

Book

Policies for Ohio Local Update

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Title

Vol. 40, No. 2 - January 2022 GUIDANCE DOCUMENT: ADDRESSING LEGAL ISSUES CONCERNING TRANSGENDER STUDENTS AND EMPLOYEES

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ATTORNEYS AT LAW

GUIDANCE DOCUMENT

To: Neola Clients

From: Peters Kalail & Markakis Co., L.P.A.

Re: Addressing Legal Issues Concerning Transgender Students and Employees

Date: January 2022

Discrimination against a student or employee based on the person's gender identity or sexual orientation is an unlawful violation of Title IX (20 United States Code ("U.S.C.") 1681 et seq.) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(a)(1)), respectively. Both laws prohibit discrimination based on sex.

On June 15, 2020, the United States Supreme Court in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), held that Title VII's prohibition against discrimination on the basis of sex includes a prohibition against discrimination on the basis of gender identity or sexual orientation.

Bostock involved an employee who was terminated for being gay or transgender. After *Bostock*, because courts have consistently applied Title VII law to Title IX,¹ United States appellate courts began to apply *Bostock* to Title IX cases to hold

that discrimination based on gender identity or sexual orientation violates Title IX's prohibition against discrimination based on sex.²

On January 20, 2021, President Biden issued Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation ("EO"). Among other things, the EO states: "All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation." The EO directs all federal agencies, including the U.S. Department of Education, to align their policies and procedures to reflect the scope of Title VII and Title IX pursuant to *Bostock*. As a result, school districts should expect that the U.S. Department of Education's Office for Civil Rights ("OCR") will investigate claims of discrimination on the basis of gender identity or sexual orientation as violations of Title IX.³

As such, boards of education should verify their student and employment policies and regulations/guidelines prohibit gender discrimination, including discrimination on the basis of gender identity or sexual orientation.⁴ School boards should further verify that their practices and the practices of their employees do not discriminate against employees, students, or the public on the basis of gender identity or sexual orientation.

In regard to gender identity, school personnel must treat employees, students, and members of the public consistent with their gender identity. If a person identifies as a gender that differs from the person's gender as identified at birth, school personnel generally must recognize the person's current gender identity.

Terminology - For purposes of clarity and consistency as to the meaning of various terms used in this guidance document and related to discussions involving the topics addressed in this document, Neola offers the following definitions that are taken from the GLAAD Media Reference Guide - 10th Edition (<https://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf>.)⁵

Sex – The classification of a person as male or female. At birth, infants are assigned a sex, usually based on the appearance of their external anatomy. (This is what is written on the birth certificate.) A person's sex, however, is actually a combination of bodily characteristics including: chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics.

Gender Identity – A person's internal, deeply held sense of their gender. For transgender people, their own internal gender identity does not match the sex they were assigned at birth. Most people have a gender identity of man or woman (or boy or girl). For some people, their gender identity does not fit neatly into one of those two choices (see non-binary and/or genderqueer below.⁶ Unlike gender expression (see below) gender identity is not visible to others.

Gender Expression – External manifestations of gender, expressed through a person's name, pronouns, clothing, haircut, behavior, voice, and/or body characteristics. Society identifies these cues as masculine and feminine, although what is considered masculine or feminine changes over time and varies by culture. Typically, transgender people seek to align their gender expression with their gender identity, rather than the sex they were assigned at birth.

Sexual Orientation – Describes a person's enduring physical, romantic, and/or emotional attraction to another person. Gender identity and sexual orientation are not the same. Transgender people may be straight, lesbian, gay, bisexual, or queer. For example, a person who transitions from male to female and is attracted solely to men would typically identify as a straight woman.

Transgender (adj.) – An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms – including *transgender*. Some of those terms are defined below. Use the descriptive term preferred by the person. Many transgender people are prescribed hormones by their doctors to bring their bodies into alignment with their gender identity. Some undergo surgery as well. But not all transgender people can or will take those steps, and a transgender identity is not dependent upon physical appearance or medical procedures.

Transsexual (adj.) – An older term that originated in the medical and psychological communities. Still preferred by some people who have permanently changed – or seek to change – their bodies through medical interventions, including but not limited to hormones and/or surgeries. Unlike *transgender*, *transsexual* is **not** an umbrella term. Many transgender people do not identify as transsexual and prefer the word *transgender*. It is best to ask which term a person prefers. If preferred, use as an adjective: transsexual woman or transsexual man.

