holding that Massachusetts disability protections in employment covers transgender employees).

As such, transgender students are guaranteed non-discriminatory treatment at public schools and colleges throughout Massachusetts. This guarantee includes ensuring that transgender students have safe and dignified access to the bathroom and locker room facilities that are consistent with each student's gender identity and expression.

Transgender Students' Right to Use Gender-Appropriate Bathrooms

Transgender students should be allowed to use the bathroom that would be appropriate for a non-transgender student with the same gender identity and expression as the transgender student, regardless of the transgender student's birth sex. Most transgender students already do so without anyone needing to be informed of or to scrutinize the student's gender or medical history. The touchstone for equality in this context is equal treatment. Non-transgender students appropriately are not asked for proof of their gender or information relating to their medical history; neither should transgender students be asked for such information. An alternative that would require either anatomical checks or proof of medical history would be insulting, invasive, and would violate the student's right to privacy, particularly with regard to personal medical information.

In addition, forcing transgender students who have transitioned to use the bathroom that matches their assigned birth sex would actually cause more distraction and problems. For example, a female-to-male transgender individual (who has transitioned from female to male by taking hormones with or without any surgical intervention) has a gender presentation that is similar to non-transgender men. Requiring a transgender male student to use the women's room would likely make everyone uncomfortable--the transgender male student as well as the non-transgender female students with whom he would have to share the facility. The same would be true for transgender women. Also, such a policy would be not only degrading and potentially unsafe for the transgender student but seriously damaging to the student's mental health.

Transgender Students' Right to Use Gender-Appropriate Locker Rooms

While some locker rooms can pose a slightly different situation, transgender students should be allowed to use the locker room that would be appropriate for a non-transgender student with the same gender identity and expression.

Like most people, transgender people seek privacy and personal space when changing and showering in locker rooms, in order to protect their own safety and privacy. Just as is true for many non-transgender individuals, many transgender individuals have a strong sense of modesty and choose to use private shower stalls when available and enclosed bathroom stalls to change their clothes. As is also true for non-transgender individuals, not everyone is as modest.

In situations where nudity may be unavoidable, and a transgender student has expressed discomfort with this situation, schools and colleges can make a reasonable

accommodation by creating a separate changing/showering space within the locker room—as many do already for people with physical disabilities. This solution may be as easy as putting up a shower curtain, or it may involve creating a separate shower stall or changing space that is private. Either way, schools and colleges should work with the transgender student/s to find an accommodation that is both reasonable and appropriate for the student, and that does not require the student to use an inappropriate facility.

An inappropriate facility would be one that is not consistent with the student's gender identity and expression. For example, it would not be appropriate for a school to require a student who has a male gender identity and expression (even if that student was born female) to use the locker room facility provided for female students. Neither would it be appropriate for a school to require a student who has a female gender identity and expression (even if that student was born male) to use the locker room facility provided for male students. .

As a last resort, if no reasonable accommodation that satisfies the student's concern can be made within the locker room that is consistent with the student's gender identity and expression, then a school or college can make available a separate, single-user locker room and showering facility.

Summary

In general, we have found at GLAD that most people do not encounter problems with transgender people using bathrooms and locker room facilities. To the extent we have learned of problems, we have found that appropriate education and/or training can resolve them. Often, resolving a concern that gets raised either by a transgender or non-transgender person in this context is as easy as educating staff or students about the basic realities and existence of transgender people's lives. Having appropriate policies in place to begin with can help prevent any problems from arising. The Massachusetts Department of Elementary and Secondary Education (DESE) has issued guidance that public schools should put in place for their transgender students that include allowing them to use the bathroom and locker room that corresponds to their gender identity. The DESE guidance can be found at: <http://www.doe.mass.edu/ssce/GenderIdentity.pdf>.

Update March 2014