

Which Way to the Restroom? — Respecting the Rights of Transgender Youth in the School System: A North American Perspective

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Freedom from discrimination based on sex is a right. It is clear that a man and woman must be treated the same before the law. As society progresses, the traditional concept of “sex” based on birth is becoming less relevant. Instead, “gender” irrespective of birth sex determines rights. It is not uncommon for individuals to self identify as transgendered, gender non-conforming, gender fluid, gender variant, genderqueer, androgynous, and so on. When a person whose gender identity, gender expression, or behaviour does not conform to that typically associated with the sex to which they were assigned at birth, determining rights can become complicated, especially when the person is a child.

The problem is further complicated because the legislation is fairly new and to date there has been limited case law interpretation by tribunals, commissions, and courts in both Canada and the United States, which may result in uncertainty and confusion when attempting to address the needs of the transgendered child at school.

This article outlines the main issues that arise in the context of the transgendered student. These include the use of the restroom, participation in sports and use of locker rooms, school dress codes, bullying and harassment of transgendered students, gender and sexual identity curriculum, and name/sex designation on school records. Moreover, we review the current landscape and background within each of these areas as well as highlight the applicable Canadian and American legislation, policies, and case law resources to assist lawyers and school boards understand this rapidly evolving area of law.

Toute personne a le droit de vivre sans discrimination fondée sur le sexe. Il est clair qu'un homme et une femme doivent être traités également aux yeux de la loi. Au fil de l'évolution de notre société, le concept traditionnel de « sexe » fondé sur celui à la naissance devient moins pertinent. Les droits sont maintenant plutôt fondés sur le « genre », sans égard au sexe à la naissance. Il n'est plus inhabituel que des individus s'identifient comme étant transgenres, non-conformistes sexuels, à genre fluide, à genre variant, intergenres, androgynes ou autre. Lorsque

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l'identité de genre, l'expression de genre ou le comportement d'une personne ne correspondent pas à ceux typiquement associés au sexe qui lui a été attribué à la naissance, la détermination de ses droits peut devenir complexe, surtout lorsqu'il s'agit d'un enfant.

Le problème devient encore plus complexe du fait que la législation sur le sujet est assez récente et qu'à ce jour, il y a peu d'interprétation jurisprudentielle des tribunaux, des commissions et des cours, tant au Canada qu'aux États-Unis, ce qui peut entraîner de l'incertitude et de la confusion lorsque vient le temps de répondre aux besoins des enfants transgenres en milieu scolaire.

Cet article traite des questions principales qui entourent la situation des étudiants transgenres. Ces questions comprennent l'utilisation des toilettes, la participation aux sports et l'accès aux vestiaires, les codes vestimentaires, le harcèlement et l'intimidation des étudiants transgenres, l'éducation portant sur le genre et l'identité sexuelle ainsi que les indications quant au nom et au sexe des étudiants dans les dossiers scolaires. De plus, les auteurs examinent le contexte actuel de chacune de ces questions et soulignent le droit, les politiques et la jurisprudence applicables, tant d'origine canadienne qu'américaine, afin d'aider les avocats et les commissions scolaires à mieux comprendre ce domaine du droit en pleine évolution.

1. INTRODUCTION

When a person whose gender identity, gender expression, or behaviour does not conform to that typically associated with the sex to which they were assigned at birth, determining rights can become complicated, especially when the person is a child. The issue often receives media attention. For example, in June 2013, the Colorado Civil Rights Division ruled that Coy Mathis, a biological male in Fort Carson, Colorado, who identified as a female, had an enforceable legal right to use the women's restroom at school.¹ Similarly, in 2011, a child who was born male but had been identifying as a girl since age two was admitted at age nine to a Girl Scout troop in Denver, Colorado.²

This issue is difficult because it places school boards in a position of balancing transgender students' rights to freedom from discrimination and freedom of expression with the rights of other students and parents to freedom of religion and expression, among others.

The restroom has become the lightning rod because it is the one place where use has been segregated on the basis of biological sex, not gender identity. The problem is further complicated because the rights of transgender students found in legislation are fairly new and evolving and there is limited case law interpretation by tribunals, commissions, and courts. Nevertheless, in Canada, some provincial

¹ P. Solomon Banda and Nicholas Riccardi, "Transgender first-grader who wasn't allowed to use girls' bathroom wins Colorado discrimination case" *National Post* (26 June 26 2013) online: <<http://news.nationalpost.com/2013/06/25/transgender-first-grader-who-wasnt-allowed-to-use-girls-bathroom-wins-colorado-discrimination-case>>.

² David Graham, "Mom fights to get son into Girl Scouts — and wins" *The Toronto Star* (28 October 2011) online: [Toronto Star <http://www.parentcentral.ca/parent/articlePrint/1077785>](http://www.parentcentral.ca/parent/articlePrint/1077785).

and territorial human rights codes have been amended recently to include gender expression and gender identity.³

2. DEFINITIONS

To deal effectively with gender equality issues, knowledge of relevant terminology is essential. For the purpose of this article, we use the term “sex” when referring to birth sex whereas “transgender” and “trans” encompass the entire gamut of non-sex-based gender identification. “Gender identity” relates to a person’s inner sense of being male, female, or something else. “Gender expression” relates to the way in which a person communicates gender identity through clothing, hairstyle, grooming, or voice. When a trans person surgically alters their body it is often called sex/gender reassignment or gender affirmation.⁴ Gender identity does not equate to sexual preference or orientation. For example, a trans girl (born as a boy by sex) who is attracted to males is not gay but is heterosexual.⁵ Trans persons can have the same spectrum of orientation as anyone else, and they can be straight, gay, bi-sexual, or asexual.

People who experience intense, persistent gender incongruence could have been diagnosed with gender identity disorder (GID).⁶ However this “diagnosis” was highly controversial among some mental health professionals and transgender communities. In 2013, the American Psychiatric Association (APA) eliminated this diagnosis and added a new diagnostic class in DSM-5 called “gender dysphoria.”⁷ Gender dysphoria’s defining feature becomes gender incongruence rather than cross gender identification. It is neither a sexual dysfunction nor sexual deviance, but a unique condition in that although it is a mental health diagnosis the treatment is biological or surgical.⁸

3. STAGES OF DEVELOPMENT IN TRANSGENDER CHILDREN

It is generally understood that gender identity develops in the brain and is most likely determined before a child is born. It is a misconception that children choose to feel like a girl or a boy.⁹

³ *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1 [Code]; *Human Rights Code*, C.C.S.M., c. H175, s. 9(2) [Manitoba Code]; *Human Rights Act*, R.S.N.S. 199, c. 214, ss. 5(1)(na)-(nb) [Act]; Northwest Territories *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 5. [NWT Act]

⁴ “Answers to your questions about Transgender People, Gender Identity, and Gender Expression,” American Psychological Association (2011), online: APA <<http://www.apa.org/topics/sexuality/transgender.pdf>>.

⁵ Stephanie Brill and Rachel Pepper, *The Transgender Child* (San Francisco: Cleis Press Inc., 2008) [Brill and Pepper].

⁶ Above, note 4.

⁷ “Highlights of Changes from DSM-IV-TR to DSM-5” American Psychiatric Publishing, a Division of the American Psychiatric Association (2013), online: APA <<http://www.psychiatry.org/dsm5>>.

⁸ *Ibid.*

⁹ Brill and Pepper above, note 5 at 14.