Trans – Used as shorthand to mean *transgender* or *transsexual* – or sometimes to be inclusive of a wide variety of identities under the transgender umbrella. Because its meaning is not precise or widely understood, be careful when using it with audiences who may not understand what it means. Avoid unless used in a direct quote or in cases where you can clearly explain the term's meaning in the context of your story.

Transgender man – People who were assigned female at birth but identify and live as a man may use this term to describe themselves. They may shorten it to trans man. (Note: *trans man*, not "transman.") Some may also use FTM, an abbreviation

for female-to-male. Some may prefer to simply be called *men*, without any modifier. It is best to ask which term a person prefers.

Transgender woman – People who were assigned male at birth but identify and live as a woman may use this term to describe themselves. They may shorten to trans woman. (Note: *trans woman*, not "transwoman.") Some may also use MTF, an abbreviation for male-to-female. Some may prefer to simply be called *female*, without any modifier. It is best to ask which term a person prefers.

Cross-dresser – While anyone may wear clothes associated with a different sex, the term *cross-dresser* is typically used to refer to men who occasionally wear clothes, makeup, and accessories culturally associated with women. Those men typically identify as heterosexual. This activity is a form of gender expression and not done for entertainment purposes. Cross-dressers do not wish to permanently change their sex or live full-time as women. *Replaces the term "transvestite."*

PLEASE NOTE: Transgender women are not cross-dressers or drag queens. Drag queens are men, typically gay men, who dress like women for the purpose of entertainment. Be aware of the differences between transgender women, cross-dressers, and drag queens. Use the term preferred by the person. Do not use the word "transvestite" at all, unless someone specifically self-identifies that way.

Transition – Altering one's birth sex is not a one-step procedure; it is a complex process that occurs over a long period of time. Transition can include some or all of the following personal, medical, and legal steps: telling one's family, friends, and co-workers; using a different name and new pronouns; dressing differently; changing one's name and/or sex on legal documents; hormone therapy; and possibly (though not always) one or more types of surgery. The exact steps involved in transition vary from person to person. **Avoid the phrase "sex change."**

Sex Reassignment Surgery (SRS) – Also called Gender Confirmation Surgery (GCS). Refers to doctor-supervised surgical interventions, and is only one small part of transition (see transition above). Avoid the phrase "sex change operation." Do not refer to someone as being "pre-op" or "post-op." Not all transgender people choose to or can afford to, undergo medical surgeries. **Journalists should avoid overemphasizing the role of surgeries in the transition process.**

Gender Identity Disorder (GID) – *outdated, see Gender Dysphoria*

Gender Dysphoria – In 2013, the American Psychiatric Association released the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) which replaced the outdated entry "Gender Identity Disorder" with *Gender Dysphoria*, and changed the criteria for diagnosis. The necessity of a psychiatric diagnosis remains controversial, as both psychiatric and medical authorities recommend individualized medical treatment through hormones and/or surgeries to treat gender dysphoria. Some transgender advocates believe the inclusion of Gender Dysphoria in the DSM is necessary in order to advocate for health insurance that covers the medically necessary treatment recommended for transgender people.

Transgender Students

To date, 18 states⁷ and the District of Columbia have enacted laws/statutory language and/or agency regulations prohibiting discrimination in education on the basis of gender identity. Ohio is not one of them.

In addition to Title IX, Title IV of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex, among other things, in public schools. Complaints under Title IV may be investigated by the U.S. Department of Justice. The DOJ's role is not limited to investigations. In 2015, the DOJ submitted a "statement of interest" – a legal brief – in the case of *Tooley v. Van Buren Public Schools*, Case No. 2:14-cv-13466, which was pending at the time in the U.S. District Court Eastern District of Michigan. In it, the DOJ states the "United States has a significant interest in ensuring that all students, including transgender students, have the opportunity to learn in an environment free of discrimination and that the proper legal standards are applied to claims under Title IX and the Equal Protection Clause." In the underlying suit, Tooley, a transgender male, alleged discrimination and harassment in violation of Title IV, IX, and the Equal Protection Clause. In particular, he claimed the school prohibited him from using the boys' restroom, which resulted in harassment by another student, and refused to honor his requests that he be addressed using his preferred name and male pronouns.⁸

Current NEOLA policies prohibit harassment and discrimination on the basis of sex, defined to include "sexual orientation and gender identity." See, e.g., Policies and Administrative Guidelines 2260 and 5517. In addition to adopting and implementing clear guidelines for meeting the needs of transgender students, boards of education should provide for the education and training of the school community in gender identity issues. Such actions will enable districts to uphold the rights of transgender students and prevent illegal conduct that could lead to liability.

