Beyond the Bathroom: Navigating Legal Issues in Schools Related to LGBTQ Status

September 17, 2020

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Agenda

- Terminology & Historical Background
- Legal Framework
- Best Practices/Issues to Consider

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LGBTQ Rights In The News

"New 'religious exemption' directive could harm LGBTQ workers, critics say"
Moreau, J., *NBC News*, August 16, 2018

"States Move to Expand LGBTQ Protections"
Milligan, S., *U.S. News*, February 28, 2019

"'Virtually Certain': The 'Bostock' Promise of Full Equality for the LGBT Community"
Prol, T. , *LAW.com*, August 7, 2020

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Terminology

Sexual Orientation

- An inherent or immutable enduring emotional, romantic or sexual attraction to members of the same and/or opposite sex

Gender Identity

- One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves
- One's gender identity can be the same or different from their sex assigned at birth

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Terminology

LGBTQ: Lesbian, Gay, Bisexual, Transgender, Queer and/or Questioning

- Lesbian: a woman who is emotionally, romantically or sexually attracted to other women
- Gay: a person who is emotionally, romantically or sexually attracted to members of the same gender
- Bisexual: a person who is emotionally, romantically or sexually attracted to more than one sex, gender or gender identity (though not necessarily simultaneously), in the same way or to the same degree
- Transgender: an umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth
  - Being transgender does not imply any specific sexual orientation; therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.
- Queer: a term people often use to express fluid identities and orientations; often used interchangeably with LGBTQ
- Questioning: a term used to describe people who are in the process of exploring their sexual orientation or gender identity

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Terminology

Gender Non-Conforming

A broad term referring to people who do not behave in a way that conforms to the traditional expectations of their gender, or whose gender expression does not fit neatly into a category

Gender Stereotypes

Stereotypical notions of masculinity and femininity, including expectations of how people represent or communicate their gender to others through behavior, clothing, hairstyles, activities, voice or mannerisms

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History of Presidential Administrations' Position on Gender Identity Issues

Actions Taken By the Obama and Trump Administrations and Predictions on a Possible Biden Administration

1. Obama Administration
2. Trump Administration
3. Possible Biden Administration?

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OBAMA ADMINISTRATION

1. 2009: Congress passed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act
2. ED hosted five summits on strategies for protecting students from bullying and harassment
3. 2016: ED issued the "Dear Colleague" letter
4. The Administration supported efforts to stop the use of conversion therapy against minors
5. 2010: Don't Ask Don't Tell was repealed.
6. The Defense of Marriage Act lost support of the presidency.
7. SCOTUS decided *Obergefell v. Hodges*.
8. Federal contractors were barred from discriminating against any employee due to sexual orientation or gender identity.
9. DOJ extended sex discrimination in Title VII to claims based on gender identity, including transgender status.
10. HUD assisted with providing safe places for LGBTQ youth to stay.

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TRUMP ADMINISTRATION

Grimm v. Gloucester County School Board

- In 2015 the ACLU and Virginia State ACLU filed a suit against Gloucester Co. School Board.
- The District Court denied Gavin Grimm's motion for a preliminary injunction, which would have allowed him to use the same restroom as other boys at school.
- In 2016 the Fourth Circuit Court of Appeals overturned the lower court's decision.

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TRUMP ADMINISTRATION (con't)

The Gloucester Co. School Board petitioned for certiorari with the U.S. Supreme Court

In 2017, Supreme Court granted Certiorari.

Weeks after SCOTUS set to hear the case, the Trump Administration rescinded the Dept. of Education's guidance regarding transgender students' rights under Title IX.

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TRUMP ADMINISTRATION (con't)

- President Trump "tweeted" that transgender service members were barred from serving in the U.S. Military.
- ED led by Betsy DeVos, rescinded the "Dear Colleague" letter from the Obama Administration.
- The Trump Administration filed a brief with SCOTUS in favor of preventing the extension of workplace protections to transgender citizens.
- 2020: *Bostock v. Clayton County* case

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POSSIBLE BIDEN ADMINISTRATION

- The Biden Plan to Advance LGBTQ+ Equality in America and Around the World – SUPPORT LGBTQ+ YOUTH
  - Ensure young LGBTQ+ people are supported and protected in our schools and college campuses by:
    - Guaranteeing transgender students have access to facilities based on their gender identity.
    - Protecting LGBTQ+ students from sexual assault, harassment, and bullying.
    - Ending school discipline policies that disproportionately impact LGBTQ+ students.