Children can manifest their identity at preschool age levels by their choice of toys and clothing. Thus a biological male child may wish to attend kindergarten wearing a dress. According to Stephanie Brill and Rachel Pepper, authors of *The Transgender Child*,

Four-to-six-year-olds associate gender with specific behaviors. . . . Girls wear make-up — so anyone with make-up on is a girl. Boys lift weights and play with trucks — so anyone lifting weights and driving a truck is a boy. . . . School has a great influence on children of this age so it is essential that preschools and grade schools incorporate gender differences and tolerance of such differences into their programs. . . . It is normal for 4-to-6-year-olds to think they can grow up to be the opposite sex. . . .¹⁰

When such children are frustrated and cannot express their felt identity, behavioural problems can surface and in some cases suicide ideation occurs.¹¹

Sometimes gender identity emerges in the period just before or during the early stages of puberty, ages nine to fourteen. At this age it is not unusual for a transgender child to simply announce to parents that they have a new name, reflective of gender identity; Jack becomes Jill for example. In other cases, post-pubescent adolescents may experiment with different sexualities to see what fits best, only slowly realizing that they are transgender.¹² At this stage, the underlying contradiction between the sex of the pubertal changes and the underlying gender identity can cause depression, self-neglect, and self-destructive behaviours in some individuals.¹³

Post puberty is when gender identity generally becomes fully developed. According to Brill and Pepper, “the hormonal and concurrent physical changes of puberty clarify for the child that they are going through the ‘wrong’ puberty.”¹⁴ This can cause an increased urgency to communicate, greater anxiety and exploration of options such as transitioning. This is also the age when differences between sexual orientation and gender identity can also develop. For example, remember that if a transgender child identifies as a male and is attracted to a child who identifies as a female, even though that child is a biological male, he is straight, not gay and vice versa. On the other hand, a trans child may in fact be gay when they are attracted to persons who identify as the same gender despite the birth sex of either individual.

It is estimated that there are 700,000 transgender individuals in the United States.¹⁵ This would translate into 80,000 in Canada.

¹⁰ *Ibid.* at 63.

¹¹ *Ibid.* at 64.

¹² *Ibid.* at 16–22.

¹³ *Ibid.* at 65.

¹⁴ *Ibid.* at 66.

¹⁵ “Coy Mathis and the Next Civil Rights Struggle,” Editorial, *Bloomberg News* (27 June 2013), online: <<http://www.bloomberg.com/news/2013-06-27/coy-mathis-and-the-next-civil-rights-struggle.html>>.

3. THE LAW

In Canada, at the federal level, there is no explicit protection in law for transgendered persons although there is support for such protection which is implicit or supported through policy. School boards are a provincial responsibility under the *Constitution*¹⁶ so it currently falls to the human rights legislation of every province to deal with gender identity or gender expression discrimination as it impacts school districts. The issue may, however, raise a federal constitutional concern when a claim for equal treatment based on gender occurs in a denominational school inasmuch as section 93 of the *Constitution Act, 1867* provides firm protection to such schools. An example can be found in *Hall (Litigation Guardian of) v. Powers*,¹⁷ in which a gay student successfully argued that he had the right to bring a date of the same sex to his prom despite an argument from the school board that it had the constitutional authority to determine whether to grant this request as part of its s. 93 denominational rights. This case was argued as an injunction application and a full decision regarding the fundamental issues was never made. It should be also noted that the case did not involve a claim by the student under the provincial *Code* but under section 15 of the *Charter of Rights and Freedoms*,¹⁸ which guarantees equal treatment based on, *inter alia*, sex — a ground of discrimination discussed in more detail below. However, the following portion of the *Hall* judgment is instructive for future claims in denominational settings.

The idea of equality speaks to the conscience of all humanity — the dignity and worth that is due each human being. Mark Hall is a Roman Catholic Canadian trying to be himself. He is gay. It is not an answer to his section 15 Charter rights, on these facts, to deny him permission to attend his school's function with his classmates in order to celebrate his high school career. It is not an answer to him, on these facts, to suggest that he can exercise his freedom of disassociation and leave his school. He has not, in the words of the Board, "decided to make his homosexuality a public issue". Given what I have found to be a strong case for an unjustified section 15 breach, he took the only rational and reasonable recourse available to him. He sought a legal ruling.

There are stark positions at each end of the spectrum on this issue. It is one of the distinguishing strengths of Canada as a nation that we value tolerance and respect for others. All of us have fundamental rights including expression, association and religion. Sometimes, as in this case, our individual rights bump into those of our neighbours and of our institutions. When that occurs we, as individuals and as institutions, must acknowledge the duties that accompany our rights. Mr. Hall has a duty to accord to others who do not share his orientation the respect that they, with their religious values and beliefs, are due. Conversely, for the reasons I have given, the Principal and the Board have a duty to accord to Mr. Hall the respect that he is due as he attends the Prom with his date, his classmates and their dates.¹⁹

¹⁶ *Constitution Act, 1867* (U.K.), 30 &31 Vict., c. 3, s. 93 [*Constitution Act, 1867*].

¹⁷ 2002 CarswellOnt 1752, 59 O.R. (3d) 423 (Ont. S.C.J.).

¹⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11., s. 15(1) [*Charter*].

¹⁹ Above, note 17 at paras. 59-60.

At this time, explicit protections related to gender are available only in the legislation of some provinces. The federal *Charter* provides a general guarantee of equality before and under the law, as well as equal protection and benefit of the law, without discrimination based on sex.²⁰ Similarly, the *Canadian Human Rights Act* enumerates prohibited grounds of discrimination that include sex.²¹ Neither includes gender identity or expression. Although a bill that would have amended the *Canadian Human Rights Act* and the *Criminal Code* passed in the House of Commons in February 2011, it stalled before first reading in the Senate when an election was called.²² The bill would have added gender identity and gender expression as prohibited grounds and increased penal sanctions for crimes committed against an individual's gender identity or gender expression,²³ respectively. A new bill with the same content was reintroduced on September 21, 2011.²⁴ It passed third reading in the House of Commons, but then stalled once again at third reading in the Senate.²⁵

Three provinces — Ontario,²⁶ Manitoba,²⁷ and Nova Scotia²⁸ — and one territory — the Northwest Territories²⁹ — have explicit protection. In the other provinces and territories, protection may or may not be implicit.

In Ontario, until 2012, the *Human Rights Code* did not include gender identity and gender expression as enumerated grounds. The Ontario Human Rights Tribunal relied upon the policies of the independent stand-alone body, the Ontario Human Rights Commission (OHRC), to provide guidance in interpreting the *Code*.³⁰ In 2000, the OHRC issued a "Policy on Discrimination and Harassment Because of Gender Identity," which was revised in 2009. This policy states as follows: "Based on a purposive and liberal interpretation of the ground of sex, it is OHRC's position that the protection of the code extends to individuals who are denied equal treat-

²⁰ *Charter* above, note 18.

²¹ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3(1).

²² Parliament of Canada, Status of Bill C-389, online: Parliament of Canada <<http://www.parl.gc.ca/LEGISINFO/BillDetails.aspx?billId=4328122&Mode=1&Language=E>>. <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C389&Parl=40&Ses=3>.

²³ Bill C-389, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity and gender expression)*, 3d Sess., 40th Parl, 2010-2011 (as passed by the House of Commons 9 February 2011).

²⁴ Bill C-279, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity and gender expression)*, 1st Sess., 41st Parl, 2011.

²⁵ Parliament of Canada, Status of Bill C-279, online: Parliament of Canada <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C279&Parl=41&Ses=1>>.

²⁶ *Code, Manitoba Code, Act, and NWT Act* above, note 3.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Code, ibid.*, at s. 30.

ment because of gender identity.”³¹ In a 2006 case in which a pre-operative transsexual woman was subjected to repeated strip searches by police, the Ontario Human Rights Tribunal applied the policy and determined that transsexuality was included under the meaning of “sex.”³² Transgendered rights under the new legislation were finally recognized in a 2012 case, discussed in more detail below, dealing with gender designation on birth certificates.³³

On the other hand, in Quebec and British Columbia, for example, protection remains implicit. In 1998, the Quebec Human Rights Commission decided that transsexuality is included in the word “sex.” This was a case in which an employee was terminated for undertaking a sex change.³⁴ Similarly, in British Columbia, a human rights tribunal found that gender identity was included under the ground of sex. In this case, a transgender woman who identified as lesbian was denied the services of a lesbian support group because she had been raised as a boy.³⁵

In the United States, there are no explicit constitutional legal protections at the federal level for transgendered students. However, *Title IX of the Education Amendments of 1972* addresses discrimination on the basis of sex and sexual orientation in schools receiving federal funding.³⁶ Although *Title IX* does not specifically prohibit discrimination on the basis of gender identity or gender expression, this federal law has been successfully used to address transgender issues,³⁷ and sexual or gender-based harassment in schools based on gender stereotypes.³⁸

Title IX may be enforced by filing in federal or state court or through the Office of Civil Rights (OCR) of the Department of Education. Further guidance on this issue is found in the OCR’s “Revised Sexual Harassment Guidance,” which

³¹ Ontario Human Rights Commission, *Policy on Discrimination and Harassment Because of Gender Identity* (2009), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/resources/Policies/PolicyGenderIdent>>

³² *Forrester v. Peel (Regional Municipality) Police Services Board*, 2006 HRTO 13, 2006 CarswellOnt 9215, [2006] O.H.R.T.D. No. 13 (Ont. Human Rights Trib.) [*Forrester*].