Common issues that arise pertaining to transgender students:

A. Daily use of student name, pronouns, and application of dress code

Student Name and Pronouns

School personnel should recognize and use the student's preferred name and pronouns (i.e., those that correspond to the student's gender identity) in daily conversation and on identification badges and school work (e.g., assignments, quizzes, and tests).

The school district should further recognize and use the student's preferred name in class rosters and school publications, including athletic, academic and commencement programs, and yearbooks.

When the school district discloses student names as part of a disclosure of directory information, the district should disclose the name that the student uses.

When contacting the parent or guardian of a transgender student, however, school staff should use the student's legal name and the pronoun corresponding to the student's gender assigned at birth unless the student, parent, or guardian has specified otherwise.

Dress Code

Strict enforcement of a dress code to prohibit a student from dressing in a (stereotypical) manner consistent with the student's gender identity would invite a challenge under Titles IV and IX.⁹ Students, therefore, should be permitted to dress in a manner that is in conformance with their gender identity within the parameters of the established dress code (i.e., as long as it is consistent with the district's dress code for that gender).¹⁰

A. Official School Records and Diploma

The designation of a student's name and/or gender on official school records (e.g., transcripts, report cards, registration documents, discipline records, ETRs/IEPs, testing data, health records, etc.) and other school documents requires school personnel to satisfy two potentially competing requirements: the Ohio Revised Code requirement that a school district maintain certain ("accurate") student records and the student's right to privacy regarding the student's status as a transgender person.

Requirement to maintain certain student records

The Ohio Revised Code requires school district personnel to maintain a record of each student's name, "the studies pursued," "the character of the work done and the standing of each pupil[.]" R.C. 3319.32. Also, district personnel must keep a "membership record" by grade level that includes, among other things, each student's name. R.C. 3317.031. Revised Code 1347.09 and FERPA (at 20 U.S.C. 1232g(a)(2)), which both allow a parent (or student when the student is at least 18 years old) to challenge the accuracy of a student's record, implicitly require a school district to maintain "accurate" student records.¹¹ As will be discussed below, however, the same provision in FERPA allows a parent (or 18+ year old student) to challenge the content of a student's record that violates the student's privacy rights.

In this context, the maintenance of accurate records arguably (although not explicitly) includes using a student's legal name on report cards, academic transcripts, and a diploma. A student's legal name is the name on the student's birth certificate unless a probate court has ordered a change to the student's legal name. There is no requirement in Ohio law to maintain a record of a student's gender, but federal law may require keeping a record of students' gender for anti-discrimination and grant purposes.

In addition, "during the course of transferring a student's record to an educational institution for a legitimate educational purpose as specified under [R.C. 3319.321(C)], no school district or school shall alter, truncate, or redact any part of a student's record so that any information on the student's record is rendered unreadable or unintelligible." R.C. 3319.323. This is a limited prohibition: a student's record must not be altered, truncated, or redacted so as to render the record "*unreadable or unintelligible* [emphasis added]."

Privacy rights

Students have certain privacy rights pursuant to the United States Constitution. Arguably, the right to privacy encompasses a person's status as a transgender person. A student who does not want the student's transgender status to be disclosed to third parties, such as an employer or a post-secondary school, is entitled to have the student's transgender status be kept confidential.

The Family Education Rights and Privacy Act (FERPA), 20 USC 1232g, prohibits the disclosure of personally

identifiable information from education records without prior written parental (or adult student) consent. Ohio's student confidentiality law (O.R.C. 3319.321) mirrors FERPA. Barring an exception to the rule, information concerning a student's assigned gender or sexual orientation may not be released to third parties, including members of the school community who lack a "legitimate educational interest" in the information.

Ohio law concerning "personal information systems" (O.R.C. Ch. 1347) may have some bearing on the privacy of students, as well. The law requires a school district to take reasonable precautions against the unauthorized disclosure or use of personal information maintained in a school district's personal information system, which is generally defined to mean an organized system of manually and electronically stored personal information. In addition, the law contemplates civil penalties for the intentional disclosure of information in a manner prohibited by law. (O.R.C. 1347.10.)

School officials may not, therefore, disclose a student's assigned sex, gender identity, or other medical information without proper consent. Where parents or students ask a school district to openly communicate about a student's gender identity or transition, district officials should obtain prior written consent.

As noted above, FERPA allows a parent (or 18+ year old student) to challenge the content of a student's records if the content might violate the student's privacy rights. 20 U.S.C. 1232g(a)(2). In the event that you receive such a challenge, the first step is to explain to the parents and student that the district is required by law to keep some records with the student's legal name,¹² but also explain, as described below, that the district also creates and maintains related records indicating the name that the student uses, and that the latter can typically be the records that are provided to third parties in order to protect the student's privacy rights.

