

Transgender Battles – Access and Equality A talk with Mara Keisling

I. Transgender Students in Schools

A. Sports in schools

1. The NCAA Transgender Student Athlete Policy provides a best practices guide and policy recommendations for member institutions.¹
 - a. Any trans male not taking testosterone may compete on a men's or women's team.
 - b. Any trans female not taking hormone treatments may not compete on a women's team.
 - c. A trans male student receiving testosterone for gender transition may compete on a men's team but may not compete on a women's team.
 - d. A trans female student receiving testosterone suppression medication may compete on a men's team but may not compete on a women's team until completing a year of hormone therapy.
2. High schools
 - a. Each state's high school athletics associations set their own policies regarding transgender students' participation in sports.
 - b. They vary, from states like California and Washington requiring no medical hormones or surgeries, to states like Texas, Alabama and Indiana requiring a birth certificate and/or gender reassignment surgery, hormones, and a wait period.

B. School discrimination policies

1. Many states explicitly prohibit discrimination in schools based on gender identity or expression and sexual orientation: e.g. CA, CO, CT, DC, IL, IA, ME, MA, MN, NJ, OR, VT, WA.
2. Individual school districts may also have policies prohibiting discrimination based on gender identity.
3. In the 2017 legislative session, several states have introduced restrictive bills:
 - a. Texas SB 242²
 - i. Would require teachers and administrators to give parents all information about their child's psychological and emotional well-being.
 - ii. Introduced by Konni Burton, Texas state legislator, as a response to a local school district's adoption of guidelines that

¹ NCAA Inclusion of Transgender Student-Athletes policy:

https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf

² Follow the legislative history of the Texas SB 242 here:

<http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=SB242>

advocates believed were a step toward protecting the rights of transgender students. Under the guidelines, each student's request for bathroom or locker-room access would be evaluated on a case-by-case basis.

- iii. LGBT advocacy groups said SB 242 would force school employees to out students in some cases.

II. Healthcare

A. Affordable Care Act

1. § 1557 prohibits discrimination based on race, color, national origin, sex disability and age by health care programs that receive federal funding, are administered by a federal agency, or were created by the ACA.³
 - a. Includes insurance companies, hospitals, and pharmacies that accept or administer Medicaid or Medicare.
 - b. The ACA prohibits discrimination by incorporating existing anti-discrimination statutes: Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act, the Age Discrimination Act of 1972, and the Rehabilitation Act of 1973.
2. In May 2016, the Department of Health and Human Services (HHS) issued a new rule that confirmed that § 1557 discrimination prohibition based on sex includes gender identity and expression.
 - a. In December 2016, the U.S. District Court for the Northern District of Texas enjoined § 1557's prohibitions on discrimination on the basis of gender identity and termination of pregnancy on a nationwide basis.
 - b. As a result, the HHS Office of Civil Rights stated that it may not enforce these two provisions while the injunction remains in place.
3. *Franciscan Alliance v. Burwell*⁴
 - a. Several states and religiously affiliated health care organizations filed suit challenging the rule, alleging that it violated, among other statutes, the Religious Freedom and Restoration Act. They claim that the rule requires them to perform and provide insurance coverage for gender transitions and abortion and that these services must be provided or covered regardless of religious belief or medical judgment.
 - b. U.S. District Court Judge Reed O'Connor issued a preliminary injunction prohibiting the HHS OCR from enforcing its prohibitions on discrimination on the basis of gender identity and termination of pregnancy.

³ Patient Protection and Affordable Care Act, 42 USC §18001 (2010)

⁴ *Franciscan Alliance Inc., et al. v. Sylvia Burwell, et al.*, No. 7:16-cv-00108-O (N.D. Tex. Dec. 31, 2016)

- B. Transgender people face massive and systemic discrimination in healthcare.
 1. Can range from implicit to outright refusals to provide healthcare.
 2. The issue is compounded because transgender people have a unique set of mental and physical health needs and may have greater than average need for medical care related to hormone therapy and transition.
 3. As a result, many transgender people, and sometimes the ones who are most at-risk, disengage from the healthcare system to avoid discrimination or humiliation.
- C. Proposed state bills that have either failed or are still pending
 1. Re. Medicaid
 - a. Many states already have laws that explicitly deny Medicaid coverage of gender-confirming therapies, either specifically (IA, MA) or as included in the category of cosmetic and experimental surgery (MO, IL).
 - b. Arizona HB 2294 that failed would have prohibited Medicaid recipients from getting medically necessary surgeries related to gender transition.
 2. Re. access to gender transition related surgeries
 - a. Arkansas HB 1628, now failed, would have allowed health care providers to refuse to provide health care services, such as care related to gender transition, based on their personal beliefs.
 - b. Arizona HB 2293, now failed, would have prohibited state prisoners from getting medically necessary surgeries related to gender transition.

III. Identification Documents

- A. Federal policy
 1. The State Department no longer requires proof of surgery for issuing passports and consular birth certificates. It requires proof of some form of clinical treatment for gender transitioning.
 2. Other federal agencies, including the Social Security administration, Department of Homeland Security, Veteran's Health Administration and Office of Personnel Management also do not require proof of surgery.
- B. Birth certificates
 1. States vary widely in their rules for changing gender markers on birth certificates.
 2. For example, Alabama, Arkansas, Colorado, Delaware, Georgia, and Montana require a court order indicating that the individual has undergone gender reassignment surgery. Obtaining a court order can be a lengthy and costly process.
 3. Tennessee specifically prohibits by statute the correction of sex designations on birth certificates. See Tenn. Code Ann. § 68-3-203(d).
 4. Other states like Arizona, Kentucky, Michigan, Nebraska, New Jersey, North Carolina, and North Dakota require a letter from a physician indicating gender reassignment surgery.

5. California, Connecticut, D.C., Hawaii, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New York, Pennsylvania, Rhode Island, and Washington require a letter from a physician with no surgical requirement.
- C. Name changes and drivers licenses⁵
1. In about half the states, proof of surgical requirements have been removed.
 2. In order to legally change a name, most states require the applicant to publish notice of the hearing for a certain period of time. Although many states allow a waiver of publication, many trans people without access to resources or an attorney may not be able to achieve the waiver.

⁵ See more information on state specific rules on updating name and gender on National Center for Transgender Equality ID Documents Center: <http://www.transequality.org/documents>