³³ *XY v. Ontario (Minister of Government and Consumer Services)*, 2012 HRTO 726 (Ont. Human Rights Trib.) [*XY v. Ontario*].

³⁴ *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Maison des jeunes À-Ma-Baie inc.*, 1998 CarswellQue 2602, [1998] J.T.D.P.Q. No. 31 (T.D.P.Q.).

³⁵ *Mamela v. Vancouver Lesbian Connection*, 1999 CarswellBC 3195, [1999] B.C.H.R.T.D. No. 51 (B.C. Human Rights Trib.).

³⁶ *Title IX, Education Amendments of 1972*, 20 U.S.C.A. §1681(a) [*Title IX*].

³⁷ See *Coy Mathis By and through Jeremy and Kathryn Mathis v. Fountain-Fort Carson School District 8*, Colorado Division of Civil Rights Determination, June 17, 2013 [*Mathis*].

³⁸ See *Montgomery v. Independent School Dist. No. 709*, 109 F.Supp.2d 1081 (D. Minn., 2000) at p. 1091; *Snelling v. Fall Mountain Regional School Dist.*, 2001 WL 276975, 2001 DNH 057 (D.N.H., 2001); *Theno v. Tonganoxie Unified School Dist No. 464*, 377 F.Supp.2d 952 (D. Kan., 2005) at p. 965; *Riccio v. New Haven Bd. of Educ.*, 467 F.Supp.2d 219 (D. Conn., 2006); *Doe v. South-eastern Greene Sch. Dist.*, 2006 U.S. Dist. LEXIS 12790 (W.D. Pa., 2006); *Doe v. Brimfield Grade School*, 552 F.Supp.2d 816 (C.D. III., 2008).

states that “though beyond the scope of this guidance, gender-based harassment . . . is also a form of sex discrimination to which a school must respond.”³⁹

Claims under the First Amendment,⁴⁰ as well as the Due Process and Equal Protection clauses of the Fourteenth Amendment,⁴¹ have been raised in cases involving gender identity. The Massachusetts Superior Court held in 2000 that a transgender student had the First Amendment right to wear clothes consistent with her gender identity and a due process liberty interest in her personal appearance.⁴² Several cases involving harassment and discrimination against lesbian, gay, bisexual, and transgender (LGBT) students have been successful based on the Equal Protection Clause.⁴³ This means that public schools have an implied duty to protect transgender students from harassment on an equal basis with other students.

At the state level, only seventeen states and the District of Columbia,⁴⁴ have some form of protection for transgender persons on the basis of gender identity or expression. These states include California,⁴⁵ Colorado,⁴⁶ Connecticut,⁴⁷ Delaware,⁴⁸ Hawaii,⁴⁹ Illinois,⁵⁰ Iowa,⁵¹ Maine,⁵² Massachusetts,⁵³ Minnesota,⁵⁴ Ne-

³⁹ Office of Civil Rights, Revised Sexual Harassment Guidance, §III (Jan. 2001). <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁴⁰ U.S. Const. amend. I.

⁴¹ U.S. Const. amend. XIV, §1.

⁴² *Doe ex rel. Doe v. Yunits*, 2000 WL 33162199 (Mass.Super., 2000) [*Yunits*].

⁴³ See *Yunits*, *ibid.*; *Montgomery* above, note 38; *Flores v. Morgan High Unified School Dist.*, 324 F.3d 1130 (9 Cir., 2003); *Nabozny v. Podlesny*, 92 F.3d 446 (7 Cir., 1996).

⁴⁴ *D.C. Code* §§2-1401.01, 4-754.21 (10), 16-914, 31-2231-11(c) & 31-2231.13(d), 31-1603, 43-1507.

⁴⁵ Cal. Penal Code §422.56, Cal. Gov’t Code §12926, Cal Civ. Code §51, Cal. Educ. Code §§220 & 51500.

⁴⁶ Colo. Rev. Stat. Ann. §§24-34-401, 22-32-109.

⁴⁷ U.S., H.B. 6599, *An Act Concerning Discrimination*, January 2011 Gen. Assem., Reg. Session., Conn., 2011 (enacted).

⁴⁸ U.S., S.B. 97, *An Act to Amend Titles 6, 9, 11, 18, 19, 25, and 29 of the Delaware Code Relating to Hate Crimes and Discrimination in Employment, Public Works Contracting, Housing, Equal Accommodations, and the Insurance Business on the Basis of Gender Identity*, 147th Gen. Assem., Reg. Sess., Del., 2013 (enacted).

⁴⁹ Haw. Rev. Stat. Ann. §§489-2, 515-3.

⁵⁰ 775 Ill. Comp. Stat. 5/2-102.

⁵¹ Iowa Code Ann. §216.1.

⁵² Me. Rev. Stat. Ann. tit. 5, §4552.

⁵³ U.S., H. 3810, *An Act relative to gender identity*, 2010-11, Reg. Sess., Mass., 2011 (enacted).

⁵⁴ Minn. Stat. Ann. §363A.03.

vada,⁵⁵ New Jersey,⁵⁶ New Mexico,⁵⁷ Oregon,⁵⁸ Rhode Island,⁵⁹ Vermont,⁶⁰ and Washington.⁶¹ With the exception of Nevada and Hawaii, all the states listed above and North Carolina⁶² have enacted gender identity and gender expression anti-discrimination legislation relating specifically to education.

Consequently, transgender people in most U.S. cities and states face discrimination in nearly every aspect of their lives. The United States National Center for Transgender Equality and the National Gay and Lesbian Task Force released a report in 2011 entitled *Injustice at Every Turn*, which confirmed the pervasive and severe discrimination faced by transgender people. Out of a sample of nearly 6,500, the report found that transgender people experience high levels of discrimination in employment, housing, health care, education, legal systems, and even in their families.⁶³

Interestingly, prior to 2003, U.S. courts and administrative agencies had found that transgender people were protected under state civil rights laws that prohibit discrimination based on disability.⁶⁴ GID, now a discredited diagnosis, was also found to be a disability in Ontario.⁶⁵ It is likely that the new diagnostic class of gender dysphoria would be considered a disability under the Ontario *Human Rights Code* or other provincial or territorial human rights legislation. This prediction may soon be tested in Nunavut, where a transgendered woman, Vanida Plamandon, filed a complaint in 2012 against the territorial Minister of Health claiming discrimina-

⁵⁵ U.S., A.B. 211, *AN ACT relating to employment practices; prohibiting discriminatory employment practices based upon the gender identity or expression of a person; authorizing the Nevada Equal Rights Commission to investigate certain acts of prejudice against a person with regard to employment based on gender identity or expression and sexual orientation; and providing other matters properly relating thereto*, 2011, Reg. Sess. Nev., 2011 (enacted).

⁵⁶ N.J. Stat. Ann. §§10:5-4, 18A:37-14.

⁵⁷ N.M. Stat. Ann. §28-1-2.

⁵⁸ Or. Rev. Stat §174.100(6), Or. Rev. Stat. §§659A.003, 101.115(3), 179.750(2), 240.306(1), 418.648(10), 430.550, 443.739(19), 458.505(4)(h), 659.850(2), 744.382(4), 10.030(1).

⁵⁹ R.I. Gen. Laws §11-24-2, R.I. Gen. Laws 1956 §§28-5-7, 28-5.1-4(a), 34-37-4, 34-37-5.4.