Accommodation of competing requirements

The competing interests of maintaining accurate records and protecting student privacy can be accommodated by the district's creation and/or maintenance of records that accurately reflect a student's legal name and gender at birth, but also creating, maintaining, and, when necessary, providing to third parties records that use the name and gender that a student uses based on the student's gender identity.

Thus, a school district should maintain grade reports for each student that indicates the student's legal name. This satisfies R.C. 3319.32 and R.C. 3317.031. A school district should also create and maintain grade reports that indicate the name that the student uses and provide such reports to the parents and/or students. If the district provides a transcript directly to the student, the district should provide a transcript that indicates the name that the student uses.

If a school district typically maintains a copy of each student's diploma, the district should maintain such a copy with each student's legal name. A school district should, however, provide a student with a diploma that indicates the name that the student uses.

When the district provides a copy of the student's transcript or diploma directly to a third party such as an employer or another educational institution, the district should provide the document that has the name that the student uses. When the district provides a transcript or diploma with the name that the student uses directly to another educational institution, R.C. 3319.323 is not implicated as long as no part of the document is unreadable or unintelligible.

When the district is providing a certified copy of a school record, such as an official transcript, directly to a third party, care should be taken that the statement in the certification is accurate. For example, when providing an official transcript that includes the name that the student uses, school personnel may sign a certification that states that the document is a true and accurate copy of a record of the school district because the district maintains a transcript for the student that indicates the name that the student uses. If the third party has provided the text of the certification to be used, and you are concerned about signing the certification as written, you should consult with legal counsel before signing and providing the certification and record.

B. Use of restrooms and locker rooms

Students' use of restrooms and locker rooms can be a difficult topic. Generally, a transgender student should be permitted to use the restroom, locker room, or changing area that corresponds with the student's gender identity to avoid a discrimination challenge on the basis of sex under Titles IV or IX. The first step, however, to addressing a student's restroom and locker room use is to discuss the issue with the student (and parent): discuss the options available and find out the student's (and parent's) thoughts. In considering alternatives, school officials may take into consideration the safety and comfort of students, the age of the students, the transgender student's preference, and alternate facilities. As such, it is permissible to *offer* a transgender student the use of a private bathroom (e.g., a staff bathroom) or a private changing area (e.g., an office or a locker room when no other students are present), but school personnel *cannot require* either of these practices. When discussing these

options, school personnel must make it clear to the student that a separate facility is only an option that can be considered and is not a requirement. It is best practice to document in writing with the student and/or parents the optional nature of a separate facility. Also, it is permissible to designate one or more restrooms to be gender-neutral and to allow all students to use such restrooms. The same is true for staff restrooms.

Based on existing case law (including, as discussed below, the U.S. Supreme Court's determination in June 2021 not to review the Fourth Circuit Court of Appeals' decision in *Grimm v. Gloucester County School Board*, which held that a male transgender student had the right to use the boys' bathrooms at his school) and recent communications from the U.S. Department of Education's Office for Civil Rights related to the topic, if a transgender student wants to use the restroom or locker room that corresponds with the student's gender identity, the student must be permitted to use that restroom or locker room. If a District intends to follow an alternative approach, it should do so only after consultation with local legal counsel.¹³

Often, a transgender student's use of a restroom or locker room consistent with the student's identified gender is more of an issue for adults than it is for students. Some students may express discomfort or embarrassment in the beginning, but many or most students will acclimate to the situation.

Permissible steps to preserve privacy in locker rooms include the provision of private changing stations to all students or the installation of privacy curtains for all students.

C. Gender-segregated activities

A transgender student should be provided access to sex-specific facilities consistent with the student's gender identity at all school-sponsored activities, including overnight events and extracurricular activities on and off-campus.¹⁴ The transgender student, however, may request access to private facilities based on privacy, safety, or other concerns. The student should be permitted to participate in school ceremonies, classroom activities, health and physical education classes, and other gender-segregated activities and routines consistent with the student's gender identity.

D. Sports

Unless and until the General Assembly passes legislation concerning transgender athletes participating in 7-12 sports,¹⁵ a school district should follow the Transgender Policy of the Ohio High School Athletic Association ("OSHAA Policy") (<https://ohsaaweb.blob.core.windows.net/files/Eligibility/OtherEligibilityDocs/TransgenderPolicy.pdf>). Among other things, the OHSAA Policy states that "Transgender athletes should have an equal opportunity to participate in sports" but that "the integrity of women's sports should be preserved." The OSHAA Policy contemplates a transgender athlete giving notice to the school district that the athlete wants to participate in sports, the school district notifying OHSAA of the situation, and OHSAA applying its Policy to determine whether the student may participate as the student wishes. The OHSAA Policy is meant to allow the participation of transgender athletes as long as the student does not have a physiological advantage because of natural gender characteristics or physiological characteristics derived from medical treatment.

