

Transgender Battles – Access and Equality

A talk with Mara Keisling

I. Terminology and Basic Protections

A. Terminology

1. As the National Center for Transgender Equality notes, terminology within the community varies and has also evolved over time.¹
2. Gender identity: a person's internal sense of their gender.
3. Gender expression: external manifestations of gender.
4. Transgender: umbrella term for person whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth.
5. Transsexual: older term for people whose gender identity is different from their assign sex at birth who seeks to transition.

B. Nondiscrimination laws

1. Some federal laws that have been interpreted as prohibiting discrimination of transgender people in employment and housing.
 - a. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex by an employer with 15 or more employees. The EEOC interprets "sex" to encompass gender identity and sexual orientation.
 - b. The Department of Housing and Urban Development has interpreted the Federal Fair Housing Act to encompass gender identity and gender nonconformity in illegal sex discrimination.
2. The following states have laws that explicitly prohibit discrimination against transgender people to varying degrees: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and D.C.

II. Public Accommodation Laws

A. Federal public accommodations non-discrimination protections - Civil Rights Act of 1964²

- a. Prohibits discrimination based on race, color, religion, or national origin in public accommodations, which includes hotels, restaurants, theaters, stadiums, and the like.
- b. Does not cover "sex" or "gender identity."

¹ Transgender Terminology, National Center for Transgender Equality. See more at: <http://www.transequality.org/issues/resources/transgender-terminology>

² 42 U.S.C. 2000a: <https://www.law.cornell.edu/uscode/text/42/2000a>

- B. The conversation and legislations about public accommodations have mostly centered on bathrooms, the so-called “bathroom bills.”
 - 1. Some states have proposed legislation specifically prohibiting nondiscrimination.
 - 2. Many other states have proposed “bathroom bills” that restrict access to restrooms and locker rooms on the basis of gender assigned at birth.
 - a. Proponents of such bills say they set a baseline for privacy and that the intended purpose is to ensure privacy and safety of individuals.
 - b. They claim that nondiscrimination laws are dangerous and that bathroom bills are necessary to protect the women and children from
- C. North Carolina’s HB 2 is the only bill that became law.
 - 1. An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations, also known as Public Facilities Privacy & Security Act.
 - 2. § 115C-521.2 Sing-sex multiple occupancy bathroom and changing facilities
 - a. Defines “biological sex” as the sex indicated on a person’s birth certificate.
 - b. Section (b) requires schools to designate student multiple occupancy bathrooms and locker rooms for use based on students’ biological sex.
 - c. Article 49B § 143-422.11 required “designated multiple or single occupancy bathrooms or changing facilities according to biological sex.”
 - d. Effectively barred transgender individuals from using bathrooms and lockers rooms that did not match their biological sex.
 - 3. HB 2 was a response to a Charlotte ordinance that prohibited discrimination on the basis of gender identity. Most importantly, HB 2 prohibited any municipal law that provided greater protections than state law.
- D. HB 2 had a measurable economic impact on the state.
 - 1. Prompted the NBA to decide to relocate its 2017 All-Star Game from Charlotte.
 - 2. The NCAA initially pulled its championship games from North Carolina in August 2016. After HB 2 was repealed in March 2017, the NCAA announced it was bringing the games back.
 - 3. Other musical acts and musicians like Bruce Springsteen, Ringo Starr, and Pearl Jam either canceled already planned concerts or boycotted the state as well.
 - 4. The Associated Press estimated that the law would cost the state more than \$3.76 billion over the next 10 to 12 years.³
- E. Repeal of HB 2

³ Associated Press, Price tag of North Carolina’s LGBT law: \$3.76B, March 27, 2017: <https://apnews.com/fa4528580f3e4a01bb68bcb272f1f0f8/ap-exclusive-bathroom-bill-cost-north-carolina-376b>

1. In March 2017, HB 2 was repealed and replaced with HB 142.
 2. HB 142 is a preemption law⁴ - forbids state agencies and public schools from regulating access to bathrooms and locker rooms, and forbids local municipalities from regulating private employment practices or public accommodations.
- F. Examples of other failed bills or pending legislation
1. In the 2017 legislative session, 16 states have considered various forms of bathroom bills.
 2. Texas Senate Bill 6⁵
 - a. Prohibits local municipalities from adopting policies related to and requires schools and government buildings to restrict restrooms to use based on “biological sex.”
 - b. “Biological sex” is defined as the sex indicated on a person’s birth certificate.
 3. South Carolina House Bill 3012⁶: prohibits local municipalities from enacting laws to require gender neutral restrooms and allows for local municipalities to enact laws to require bathroom designation based on “biological sex.”
 4. Washington House Bill 1011⁷: allows public and private entities to limit access to restrooms “if the person is preoperative, nonoperative, or otherwise has genitalia of a different gender from that for which the facility is segregated.”
- G. California’s Equal Restroom Access Act⁸
1. Requires all single user bathrooms in businesses, government buildings, and places of public accommodation to be identified as “all-gender” bathrooms.
 2. Requires the unisex restroom symbol to be posted.

III. Transgender Students in Schools

- A. Title IX of the Education Amendments Act of 1972
1. Title IX prohibits sex discrimination in schools.
 2. It applies to all private and public educational institutions that receive federal funds.

⁴ N.C. General Statute § 142-760. Preemption of regulation of access to multiple occupancy restrooms, showers, or changing facilities.:

<http://www.ncleg.net/Sessions/2017/Bills/House/HTML/H142v5.html>

⁵ Texas Senate Bill 6: <http://www.legis.state.tx.us/tlodocs/85R/billtext/html/SB000061.htm>

⁶ South Carolina House Bill 3012: http://www.scstatehouse.gov/sess122_2017-2018/bills/3012.htm

⁷ Washington House Bill 1011: <http://app.leg.wa.gov/billsummary?BillNumber=1011&Year=2017-documentSection>

⁸ California Health and Safety Code § 118600:

https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=HSC&division=104.&title=&part=15.&chapter=2.&article=5

B. DOJ and DOE guidance

1. 2016 guidance

- a. The Departments of Justice and Education issued joint guidance that, under Title IX of the Education Amendments of 1972, schools receiving federal funds may not discriminate based on a student's transgender status and that "sex" encompasses gender identity for purposes of enforcing Title IX.⁹
- b. The letter was issued in response to questions from school districts and higher education to clarify protections for transgender students.

2. 2017 guidance¹⁰

- a. The guidance withdrew the DOJ and DOE's 2016 Dear Colleague Letter.
- b. It stated that the 2016 guidelines gave rise to legal inconsistencies and that it was best left up to states to form the educational policy.

C. Gloucester County School District v. G.G.¹¹

1. Gavin Grimm, a transgender student at Gloucester High School, obtained permission from school administrators to use the boys' restrooms. After some parents and residents of the County complained, the school board adopted a policy that required students to use bathrooms corresponding to their biological gender and segregating trans students into separate unisex bathrooms. Gavin filed a suit against the school board claiming that the policy violated his Title IX rights and filed a motion for preliminary injunction asking the court to use the same restroom as other boys.
2. The district court denied the injunction and dismissed his claim under Title IX. The Fourth Circuit overturned the district court's decision.
3. The Supreme Court remanded the case to the Fourth Circuit in light of the 2017 guidance issued by the DOJ and DOE.

⁹ Press release – US Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students, May 13, 2016:

<https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights>

¹⁰ DOE Dear Colleague Letter on Transgender Students, February 22, 2017 (download link): <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx>

¹¹ More information on case on ACLU website: <https://www.aclu.org/cases/gg-v-gloucester-county-school-board>