⁶⁰ Vt. Stat. Ann. tit. 3, §§961(6), 963, 1026(6), 1028, 1621; Vt. Stat. Ann. tit. 8, §§4724(7) (B) &(C), 10403; Vt. Stat. Ann. tit. 9, §§2362, 2410, 2488, 4502, 4503; Vt. Stat. Ann. tit. 16, §§11, 565; Vt. Stat. Ann. tit. 21, §§495(a), 1726.

⁶¹ Wash. Rev. Code §§48.30-300, 49.60.175, 49.60.180, 49.60.190, 49.60.215, 49.60.222.

⁶² N.C. Gen. Stat. §§115C-407.15, 115C-407.16.

⁶³ Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011) [Grant et al.].

⁶⁴ Jennifer Levi and Bennett Klein, "Pursuing Protection for Transgender People Through Disability Laws" in Paisley Currah, Richard Juang, and Shannon Minter, eds., *Transgender Rights* (Minneapolis: University of Minnesota Press, 2006).

⁶⁵ Forrester above, note 32.

tion on the basis of disability — gender dysphoria — because her health coverage for transition surgery was denied. At the time of writing, she was homeless in Edmonton as a result.⁶⁶

4. SCHOOLS AND TRANSGENDER STUDENTS

(a) Restrooms

Public restrooms can be a major source of anxiety amongst transgender youth because the assignment of public restroom use based on sex does not conform to the self identification of the youth based on gender. Trans students may be subject to ridicule, abuse, or even assault, physical or sexual, in public lavatories. It is the use of the restroom that may provide the first notice to a school that it has a child who is transgender.

Brill and Pepper recommend that, as a general rule, transgender students of any age should have access to the restroom that corresponds to their gender identity, particularly if it aligns with their gender presentation. When a student desires privacy, then a single-stall bathroom should be made available. It is important, however, that the use of a single-stall facility be the personal choice of the student and not be forced or mandated in any way.⁶⁷

The first litigation around bathroom use occurred in Maine. In 2009, the Maine Human Rights Commission (MHRC) ruled that the Orono School District discriminated against a fifth grade student, Nicole Maines, at Asa Adams Elementary School. Nicole was biologically male but presented as female. This case attracted considerable public attention when the parents of a male student who had assaulted the trans student brought the situation to the attention of their church, the local press, and the school district. The transgender student was erroneously referred to in the media as a “transvestite.”⁶⁸

Nicole’s parents had met with the school administration prior to the beginning of the school year and had agreed that the student would use the girls’ restroom unless other girls or parents objected. However, when the male student, referred to above, followed Nicole into the bathroom and assaulted her, the school terminated her access to the female students’ restroom and told Nicole that she was to use the staff restroom for her own safety.⁶⁹ On June 5, 2009, the MHRC found reasonable grounds to believe that the Orono School District had engaged in unlawful discrimination in education and public accommodations by denying Nicole access to and use of the girls’ restroom facilities based on sexual orientation.⁷⁰ It is important to note that the Maine *Human Rights Act* includes gender identity and expression

⁶⁶ David Murphy, “Expert backs Plamondon in Nunavut trans debate” *Nunatsiaq News* (22 May 2013), online: Nunatsiaq News <http://www.nunatsiaqonline.ca/stories/article/65674expert_backs_plamondon_in_trans_debate/>.

⁶⁷ Brill above, note 5 at 167.

⁶⁸ *Parent of Minor Student v. School Union 87, Clenchy et al. (Orono)*, Investigator’s Report, PAED/08-0239, June 5, 2009 [*Clenchy 1*].

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

under its definition of sexual orientation.⁷¹ When Nicole entered Middle School, she was again denied access to the girls' restroom. On August 24, 2010, the MHRC again found this action by the school authority to be discriminatory.⁷²

The difficult issue of balancing rights exists not only between the transgender student and other members of the school community; there is also a careful balance that must be struck between the competing rights of the transgender student. As exemplified in this case, the school attempted to balance the right of the transgender student to attend school and be free from harassment and bullying with her right to access to public restroom facilities.

As a result of the MHRC findings, the family and the MHRC commenced proceedings in Superior Court to enforce the Commission's decision alleging unlawful discrimination in education on the basis of "sexual orientation," unlawful discrimination in public accommodations on the basis of sexual orientation, and the intentional infliction of emotional distress. On April 1, 2011, the court ruled on the defendants' motion to dismiss and stated that the count of unlawful discrimination in public accommodations on the basis of "sexual orientation" may proceed to the extent that the Orono School District may have unlawfully discriminated against the student by forcing her to use a staff bathroom. However, the claim that the Orono School District had an affirmative obligation to accommodate the student's transgender status by allowing her to continue using the girls' bathroom facilities was dismissed.⁷³ In a subsequent 2012 decision, Superior Court Justice William R. Anderson granted summary judgment to the defendant school district on the ground that state law permitted the district to assign bathroom use by biological sex.⁷⁴ According to John P. Gause, MHRC Counsel, the decision has been appealed on the ground that while the law may allow separate boys' and girls' washrooms, it should not be interpreted so as to unilaterally assign a transgender youth to one or the other. This would amount to a segregation of the child.

The bathroom issue was not only addressed in the courts but was also subject to legislative debate in Maine. Representative Ken Freddette of Newport, in an attempt to resolve the issue, tendered a bill⁷⁵ in the Maine legislature that would have effectively overturned the MHRC's original decision and allowed the operators of restrooms to decide who could use each gender's restroom. The proposed amendment stated as follows:

It is not unlawful public accommodations discrimination, in violation of this Act, for a public or private entity to restrict restroom or shower facilities that are part of a public accommodation to the use of single-sex facilities to members of a biological sex regardless of sexual orientation. Unless other-

⁷¹ *Human Rights Act*, Me. Rev. Stat. Ann. tit. 5 §4553 (9-C).

⁷² *Parent of Minor Student v. Regional School Unit #26 (formerly Orono), Clenchy et al.*, Investigator's Report, PAED/08-0239-A, August 24, 2010 [*Clenchy 2*].

⁷³ *Doe v. Clenchy* (April 1, 2011), No. 09-201 (Me. Sup. Ct.) [*Clenchy 3*].

⁷⁴ *Doe and Maine Human Rights Commission v. Clenchy* (Me. Sup. Ct. November 20, 2011) [*Clenchy 4*].

⁷⁵ U.S., H.P. 781, *An Act To Amend the Application of the Maine Human Rights Act Regarding Public Accommodations*, 121st Maine Leg., Reg. Sess., Maine, 2011.

wise indicated, a restroom or shower facility designated for one biological sex is presumed to be restricted to that biological sex.⁷⁶

In June 2011, the bill proposed by Representative Freddette failed to pass.

The issue of the use of restrooms at school came before the Colorado Division of Civil Rights in 2013. Coy Mathis registered as a boy in kindergarten at Eagleside Elementary School in Fountain-Fort Carson School District 8. Coy began to identify as a female not long after she entered school. The school accommodated her, but the restroom was not an issue because there was a single facility for all kindergartens used by both boys and girls. In Grade 1, Coy chose to use the girls' restroom and this practice continued until December 2012, when the Superintendent of the school district barred her from the girls' restroom. The parents were told that as Coy grew older and developed other students were going to be uncomfortable. Coy was directed to use a gender-neutral washroom or the staff bathroom. In February 2013, the parents pulled Coy from school, and launched a complaint stating that the school district had violated the 2008 Anti-Discrimination Policy that had expanded to include transgender protections. The school district relied upon the fact that Coy's birth certificate identified her as "male," even though Coy had other medical and legal documents that identified her as female, and argued they could thus deny her access to the girls' bathroom on the basis of her biological sex at birth. However, the Civil Rights Division noted that Coy had integrated into society as a girl and rejected the district's position:

... compartmentalizing a child as a boy or a girl solely based on their visible anatomy, is a simplistic approach to a difficult and complex issue. The Respondent, moreover, ignores federal and legal documents — more current than the Charging Party's birth certificate — which undeniably state the Charging Party's sex as female.⁷⁷

Although there has been no similar litigation in Canada, school boards are also wrestling with the restroom issue. For example, in 2012, James Spencer, a student at Kawartha Pine Ridge District School Board (KRDSB) in Ontario, who is biologically female but presents as male, was told that he could not use the men's washroom at school. He alleges that he was told to use the bathroom facilities at the neighbouring Harvey's restaurant. For a period of time, he was using a private washroom reserved for other staff, but he had to get a key from the office every time.⁷⁸ When the student raised the issue with administration, a meeting was called to review his needs. According to Martin Twiss, Superintendent of Education for Student Achievement at the KRDSB, the student is now using the men's washroom, and there was education and training provided to staff and students at the school, into which James had input. There have been no incidents of bullying since then.⁷⁹

⁷⁶ *Ibid.*

⁷⁷ *Mathis* above, note 37 at 10.