A transgender female (i.e., male at birth; identifies as female now) who is taking medically prescribed hormone treatment related to gender transition may participate on a *boys' team* at any time. A transgender female may not, however, participate on a girls' team unless the athlete has either completed at least one year of hormone treatment related to gender transition or has demonstrated to OSHAA using sound medical evidence that the athlete does not possess a physical or physiological advantage over genetic females (i.e., female at birth) of the same age group.

A transgender male (i.e., female at birth; identifies as male now) who has not begun medically prescribed testosterone treatment for purposes of gender transition may participate on a boys' team. The student must first provide medical evidence to OHSAA that he has not yet begun any hormone treatment.

A transgender male who has begun medically prescribed testosterone treatment for purposes of gender transition may participate on a boys' team if the student provides medical evidence to OHSAA that: (a) muscle mass developed as a result of taking testosterone does not exceed muscle mass of a typical genetic boy; (b) the treatment has not caused testosterone levels to exceed normal levels, and (c) a licensed physician is monitoring the student's hormone levels every three to six months.

E. Discrimination, harassment, and/or bullying

Like all students, transgender students are entitled to a school environment that is free of bullying and harassment. Ohio Revised Code Section 3313.66 requires boards of education to adopt policies prohibiting student bullying, harassment, and intimidation. NEOLA Policy 5517.01 states that the board strictly prohibits harassment,

intimidation, or bullying toward a student, whether by other students, staff, or third parties. NEOLA Policy 5517 prohibits harassment on the basis of sex, defined to include “gender identity.”

School staff should take steps to prevent the harassment of students on the basis of their gender identity (actual or perceived) and gender expression. Anti-bullying training programs for students and staff should incorporate information about transgender-specific issues and rights.

Nevertheless, some students or adults may have difficulty adjusting to the requirements of the law and may discriminate or harass based on gender identity.¹⁶ School personnel must recognize and address gender discrimination directed at a student because of the student’s gender identity or sexual orientation. Student-on-student discrimination includes harassing a student because of the student’s gender identity or sexual orientation, just as harassing a student because the student is male or female, or because of the student’s race, color, national origin, or disability, is discriminatory harassment.

When student-on-student harassment or other discrimination occurs, the legal obligation of school personnel and the board of education is to take reasonable steps to: (a) prevent future harassment or other discrimination from occurring; and (b) remedy the effects of the harassment or other discrimination that the student has experienced. A school board will be held responsible for student-on-student harassment if the board and/or school personnel do not take these steps and the school board’s failure to respond amounts to deliberate indifference.

If a board of education does not adopt policies, procedures, and practices that prohibit discrimination on the basis of sex, including discrimination on the basis of a person’s gender identity or sexual orientation, the board may be faced with defending an administrative complaint made to OCR or a lawsuit in court. Remedies available to OCR include requiring the modification of board policy and procedures, requiring training for personnel, and imposing loss of federal funding. Remedies available to a student/parent in court include monetary damages and the requirement that the board pay the family’s attorney’s fees.

In *Grimm v. Gloucester County School Board*, the School Board agreed in August of 2021 to pay the plaintiff over \$1.3 million in attorney’s fees after the U.S. Supreme Court declined to hear the School Board’s appeal of the decision of the U.S. Fourth Circuit Court of Appeals that the School Board had violated Title IX and the U.S. Constitution when it refused to allow a transgender male student to use male restrooms and refused to issue him a transcript indicating his gender to be male.

Transgender Employees

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of sex with respect to recruitment, hiring, assignments and promotions, and pay and benefits. It also prohibits gender-based harassment and retaliation for complaining about discrimination. The Equal Employment Opportunity Commission (EEOC) investigates employment discrimination. Likewise, the Department of Justice enforces against state and local government employers (including boards of education) the provisions of Title VII prohibiting employment practices that discriminate on grounds of sex. Ohio Revised Code Chapter 4112 also prohibits discriminatory employment practices on the basis of sex.

As discussed above, in 2020, the U.S. Supreme Court affirmed in its *Bostock* decision that Title VII protects employees from discrimination based upon their sexual orientation and/or gender identity. NEOLA policies prohibit harassment and discrimination on the basis of sex, defined to include “sexual orientation and gender identity.” (See, e.g., Policies 1422, 3122, 4122, 1662, 3362, 4362.)