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Legal Framework

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What is Title VII?

- Prohibits discrimination in the ***workplace*** because of ***sex***
- Currently, there are no federal statutes expressly protecting LGBTQ individuals from sexual orientation or gender identity discrimination in the workplace
  - **Note:** Some state laws expressly prohibit employment discrimination on the basis of sexual orientation only and/or gender identity
- Courts and administrative agencies have expanded rights for LGBTQ employees in the workplace over time, including very recently

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Title VII of the Civil Rights Act: EEOC

- **What has the EEOC considered to be LGBTQ sex discrimination?**
  - Failing to hire an applicant because of gender identity or sexual orientation
  - Firing an employee for gender transition
  - Denying employee equal access to restroom
  - Harassing or permitting harassment of employee because of gender identity, gender transition, sexual orientation
  - Denying promotions because of gender identity or sexual orientation
  - Lower salary because of gender identity or sexual orientation
  - Failing to use name/gender pronoun corresponding to gender identity
    - ✓ *Jameson v. U.S. Postal Service* (EEOC, May 21, 2013)
  - Failure to revise records pursuant to changes in gender identity
    - ✓ *Complainant v. Dep't of Veterans Affairs* (EEOC Apr. 16, 2014)

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Title VII: Supreme Court

Oncale v. Sundowner Offshore Services,
523 U.S. 75 (1998)

Facts:

- Male oil-rig worker claimed that he was repeatedly subjected to sexual harassment by his male co-workers.
- On several occasions, members of the eight-man crew subjected Oncale to perform sex-related humiliating actions in front of his co-workers.
- Oncale stated "I felt that if I didn't leave my job, that I would be raped or forced to have sex."

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Title VII: Supreme Court

Oncale v. Sundowner Offshore Services,
523 U.S. 75 (1998)

Holding:

- Held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.

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Title VII: Supreme Court

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989)

Facts:

- Hopkins was a senior manager when she was proposed for partnership.
- Candidacy was held for reconsideration the following year.
- Partners in her office later refused to re-propose her for partnership.
- Price Waterhouse had denied Ann Hopkins a promotion in part because other partners at the firm felt she did not act as a woman should act.

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Title VII: Supreme Court

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989)

Holding:

- The Supreme Court recognized that employment discrimination based on sex stereotypes (*e.g.*, assumptions and/or expectations about how persons of a certain sex should dress, behave, etc.) is unlawful sex discrimination under Title VII.

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Bostock v. Clayton County: 11th Circuit (2018)

Facts:

- Bostock, a gay man, began working for Clayton County as a child welfare services coordinator.
- Bostock started participating in a gay recreational softball league.
- He received criticism for his participation in the league as well as his sexual orientation and identity generally.
- Shortly thereafter, he was terminated for "conduct unbecoming of its employees."

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Bostock v. Clayton County: 11th Circuit (2018)

District Court:

- Bostock argued that Clayton County discriminated against him based on his sexual orientation and gender stereotyping
- Dismissed Bostock's complaint because it failed to support a cause of action under Title VII

Court of Appeals:

- Affirmed the District Court, stating that based on earlier precedent, the 11th Circuit has rejected the argument that sexual orientation discrimination falls under Title VII protection
- Ruled that Title VII does not prohibit employers from discriminating against a worker based on sexual orientation

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Zarda v. Altitude Express: 2nd Circuit (2018)

Facts:

- Donald Zarda worked as a sky-diving instructor. In an effort to preempt discomfort with a client being strapped to the body of an unfamiliar man, Zarda told her that he was gay.
- The client alleged that Zarda inappropriately touched her. Her boyfriend told Zarda's boss, and Zarda was fired soon after.

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Zarda v. Altitude Express, Inc.: 2nd Circuit (2018)

- **Holding:**
  - Sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination for Title VII purposes
  - Chief Judge Katzmann stated the following in the majority opinion:
    - "Sexual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account."
- **EEOC v. DOJ**
  - The Justice Department filed an amicus brief disagreeing that "Title VII reaches sexual orientation discrimination"
  - The EEOC also filed its own brief in support of the inclusion of sexual orientation under Title VII

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EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.: 6th Circuit (2018)

Facts:

- Aimee Stephens, a transgender woman who was assigned male at birth, joined the funeral home as an apprentice and then served as a Funeral Director/Embalmer.
- Stephens provided the owner with a letter stating that she struggled with Gender Identity Disorder and intended to have sex reassignment surgery during her vacation.
- Just before leaving for her vacation, the owner fired her.