⁷⁸ Tim Almenciak and Jeff Green, "Transgendered student denied access to men's washroom" *Toronto Star* (15 November 2012), online: *Toronto Star* <http://www.thestar.com/news/gta/2012/11/13/transgendered_student_denied_access_to_mens_washroom.html>.

⁷⁹ *Ibid.*

Conversely, the Toronto District School Board (TDSB) already has a policy that addresses transgender accommodation. It specifically states that students may use the restroom in accordance with their gender identity.⁸⁰

(b) Sports/Locker Rooms

School boards may also have to deal with similar issues related to transgender athletes. As a result, there is often an attempt to balance competitive equality, access to sports in accordance with gender identity, and shared athletic facilities.

This issue gained attention when the International Olympic Committee (IOC) adopted a policy in 2003 that allowed transgendered athletes to compete in the sport of their corresponding gender identity if they had undergone genital reconstruction surgery.⁸¹ The USA Track & Field (USATF) followed suit and adopted the same policy in 2005.⁸²

In 2007, the Washington Interscholastic Activities Association (WIAA), the governing body for high school and middle/junior school athletics, departed from the focus on surgery when they adopted their own policy for the transgender student athlete.⁸³ The WIAA sets out a procedure for the transgender student who wishes to participate in athletics pursuant to their gender identity. The student must first give notice to the school and then to the WIAA via the school. Once notice has been given, a hearing is scheduled to hear the submissions of the student and review any supporting documentation. In contrast to the IOC policy, the student is to provide documentation that is consistent with the student's gender identification, which can be affirmed from statements from the student, a parent, or a health care provider. Furthermore, it should also be noted that the Appeal Committee can be comprised of a physician or psychiatrist versed in gender identity health care, a school administrator from another school, a WIAA staff member, and an advocate familiar with gender identity and expression issues. There is also another level of appeal should the student not agree with the decision of the Appeal Committee.⁸⁴ The Colorado High School Activities Association has adopted a similar policy.⁸⁵

These issues have also come to the fore in professional and college sports. In 2010, a transgender woman sued the Ladies Professional Golf Association (LPGA)

⁸⁰ The Policy is available online at <http://www.tdsb.on.ca/Portals/0/AboutUs/Innovation/docs/tdsb%20transgender%20accommodation%20FINAL_1_.pdf>.

⁸¹ International Olympic Committee, Statement of the Stockholm Consensus on Sex Re-assignment in Sport (28 October 2003), online: IOC <http://www.olympic.org/Documents/Reports/EN/en_report_905.pdf>.

⁸² US Track & Field, Policy on Transgender and Transsexual Athletes (25 February 2005), online: USATF <<http://www.usatf.org/about/policies/transgenderAndTranssexualAthletes>>.

⁸³ Washington Activities Association, Washington Activities Association Handbook 2011-2012 (08 September 2011), online: <[http://www.wiaa.com/ConDocs/Con951/Handbook%20\(Web\).pdf](http://www.wiaa.com/ConDocs/Con951/Handbook%20(Web).pdf)>.

⁸⁴ *Ibid.* at 49-50.

⁸⁵ Colorado High School Activities Association, Constitution of the Colorado High School Activities Association (2011), online: CHSAA <http://www.chsaa.org/about/pdf/Handbook_2011.pdf>.

claiming that the LPGA's constitution violated California's civil rights laws by requiring that a player must be "female at birth" in order to be eligible to compete on tour.⁸⁶ In response to the lawsuit, the LPGA voted to remove this eligibility requirement from the constitution.⁸⁷

In September 2011, the National Collegiate Athletic Association (NCAA), in an attempt to maintain competitive equality and allow student-athletes to compete in accordance with their gender identity, took a slightly different approach when they approved a transgender policy. The NCAA policy states as follows:

- A trans male (female to male) student-athlete who has received a medical exception for treatment with testosterone for gender transition may compete on a men's team but is no longer eligible to compete on a women's team without changing the team status to a mixed team. A mixed team is eligible only for men's championships.
- A trans female (male to female) student-athlete being treated with testosterone suppression medication for gender transition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of documented testosterone-suppression treatment.⁸⁸

The Canadian Collegiate Athletic Association (CCAA) followed the NCAA's lead in June 2012 when it created a policy⁸⁹ to enable transgendered student-athletes to participate in college sports. The policy mirrors the NCAA's with one exception. The CCAA policy adds a requirement that the student-athlete be receiving testosterone treatment or suppression for diagnosed GID or gender dysphoria, whereas the NCAA policy does not require this diagnosis.⁹⁰

The issue of transgendered students in athletics is also beginning to be addressed more widely at the elementary and secondary level. In April 2013, the California legislature amended the *California Education Code* such that "pupils be permitted to participate in sex-segregated school programs and activities including *athletic teams and competitions*, and use facilities consistent with his or her gender

⁸⁶ Katie Thomas, "Woman sues L.P.G.A Over Policy" *New York Times* (12 October 2010) online: [New York Times <http://www.nytimes.com/2010/10/13/sports/golf/13lawsuit.html>](http://www.nytimes.com/2010/10/13/sports/golf/13lawsuit.html).

⁸⁷ Katie Thomas, "L.P.G.A Tour Accepts Transgender Players" *New York Times* (1 December 2010) online: [New York Times <http://www.nytimes.com/2010/12/02/sports/golf/02sportsbriefs-LPGATOURACCE_BRF.html>](http://www.nytimes.com/2010/12/02/sports/golf/02sportsbriefs-LPGATOURACCE_BRF.html).

⁸⁸ Dr. Pat Griffin and Helen Carol, NCAA Inclusion of Transgender Athletes (August 2011), online: http://www.ncaa.org/wps/wcm/connect/fd9a78804841ff93953f9bf5e8bc9cc/Transgender_Handbook_2011_Final.pdf?MOD=AJPERES&CACHEID=fd9a78804841ff93953f9bf5e8bc9cc.

⁸⁹ Canadian Collegiate Athletic Association, CCAA/ACSC Operating Handbook (July 2012), online: <http://www.ccaa.ca/web/images/stories/MembersArea/english/Policies/Procedures/OperatingCode12-13.pdf>.

⁹⁰ *Ibid.* at ss. 15.1.1 & 15.1.2.

identity irrespective of the gender listed on the pupil's records."⁹¹ Other states seem to be on the same track. For example, earlier this year, the Massachusetts Department of Elementary and Secondary Education decreed that transgendered students should be allowed to play on sports teams and bathrooms in accordance with their gender identity.⁹²

The complexity of this issue is amplified as it often is coupled with the use of corresponding shower/locker facilities which are often not addressed in policy. This complication is illustrated in a recent incident at the University of Pittsburgh-Johnstown. A transgendered male, born female, had been using the male locker facilities for a weight training course for almost two semesters. However, in September of 2011, the University advised him that he could no longer do so because of student complaints and he was offered the use of private unisex facilities. The student's continued use of the facilities resulted in a complete ban from the locker room.⁹³ The campus police charged him with indecent exposure, defiant trespass, and disorderly conduct. The student was subsequently expelled in January 2012.⁹⁴ The University Anti-Discriminatory Policies Committee (ADPC) passed a resolution that the expulsion violated the University's Anti-Discrimination Policy, which since 2008 has prohibited discrimination on the basis of gender identity and gender expression and has required that the University develop a "universal bathroom policy."⁹⁵ In March 2012, the University adopted the unwritten opinion of the Office of the General Counsel that in order for students to use gender-specific facilities not matching their biological sex, they would need to furnish a birth certificate matching that sex.⁹⁶ This is problematic inasmuch as some states require that a person get sex-reassignment surgery before they can change their birth certificate. Also, other

⁹¹ U.S., A.B. 1266, *An Act to amend Section 221.5 of the Education Code, relating to pupil rights*, 2013-2014, Reg. Sess., Cal., 2013 (enacted).