Common issues that arise pertaining to employees:

A. Restrooms

Transgender employees are entitled to access restrooms and other facilities consistent with their gender identity. The discomfort of other employees is not a defense to a discriminatory employment practice.

While not controlling over public school employers in Ohio, the DOL’s OSHA department issued a statement of “best practices” called *A Guide to Restroom Access for Transgender Workers*.¹⁷ The *Guide* states that “regardless of the physical layout of a worksite, all employers need to find solutions that are safe and convenient and respect transgender employees,” because OSHA requires all employers under its jurisdiction to provide employees with “sanitary and available toilet facilities so that employees will not suffer the adverse health effects that can result if toilets are not available when employees need them.” OSHA notes that employees should not be asked to provide any medical or legal documentation of their gender identity in order to have access to gender-appropriate facilities.

B. Privacy

The requirements in O.R.C. Ch. 1347 pertaining to personal information systems maintained by school districts applies equally to public school employees. There are civil and criminal penalties associated with the failure to comply with the privacy provisions under the Chapter.

More generally, an employee's transition process (legal, medical, or merely expressive) should be treated with the same amount of confidentiality as accorded to any other employee's legal, medical, or life experiences (i.e., divorce proceedings, health complications, family problems). Of course, medical or health documentation must be kept confidential and is not subject to any public records request.

A. Gender expression (clothing, names/pronouns)

If a transgender employee takes legal steps to change the employee's name, the change should be reflected in employment records, in the same manner, it would for any other employee who has legally changed a name. Failure to address the transgender employee by the employee's new name, or to use appropriate pronouns, may create a hostile environment based on sex.

The EEOC has ruled that employers should require supervisors and coworkers to utilize the name and gender pronoun that corresponds to the gender identity with which the employee identifies in all employee records and communications to and about the employee. *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992 (May 21, 2013). The EEOC relied on the Supreme Court's Title VII decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 (1998) (stating "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"), to find that persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if it is severe and pervasive enough to create a hostile work environment when judged, under the *Oncale* standard, from the perspective of a reasonable person in the employee's position.

Recently, in the *Lusardi* case, the EEOC determined that the employer's (Lusardi was an Army civilian) repeated refusal to use the employee's new name and correct pronoun, as well as its denial of restroom access consistent with her gender identity, were actions severe and pervasive enough to subject Lusardi to a hostile work environment based on sex.

Strict enforcement of a dress code to prohibit a transgender employee from dressing in a manner consistent with the employee's gender identity would violate Title VII. Employees undergoing a transition process who wear clothes stereotypically associated with the gender to which they are transitioning should not be disciplined under an employer's dress code such that the employee is inhibited or prevented from dressing in a manner consistent with the employee's gender identity. While transgender employees should dress appropriately within the parameters of the current dress code, employers should consider moving toward a more gender-neutral dress code. Employers should also take care not to apply a dress code more strictly for transgender employees than for other employees.

B. Insurance

Failure to provide an insurance plan that covers medical treatment such as hormone therapy, sex reassignment surgery, and/or counseling for Gender Dysphoria and related issues is a potential scenario for a transgender employee's sex discrimination claim, especially where such a plan was available and considered, but rejected.

C. Disability/FMLA

Both the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") and the Rehabilitation Act of 1973 ("Rehabilitation Act") currently exclude "transsexualism" and "gender identity disorders not resulting from physical impairments" from the definitions of "disability." See 42 U.S.C. § 12211(b)(1) (1997); 29 U.S.C. § 706(8)(F)(i) (1997).

To qualify for FMLA leave, a transgender employee must have a "serious medical condition" related to the employee's transgender status or be receiving treatment for gender dysphoria. A "serious health condition" is "an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, or continuing treatment by a health care provider." 29 U.S.C. § 2611(11). Treatment that *may* qualify as a "serious health condition" includes sex reassignment surgery, treatment for Gender Dysphoria¹⁸ and, potentially, the effects of hormone therapy. Paid sick leave should be provided in accordance with Ohio law and local requirements.

D. Harassment

Neola Policies currently prohibit harassment on the basis of sex, defined to include “sexual orientation and gender identity.” (See, e.g., Policies 1362, 3362, 4362.) If not already doing so, school boards should implement training programs for staff to prevent and address gender-based discrimination. When incorporating a gender identity component in the board’s anti-harassment and anti-bullying training for students, as stated above, the school board could refer to transgender employee issues in an effort to prevent and address hostility from students toward transgender staff.