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EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.: 6th Circuit (2018)

- **Holding**: The funeral home's actions were not protected by the Religious Freedom Restoration Act (RFRA). It found that the funeral home was not an overtly religious institution and that the plaintiff's job was not of a ministerial nature.
- The Court also determined that Title VII prohibits transgender discrimination based on sex and sex stereotypes and that the funeral home and its owner's exercise of religion was not substantially burdened under the RFRA by EEOC enforcement.

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Supreme Court Landmark Decision

- *Bostock v. Clayton County Georgia*, 140 S. Ct. 1731 (2020).
  - Through its interpretation of "sex" in Title VII, the Court extended protections to gay and transgender employees.

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Bostock Decision

- 6-3 decision
- Holding: sexual orientation and gender identity are so intertwined with sex that it is not possible to consider this status without also considering the individual's sex.
  - Therefore, an employer cannot take action against individuals because of their sexual orientation or gender identity, because these traits are covered by Title VII.

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Bostock Decision: Majority Opinion

"Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."
-Gorsuch, J. delivered the opinion of the Court

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Bostock Decision: Dissenting Opinions

- "There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive."
  -Alito, J., dissenting.

- "Like many cases in this Court, this case boils down to one fundamental question: Who decides? . . . Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court."
  -Kavanaugh, J., dissenting.

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Takeaways

- Title VII protects against discrimination on the basis of sexual orientation or gender identity
- Although *Bostock* involved adverse employment actions, ruling will apply to hostile environment claims as well
- Adds a federal remedy to state remedies, many of which protected sexual orientation (fewer for gender identity)

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Potential Areas of Impact in Education

- Facilities
- Athletics
- Hostile Environment Claims

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Bostock's Application to Education

- Applicable to school district employees
- Definition of sex under Title VII relevant, but not per se applicable to Title IX
- *Grimm* case
  - Originally filed in 2015: bathroom policy in school was unconstitutional
  - A motion for preliminary injunction was denied that requested Gavin be able to use the same restroom as other boys, which was reversed on appeal and SCOTUS granted cert.
  - A few weeks before the Supreme Court could hear the case, the Trump Administration rescinded the previous guidance regarding transgender students' rights under Title IX.
  - The Supreme Court sent Gavin's case back to the Fourth Circuit Court of Appeals to be reconsidered now that the guidance had been rescinded.
- 8/9/19: The District Court granted Gavin's motion for summary judgement, ruling that the school violated Gavin's rights under Title IX and the 14th Amendment.
- 8/24/20: 4th Circuit Court of Appeals affirmed and ruled in favor of Gavin Grimm

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OCR's Revised Letter of Impending Enforcement Action

- August 31, 2020: Issuance date
- Several cases involving a challenge to the Connecticut Interscholastic Athletic Conference's (CIAC) rule allowing transgender student-athletes to participate in interscholastic sports on the basis of gender identity.
- The letter states: "The earlier Letter of Impending Enforcement Action, dated May 15, 2020, has been updated in light of the Supreme Court's holding in *Bostock.*"

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OCR's Revised Letter of Impending Enforcement Action (continued)

- The "Revised Letter" concludes that the Supreme Court's holding in *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020), "does not alter the relevant legal standard under 34 C.F.R. § 106.41, or how that provision interacts with 34 C.F.R. § 106.31 or 34 C.F.R. § 106.6."
- According to OCR: "The Court's opinion in *Bostock* also does not affect the Department's position that its regulations authorize single-sex teams based only on biological sex at birth—male or female—as opposed to a person's gender identity. The Court states that its ruling is based on the 'assumption' that sex is defined by reference to biological sex, and its ruling in fact rests on that assumption."
- *It remains to be seen whether the courts will agree with the Trump Administration's position on this issue.*

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Litigation Across Country Impacting Students

1. *Whitaker by Whitaker v. Kenosha Unified School Dist. No. 1 Board of Educ.*, 858 F.3d 1034 (7th Cir. 2017).
2. *Evancho v. Pine-Richland School Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017).
3. *R.M.A. by Appleberry v. Blue Springs R-IV School Dist.*, 568 S.W.3d 420 (Mo. 2019).

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Whitaker by Whitaker v. Kenosha Unified School Dist.

- Student was banned from using the boy's bathroom.
- He brought claims alleging Title IX and Fourteenth Amendment Equal Protection violations.
- The Seventh Circuit held that plaintiff would "suffer irreparable harm" without an injunction allowing him to use the bathroom aligning with his gender identity.

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Evancho v. Pine-Richland School Dist.