⁹² Jay Lindsay, "Mass. Education Department issues rules on transgender pupils" *Associated Press* (16 February 2013), online: *The Boston Globe* <<http://www.bostonglobe.com/metro/2013/02/16/mass-education-department-issues-rules-transgender-pupils/xPBs6JQBIOqGpUxlyd1XTN/story.html>>.

⁹³ Bill Vidonic, "Transgender Student could be sanctioned for locker room use" *Pittsburgh Tribune Review* (9 December 2011), online: *Pittsburgh Tribune Review* <http://triblive.com/x/pittsburghtrib/news/regional/s_771169.html#axzz2ZJlixM7d>.

⁹⁴ Kimberley K. Barlow, "Transgender former UPJ student pleads guilty to reduced charges" *The University of Pittsburgh University Times* (13 June 2013), online: *University Times* <<http://www.utimes.pitt.edu/?p=26294>>.

⁹⁵ Chris Young, "Pitt bathroom policy surprises, outrages transgender faculty, students" *Pittsburgh City Paper* (4 April 2012), online: *Pittsburgh City Paper* <<http://www.pghcitypaper.com/pittsburgh/pitt-bathroom-policy-surprises-outrages-transgender-faculty-students/Content?oid=1509064>>.

⁹⁶ Peter Hart, "Senate ad hoc committee to look at transgender issues" *The University of Pittsburgh University Times* (5 April 2012), online: *University Times* <<http://www.utimes.pitt.edu/?p=26294>>.

states, such as Idaho, Ohio, and Tennessee, do not allow changes to birth certificates under any circumstances.⁹⁷

As issues surrounding transgender athletes continue to evolve, school boards may wish to refer to a guide on the transgender athlete published by the National Center for Lesbian Rights (NCLR) in 2010.⁹⁸ The guide highlights another issue related to the issue of restrooms — the use of locker-room facilities during physical education activities. It recommends that transgender student athletes should be able to use locker rooms, showers, and toilet facilities in accordance with their gender identity. It further recommends that every locker room should have some private, enclosed changing areas, shower areas, and toilets. When requested by a transgender athlete, schools should provide private and separate facilities, but transgendered youth should not be required to use these separate facilities.⁹⁹

(c) Dress Codes

A student's right to dress in accordance with their gender identity also arises in the school setting, particularly where schools have dress codes that prohibit certain clothing as inappropriate. In Massachusetts, student "Pat Doe" was granted an injunction allowing her to wear any clothing or accessories that any other male or female student could wear in the school without being disciplined.¹⁰⁰

In this case, Pat, who is biologically male, began to express her female gender identity by wearing girls' clothing and accessories. The Principal would often send Pat home if she arrived at school wearing girls' clothing. Furthermore, when Pat began eighth grade, the Principal instructed her to come to his office every day so that he could approve her appearance. If her appearance failed to meet the Principal's approval, Pat would be sent home to change. At the beginning of her grade nine year, the school informed Pat that she would not be allowed to enrol at the school if she continued to wear girls' clothing or accessories. The school relied on the provision in the school's dress code that prohibits "clothing which would be disruptive or distracting to the educational process or which could affect the safety of students."¹⁰¹ The court ruled that the school may not prohibit the student from expressing her female gender identity as such a prohibition violates the student's right to freedom of expression.¹⁰² In addition, it was found that disciplining a biologically male student for wearing girls' clothing constitutes sex discrimination.¹⁰³ This Superior Court decision confirms that a school may not exert its authority over

⁹⁷ "Know Your Rights — Transgender People and the Law" *American Civil Liberties Union* (24 April 2013), online: ACLU <<http://www.aclu.org/lgbt-rights/know-your-rights-transgender-people-and-law>>.

⁹⁸ Dr. Pat Griffin and Helen J. Carroll, *On the Team—Equal Opportunity for Transgender Student Athletes*, Griffin and Carroll, (October 4, 2010) NCLR, online: NCLR <<http://www.nclrights.org/site/DocServer/TransgenderStudentAthleteReport.pdf?docID=7901>>.

⁹⁹ *Ibid.* at 31.

¹⁰⁰ *Yunits* above, note 42.

¹⁰¹ *Ibid.* at para. 1.

¹⁰² *Ibid.* at para. 4.

¹⁰³ *Ibid.* at para. 7.

a student simply to enforce stereotypical ideas of how boys and girls should look. The court's decision to issue an injunction was affirmed on appeal.¹⁰⁴

It should also be noted that freedom of expression claims regarding clothing are stronger if based on gender identity as opposed to gender expression alone. In a Florida case, for example, it was decided that a girl identifying as a girl who did not conform to gender norms, wishing to wear a shirt and tie in a graduation photograph, absent a gender identity rationale did not have freedom of expression protection.¹⁰⁵

Presumably, where school uniforms are required, while a student may dress in a uniform consistent with gender identity, the student would be subject to the application of the dress code provisions for that gender, such as skirt length or shoe selection.

(d) Bullying and Harassment

Recent studies have shown that transgendered students suffer a higher rate of discrimination and harassment. In the United States, students who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%), and sexual violence (12%). Such harassment was so severe that it led almost one-sixth (15%) to leave a school in K-12 settings or in higher education.¹⁰⁶ Similarly, in Canada, a study by Egale Canada and the University of Winnipeg showed that 95 per cent of transgender students felt unsafe at school, compared to one-fifth of straight students.¹⁰⁷

Anti-bullying initiatives which consider gender have been undertaken in Canada and the United States. In California, for example, the *California Education Code* provides that “no person shall be subject to discrimination on the basis of . . . gender, gender identity, gender expression . . . in any program or activity conducted by an educational institution that receives or benefits from state financial assistance.”¹⁰⁸ The *California Code of Regulations* defines gender as “a person’s actual or perceived sex and includes a person’s perceived identity, appearance or behaviour whether or not that identity, appearance or behaviour is different from that traditionally associated with a person’s sex at birth.”¹⁰⁹ It is noteworthy that both the Los Angeles County School District and San Francisco Unified School District have developed detailed guidelines for school employees on transgender issues and

¹⁰⁴ *Doe v. Brockton School Committee*, 2000 WL 33342399 (Mass.App.Ct., 2000).

¹⁰⁵ *Complaint for Damages and Demand for Jury Trial, Nicole Youngblood, by and through her next friend, Sonya Youngblood, v. School District of Hillsborough County, Florida* (June 2002, 2) (U.S. District court, Middle District of Florida, Tampa Division).

¹⁰⁶ Grant et al. above, note 63 at 3.

¹⁰⁷ C. Taylor et al., *Youth Speak Up about Homophobia and Transphobia: The First National Climate Survey on Homophobia in Canadian Schools. Phase One Report* (Toronto: Egale Canada Human Rights Trust, 2009).

¹⁰⁸ Cal. Educ. Code §220.