¹Title IX of the Education Amendments Act of 1972 provides that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....” 20 U.S.C. § 1681.

²*Adams v. School Bd. Of St. Johns County*, 968 F.3d 1286 (11th Cir. 2020), vacated and 11th Circuit ordered *en banc* review in August 2021; *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (the Fourth Circuit joins a “growing consensus of courts” holding that “Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender.”), U.S. Supreme Court *denied cert* on June 28, 2021.

³President Biden followed the 1/20/2021 general applicability pronouncement with a more specific order applicable to schools on March 8, 2021 – *Executive Order on Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*. In this EO, the President states that it is his Administration’s policy that “all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.” The 3/8/2021 EO further reiterates that LGBTQ+ individuals are protected under Title IX and acknowledges the disproportionate rates of sexual harassment and violence suffered by the LGBTQ+ community. To address such harassment/violence, the EO requires educational institutions to provide “appropriate support for students who have experienced sex discrimination; and to ensure that their school procedures are fair and equitable for all.”

On April 5, 2021, the Civil Rights Division of the U.S. Department of Justice (DOJ) published a memorandum (dated 3/26/2021) confirming that Title IX prohibits discrimination on the basis of sexual orientation and gender identity in educational settings, adopting the Supreme Court’s reasoning from *Bostock*. Based on the DOJ’s 3/26/2021 memorandum, Federal agencies that implement and enforce Title IX are obligated to implement and enforce the Law’s prohibition against sex-based discrimination on behalf of LGBTQ+ individuals.

On April 6, 2021, the Acting Assistant Secretary for Civil Rights at OCR issued a Letter that outlines the steps the USDOE plans to take to implement the 3/8/2021 EO. The Letter begins by recognizing that LGBTQ+ students are subject to sexual harassment, including sexual violence, at significant rates.

The U.S. Department of Education (“USDOE”) followed up on its 4/6/2021 Letter by issuing a Notice of Interpretation on June 16, 2021, concerning The Department’s Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*. The interpretation seeks to clarify the Department’s enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX in light of the U.S. Supreme Court’s *Bostock* decision. The interpretation is for the purpose of guiding OCR in processing complaints and conducting investigations.

By way of background, the Notice Of Interpretation affirms that OCR has “long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination.” It continues, “OCR also has long recognized that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity.” The Notice then acknowledges that at times OCR has “stated that Title IX’s prohibitions on sex discrimination does not encompass discrimination based on sexual orientation and gender identity.” Thus, the purpose of the Notice of Interpretation is to clearly articulate the Department’s conclusion that in light of *Bostock* it will interpret Title IX prohibition on sex discrimination to cover discrimination based on sexual orientation and gender identity. The explanation and rationale offered

in the Notice for reaching this conclusion is consistent with the reasoning set forth in the DOJ's 3/26/2021 memorandum.

On June 23, 2021, the DOJ and OCR jointly released a resource entitled "Confronting Anti-LGBTQ+ Harassment in Schools," which sets forth examples of the kinds of incidents that DOJ and OCR can investigate.

⁴Boards that have adopted Neola's policies and administrative guidelines have had appropriate language since 2014.

⁵For additional terminology, see Department of Labor Policies on Gender Identity: Rights and Responsibilities (<https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/gender-identity>).

⁶**Non-binary and/or genderqueer** – Terms used by some people who experience their gender identity and/or gender expression as falling outside the categories of man and woman. They may define their gender as falling somewhere in between man and woman, or they may define it as wholly different from these terms. The term is not a synonym for *transgender* or *transsexual* and should only be used if someone self-identifies as non-binary and/or genderqueer.

⁷California, Colorado, Connecticut, Illinois, Iowa, Maryland, Massachusetts, Maine, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington.

⁸On March 8, 2017, the parties settled the case – the Plaintiff received \$53,150 in damages and \$44,350 for attorneys' fees and costs.

⁹At least one state court has granted an injunction to a biologically male student who expressed a female identity, in part, through wearing girls' clothing. See, *Doe v. Yunits*, Mass. Super. Ct. No. 00-1060A (Oct. 11, 2000). By disciplining the student for violating the gender-specific dress code, the school district violated the student's right to freedom of expression.