¹⁰⁹ *California Code of Regulations*, 5 C.C.R. §.4910 (k).

the prevention of transgender violence and harassment.¹¹⁰ A similar guideline has been implemented at the TDSB.¹¹¹

Not surprisingly, there has been some legislative backlash to protection of transgender students from bullying. For example, a bill before the Tennessee Senate proposes that school anti-bullying and harassment policies “may not be construed or interpreted to infringe upon the First Amendment rights of students and may not prohibit their expression of religious, philosophical or political views as long as such expression does not include a threat of physical harm to a student or of damage to a student’s property.”¹¹²

Following the gender stereotype and gender-based harassment cases mentioned above,¹¹³ in 2009 a suit was filed against a New York State school board alleging that a failure to protect a student from bullying based on gender stereotypes and his sexual orientation was a violation of the Fourteenth Amendment and *Title IX* legislation. The U.S. Department of Justice filed a motion to intervene on behalf of the student but the case was ultimately settled when the school district agreed to reform its policies and report on its responses to future complaints.¹¹⁴ Similarly, in a California case, the parent of a student who had committed suicide after severe and persistent bullying by other students made a complaint to the OCR. The OCR investigation revealed that the student had dressed in stereotypically female clothing and shoes and there had been a perception that he was gay. The OCR reached a Resolution Agreement with the school district in 2011 to develop policy, train its employees, and employ an outside consultant to implement the reforms.¹¹⁵

In Canada, many provinces have either adopted or are in the process of drafting anti-bullying legislation. Only Ontario,¹¹⁶ Manitoba,¹¹⁷ and Quebec,¹¹⁸ however, include specific protection for transgendered persons in their provisions.

¹¹⁰ Los Angeles Unified School District, Office of the General Counsel, Transgender and Gender Nonconforming Students — Ensuring Equity and Nondiscrimination (15 February 2005), online: LAUSD <<http://www.lausd.net/lausd/offices/eec/pdfs/Transg-Guide.pdf>> and San Francisco Unified School District, In Support that the San Francisco Unified School District (SFUSD) Strengthen the Anti-Discrimination Program in Schools in Order to Effect a Healthier Learning Environment for Lesbian Gay Bisexual Transgender and Questioning (LGBTQ) Students (9 February 2010), online: SFUSD <<http://www.sfusd.edu/assets/sfusd-staff/board-archive/memberreso/FEWER%20%20LGBTQ%20WTH%20AMENDS%20INCORPORATED%20%20105.pdf>>.

¹¹¹ Above, note 80.

¹¹² U.S., H.B.1153, *AN ACT to amend Tennessee Code Annotated, Title 49, Chapter 6, relative to harassment, intimidation, and bullying*, 2011-2012 Reg. Session., Ten., 2011.

¹¹³ See above, notes 38 and 43.

¹¹⁴ *J.L. v. Mohawk Central School District*, N.D.N.Y., Index No.:09-CV-943, 2009.

¹¹⁵ *United States v. Tehachapi Unified School District*, OCR Case No. 09-11-1031, DOJ Case Number DJ 169-11E-38, 2011.

¹¹⁶ *Education Act*, R.S.O. 1990, c. E.2, ss. 169(1), 300.0.1(2), 301(6)(i), 303.1(1)(d), 310(1) 7.2.

¹¹⁷ *Public Schools Act*, C.C.S.M., c. P250, s. 47.1(2)(ii).

¹¹⁸ *Education Act*, R.S.Q., c. I-13.3, s. 75.1(2).

In Ontario, anti-bullying protection has been extended to gender identity in Bill 13, which received Royal Assent in June 2012.¹¹⁹ The Preamble to the government's Bill states that

the people of Ontario and the Legislative Assembly:

... Believe that students need to be equipped with the knowledge, skills, attitude [*sic*] and values to engage the world and others critically, which means developing a critical consciousness that allows them to take action on making their schools and communities more equitable and inclusive for all people, including LGBTTIQ (lesbian, gay, bisexual, transgendered, transsexual, two-spirited, intersex, queer and questioning) people.

One of the significant changes in Ontario is greater consequences for students who have engaged in bullying. As a result of these revisions to the *Education Act*, a student may now be expelled for bullying another student in cases in which there has been a record of bullying. Previously, bullying was an enumerated ground for suspension only and not expulsion. In addition, there are requirements to train staff and students regarding bullying and harassment. One of the most controversial legislative initiatives is to mandate the support of students who establish gay-straight alliances (GSAs).¹²⁰

In Manitoba, while the *Public Schools Act*¹²¹ already includes a provision stating that all school codes of conduct should specifically prohibit discrimination on the basis of gender identity, a new bill¹²² seeks to expand on the intersection of bullying/cyberbullying and gender identity. The new legislation also takes a proactive approach as it would require each school board to establish respect for human diversity policy. One of the listed goals of the human diversity policy is to “accommodate pupils who want to establish and lead activities and organizations” that promote “the awareness and understanding of, and respect for, people of all sexual orientations and gender identities.”¹²³

(e) Curriculum

Given the complexities of transgender issues, there is a growing trend for gender education in the classroom. For example, the American School Health Association and several other agencies recommend national sexuality education standards for kindergarten to grade twelve (K-12) that includes sexual identity education as early as kindergarten and contend that children should be able to differentiate among gender identity, gender expression, and sexual orientation by the end of grade eight.¹²⁴ In California, the governor signed the *Fair, Accurate, Inclusive and*

¹¹⁹ Bill 13, *An Act to amend the Education Act with respect to bullying and other matters*, 1st Sess., 40th Leg., Ontario, 2012 (assented to on 19 June 2012), S.O. 2012, c. 5.

¹²⁰ *Ibid.*

¹²¹ CCSM, c. P250.

¹²² Bill 18, *The Public Schools Amendment Act (Safe and Inclusive Schools)*, 2nd Sess., 40th Leg., Manitoba, 2012.

¹²³ *Ibid.* at s. 41 (1.8).

¹²⁴ American School Health Association, National Education Association, American Association for Health Education & The Society of State Leaders of Health and Physical

Respectful (FAIR) Education Act.¹²⁵ It requires California public schools to provide instruction in the “social sciences to include a study of the role and contributions of LGBT Americans . . . to the development of California and the United States.”¹²⁶

This particular bill has created controversy and debate, reminding school boards they should also be aware of parental rights regarding public school curricula. For example, parents in California have the right to receive written notice of and opt out of comprehensive sexual health education, and HIV/AIDS prevention education. However, the *California Education Code* specifically states that the notice and opt-out provisions do not apply to instruction or materials that discuss gender, sexual orientation, or family life and to descriptions and illustrations of human reproductive organs and their functions.¹²⁷

In 2010, when the Ontario government attempted to revamp the sexual education component of the curriculum, there was a strong reaction from the Catholic and other religious communities. Among other topics, the proposed change would have seen grade three (eight-year-old) students learn about homosexuality and gender identity. However, the provincial government quickly abandoned this proposal after harsh criticism from several interest groups.¹²⁸

As was the experience in British Columbia, school boards considering the implementation of LGBT content into the curriculum may face more than political pressure from parents, whether for or against its inclusion, and be forced to respond to litigation. In 2010, a group of British Columbia parents on behalf of the Abbotsford School District, generally, and in particular, lesbian, bisexual, and transgendered parents, filed an application with the British Columbia Human Rights Tribunal.¹²⁹ In this case, the representative complainants had previously settled a human rights application with the same board regarding the inclusion of LGBT topics in school curricula. The parties had agreed that the school board would create an elective course in social justice. Sexual orientation and gender identity were among the intended concepts to be taught as part of the course. Although the course was under review by the school board and the Ministry of Education, one school in the board offered it. Several students signed up for the course but, at some point, the course was withdrawn. The representative complainants argued that the course had been withdrawn because of complaints by some parents in the school board and therefore the withdrawal amounted to discrimination.¹³⁰ The respondent

Education, *National Sexuality Education Standards — Core Content and Skills, K-12 A Special Publication of the Journal of School Health* (Future of Sex Initiative, January 2012) at 26.

¹²⁵ U.S., S.B. 48, *An act to amend Sections 51204.5, 51500, 51501, 60040, and 60044 of the Education Code, relating to instruction*. 2011-2012, Reg. Sess., Cal., 2011.

¹²⁶ *Ibid.*

¹²⁷ Cal. Educ. Code §51932(b).

¹²⁸ Antonella Artuso, “The rise and fall of Ontario’s new sex-ed” *CNEWS* (24 April 2010), online: *CNEWS* <<http://cnews.canoe.ca/CNEWS/Politics/2010/04/24/13707831-qmi.html>>.

¹²⁹ *Corren v. Abbotsford School Board*, 2010 BCHRT 32 (CanLII).