¹⁰In the Downey Consent Agreement with OCR, the school district agreed to ensure that the student was not disciplined for acting or appearing in a manner that does not conform to stereotypical notions of masculinity or femininity. (<http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>)

¹¹Under R.C. 1347.09, a person may ask a school district to investigate the current status of personal information the accuracy, relevance, timeliness, or completeness of which the person disputes. If not satisfied with the district's post-investigation determination, the disputant must be permitted to "include within the system" a notation that the person protests that the information is inaccurate, irrelevant, outdated, or incomplete, or a brief statement of the person's position on the disputed information. The district must then include the statement or notation in any subsequent transfer, report, or dissemination of the disputed information. The district may include with the statement or notation of the disputant a statement of its own that it has reasonable grounds to believe that the dispute is frivolous or irrelevant, and of the reasons for its belief; however, the "presence of contradictory information in the disputant's file does not alone constitute reasonable grounds to believe that the dispute is frivolous or irrelevant." R.C. 1347.09(B).

¹²Transgender students who undergo a legal name change may ask the district to change their name and gender in official records. Likewise, transgender students may ask a district to alter official records in order to be consistent with the student's gender identity. Under FERPA, eligible students or parents must be granted access to student records maintained by the school district and may request that the records be amended if they are "inaccurate, misleading, or in violation of the student's rights of privacy."

¹³ In *Bd. of Educ. of the Highland Local School District v. U.S. Dept. of Education*, 208 F. Supp. 3d 850 (S.D. Ohio 2016), the School District had a policy that prohibited a transgender female student from using the girls' restrooms. The U.S. Department of Education's Office for Civil Rights concluded that the School District discriminated against the student on the basis of sex in violation of Title IX. The School District asked the court to enjoin the Federal government from enforcing the anti-discrimination provisions of Title IX in this situation, and the student's parents asked the court to enjoin the School District from enforcing its policy and order the District to allow the student to use the girls' restroom. The court sided with the parents and ordered the District to allow the student to use the girls' restroom. The Sixth Circuit Court of Appeal affirmed the lower court's decision in December 2016.

In 2015, the DOJ resolved a transgender student's sex discrimination charge against his California school district for denying him access to restrooms and other gender-segregated facilities. The resolution agreement, voluntarily entered into by the school district to avoid further proceedings, requires the school to permit the student to use the boys' restroom and to treat him the same as other male students in all respects. *Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division.* (<http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>)

In December, 2021 a jury in a Jackson County Circuit Court (Missouri) found that the Blue Springs R-IV School District discriminated against a transgender student when the district denied the male transgender student use of the boys' restroom and locker rooms. While the student participated in boys' P.E. and athletics in middle school (including the boys' football and track teams), he had to use a "separate, single person, unisex bathroom outside the boys' locker room because Defendants refused to give him access to the boys' locker room." The jury awarded the student \$4 million.

¹⁴The transgender student who was the subject of the DOJ's Resolution Agreement with the Arcadia School District had been denied the use of sex-specific student cabins for male students during a school-sponsored overnight academic camp. Under the agreement, the student was to be permitted access to sex-specific overnight accommodations on school trips in accordance with his gender identity. (<http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>) Likewise, in the OCR's Consent Agreement with the Downey Unified School District, the transgender female complainant was to be provided access to sex-specific facilities at all District-sponsored activities, including overnight events, try-outs and participation in extracurricular activities on and off campus, consistent with her gender identity. (<http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>)

¹⁵There are currently two bills pending in the Ohio Legislature – H.B. 61 and S.B. 132. To date, the following states have enacted laws that prohibit transgender student athletes from playing on sports teams that correspond with their gender identities: Alabama, Arkansas, Florida, Idaho, Mississippi, Montana, Tennessee, Texas, and West Virginia. Additionally, the Governor of South Dakota issued two executive orders to limit participation in women's and girls' school sports teams to only people assigned female at birth, and New Mexico and Georgia have agency guidance that excludes transgender students from participating on the single-sex team that corresponds to the students' gender identity and requires them to instead participate on the team associated with the gender specified on their birth certificate or assigned at birth.

¹⁶In 2014, the Office for Civil Rights entered into a consent agreement with another California school district that allegedly discriminated against a transgender student by failing to respond adequately to complaints that the student was subjected to verbal harassment by peers and that staff at the student's school disciplined her for wearing make-up, discouraged her from speaking about her gender identity with classmates, and suggested that she transfer to another school. In it, the school was required to treat the transgender student the same as other female students in all respects in the education programs and activities offered by the District, including access to sex-designated facilities. Resolution Agreement Downey Unified School District (<http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>).

¹⁷<http://www.dol.gov/asp/policy-development/TransgenderBathroomAccessBestPractices.pdf>

¹⁸The DMS-5 includes Gender Dysphoria as a psychiatric impairment. Therefore, one could argue it is a serious health condition under the FMLA.