¹³⁰ *Ibid.* at paras. 8–24.

school district countered that they had withdrawn the course because it was still under review. The respondent moved for summary judgment but was unsuccessful.¹³¹ The school board sought judicial review of the summary judgment in favour of the parents but was again unsuccessful and the case is proceeding through appeal.¹³²

(f) Name and Gender in School Records

Many students may seek to change their name of gender to reflect their gender identity; posing additional challenges for school record keepers.

In the United States, change-of-name laws vary from state to state. The federal *Family Rights and Privacy Act* (FERPA) allows parents or eligible students to correct school records when they are inaccurate or misleading. By inference this would seem to permit a school district to make a discretionary name change.¹³³ Most states, however, require that the student have a court-ordered name change in order to amend student records. Although in some states, California, for example, there is no provision for students to change their name by repute at the school level, many schools — such as those in San Francisco — will accede to a request to refer to a child by their chosen name for day-to-day activities without reflecting the requested usage in the official record.¹³⁴ In California, a court order is required to legally change an individual's name and gender; however, no proof of medical care is required for a change. Until October 2011, the California *Health and Safety Code* required documentation by a physician to prove sex reassignment surgery and allowed for the filing of objections by any person. New legislation now allows a person who has undergone appropriate treatment for the purpose of gender transition to file for a change and no objections are permitted.¹³⁵

Although a court order is required for a name change, the U.S. federal government has relaxed its requirements for gender designation on social security documents and passports.¹³⁶

The situation is even less clear for former students who request a retroactive change to school records after having undergone a gender transition. From the point of view of a person who has transitioned, having to present records that reveal the gender change is a violation of privacy. On the other hand, school districts have an interest in maintaining the integrity of records.

¹³¹ *Ibid.* at para. 7.

¹³² *Abbotsford School District No. 34 v. Corren*, 2011 BCSC 529, 2011 CarswellBC 1055 (B.C. S.C.).

¹³³ *Family Educational Rights and Privacy Act*, 20 U.S.C §1232g (2006) [FERPA].

¹³⁴ Gender Spectrum, “Legal Considerations”, online: Gender Spectrum <<http://www.genderspectrum.org/child-family/legal>>.

¹³⁵ U.S., A.B. 433, *An Act to Amend Sections 103425, 103430, and 103435 of the Health and Safety Code, relating to vital records*. 2011-2012, Reg. Sess., Cal., 2011 (enacted).

¹³⁶ Lisa Leff, “‘M’ or ‘F’? Outdated IDs worry transgender people” *Associated Press* (15 June 2013), online: *The Morning News* <http://www.scnw.com/news/national/article_91c0d0ca-d5da-11e2-84b4-001a4bcf6878.html>.

A 1991 opinion letter of the U.S. Family Policy Compliance Office concluded that the FERPA provisions allowing name changes to school records would not apply to former students.¹³⁷ While school districts would appear to have considerable freedom to develop policy in this area, they should bear in mind that a refusal to change records could ground a claim under *Title IX* or state anti-discrimination laws although there is no case law to date.¹³⁸

In Ontario, the student record guidelines do not apply to former students.¹³⁹ As in the United States, however, failure to make a requested change may constitute discrimination. The Ontario Ministry of Education has promulgated the *Ontario Student Record (OSR) Guideline* which permits a principal to revise the student's school record to reflect the name of "repute."¹⁴⁰ Under this provision, transgender youth can have report cards and transcripts reflect their chosen name. However there is no specific provision for changing the gender of the student in school records. It is assumed that such a change would require a revised birth certificate.

Generally, in Ontario, it is not a requirement to have undergone any medical procedures in order to change one's name.¹⁴¹ In order to change gender designation on one's driver's licence, one does not need to have completed sex reassignment surgery. To change the gender designation, the person must supply a letter from a licensed physician or a psychologist which states that the physician has examined or treated the individual and that "it is their opinion that the change in sex designation on the driver's licence is appropriate."¹⁴² In addition, the 2012 decision in *XY v. Ontario*¹⁴³ held that the government's previous requirement that there be proof of sex reassignment surgery before changing a person's gender designation on a birth certificate was discriminatory. The Ontario Human Rights Tribunal made the following orders:

- 1) The respondent shall cease requiring transgendered persons to have "transsexual surgery" in order to obtain a change in sex designation on their registration of birth;
- 2) Within 180 days of the date of this Decision, the respondent shall revise the criteria for changing sex designation on a birth registration, up to the point of undue hardship, so as to remove the discriminatory effect of the current system on transgendered persons. The revision of the criteria

¹³⁷ *FERPA* above, note 133 at §1232g (2).

¹³⁸ Matthew Ell, "Old Student New Name: Should School Districts Change Records of Transgender Former Students?" (April 2011) National School Boards Association Council of School Attorneys Inquiry and Analysis at 6.

¹³⁹ Part 10, *Ontario Student Record (OSR) Guideline*, 2000, online: <<http://www.edu.gov.on.ca/eng/document/curricul/osr/osr.html>>.

¹⁴⁰ *Ibid.*

¹⁴¹ Government of Ontario, *Changing Your Name online*, Government of Ontario, online: <http://www.ontario.ca/en/information_bundle/individuals/119596.html>.

¹⁴² Government of Ontario, Ministry of Transportation, *Gender Designation Change online*, MTO, online: <<http://www.mto.gov.on.ca/english/dandv/driver/genderchange.shtml>>.

¹⁴³ *XY v. Ontario* above, note 33.

for changing sex designation on a birth registration should be in accordance with the reasoning in this Decision.

3) Within a further 30 days, the respondent shall take reasonable steps to publicize the revised criteria for changing sex designation on a birth registration so that transgendered persons are aware of them.

4) Any applications by transgendered persons who have already undergone or are in the process of undergoing “transsexual surgery” with a view to satisfying the respondent’s requirements for a change in sex designation pursuant to s. 36 of the VSA shall be administered in the normal course pending the development and publication of the revised criteria for changing sex designation on a birth registration.¹⁴⁴

Since the decision, Service Ontario has had a process for changing gender on a birth certificate which is similar to the one that was already in place for Driver’s Licences, outlined above.

5. A FINAL NOTE

As can be seen from this brief review, the issue of transgender student rights is emergent and complex. Legal counsel for school districts would be wise to advise their clients that there is not a one-size-fits-all solution in terms of policy development. As with many school issues, the exercise of discretion by principals and school officials must be informed, not just by the wishes of individual students to exercise their rights but by the need to protect the safety of students and an awareness of the political ramifications of their decisions in the broader school community. “Doing the right thing” may not be enough as school officials in Orono, Maine, discovered.¹⁴⁵ Respecting the individual needs of transgender students will remain a delicate balancing act for school districts.

Nevertheless, best practices may include advising parents to immediately communicate their child’s status to the principal and the child’s teacher as many early childhood education experts recommend. In addition, parents should insist that school staff and the broader school community receive education — and training, where appropriate — about transgender issues. When informed that a transgender child is entering a school, the board’s counsel should advise the school’s staff that religious objections or personal beliefs have no place in the classroom. Because children have the right to an environment free from discrimination, harassment, and bullying a strong example of inclusiveness must be modelled by all school employees. In some instances it may be appropriate to advise all the parents of the school by letter of the presence of a transgender student. Given the low tolerance for ambiguity around teen gender issues by society, in general, and the police and other authority figures, in particular, experts advise parents to ensure that trans teens carry a notarized letter from a doctor or therapist attesting to their status.¹⁴⁶

The issues bound up in gender identity and gender expression are rapidly evolving. As awareness and advocacy increase, definitions and political perspec-

¹⁴⁴ *Ibid.* at 300.

¹⁴⁵ See *Clenchy 1, Clenchy 2, Clenchy 3, and Clenchy 4* above, notes 68, 72, 73, and 74.

¹⁴⁶ Brill and Pepper above, note 5 at 70-71, 156-57.

tives may change. Clearly, laws have changed and no doubt will continue to do so. Some jurisdictions have taken a lead; but, for the majority of jurisdictions, confusion and uncertainty continue. Nevertheless, it is increasingly apparent that institutions ignore evolving transgender rights to their detriment.

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