- Students were only allowed to use "single-user" bathrooms in school or "school bathrooms labeled as matching their sexes assigned at birth."
- Students identifying as transgender in high school, brought a suit alleging violation of Title IX and the Fourteenth Amendment Equal Protection Clause.
- This court also found that the students would likely "suffer irreparable harm" if the school continued to prevent them from using the bathrooms that aligned with their gender identity.

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R.M.A. by Appleberry v. Blue Springs R-IV School Dist.

- High school student in Missouri was denied access to the boys' restrooms and locker rooms
- The Missouri Supreme Court found that the student had sufficiently alleged a claim, and vacated the lower court's finding that had been in favor of the school.

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Best Practices/Issues to Consider

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How Schools Have Addressed LGBT Issues

1. Keep an eye on federal law, state law, and ED guidance
2. Policies
    1. Protecting Transgender Students' Privacy
    2. Addressing Sex-Segregated Activities
3. Training
4. Resources Available

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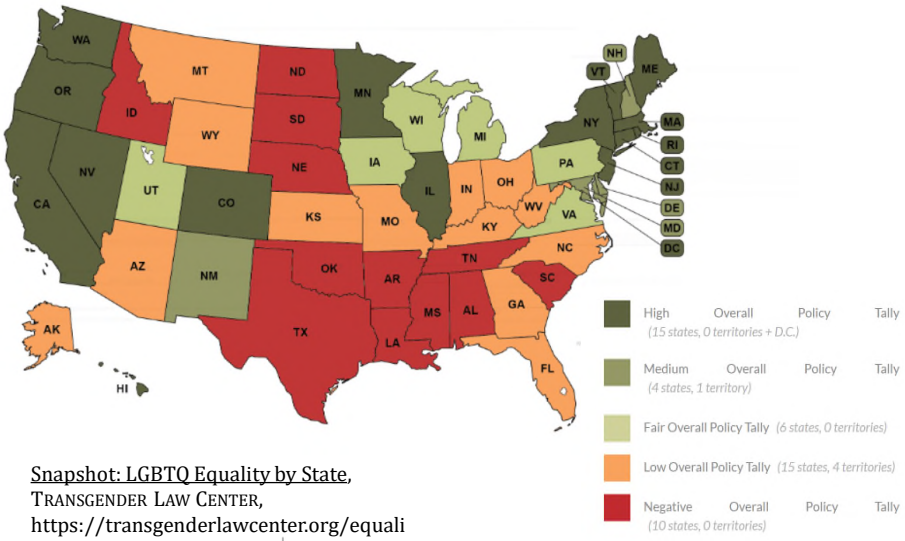
How Schools have Addressed Student Gender Identity



Snapshot: LGBTQ Equality by State, TRANSGENDER LAW CENTER, https://transgenderlawcenter.org/equalitymap.

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Not All About Bathrooms…

- Although some of these bills are about bathrooms, over half are about ways to ensure education and protection of individuals with respect to LGBTQ equality.
  - Hawaii's Bill "expanded anti-discrimination to include gender identity or expression" and surveyed how other jurisdictions proceed with Title IX enforcement.
  - New Jersey's Bill established a "Transgender Equality Task Force" as a way to ensure that there were fewer legal and societal barriers to the LGBTQ community.

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Not All About Bathrooms… (continued)

- ❑ Massachusetts had an initiative that sought to prohibit discrimination in public places against individuals who identify as non-binary or transgender.
- ❑ New York's Bill instituted a curriculum in public schools that included LGBTQ issues, even providing for an "understanding of the historical treatment" of LGBTQ individuals.
- ❑ District of Columbia's Bill called for an annual survey on the health of its LGBTQ citizens to be made public on the Dept. of Health's website.

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Pending Legislation

- Alabama, Arizona, Colorado, Iowa, Indiana, Kansas, Mississippi, New Hampshire, South Carolina, Tennessee, and West Virginia all have pending legislation excluding transgender students from athletics.
- The states with pending legislation that will prohibit any non-discrimination protections to LGBTQ individuals (aside what is offered at the state level) include:
  - Alaska (prohibiting schools from providing education about sexual orientation or gender identity), Arizona, South Dakota, and
  - Tennessee (endorsing marriage as between one man and one woman).

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Best Practices for an Evolving Legal Landscape

- Adopt non-discrimination/non-harassment/EEO policies that cover sexual orientation and gender identity
- Carefully review and decide on the terminology that school employees will use in written documents and oral communications when referring to LGBTQ students or employees

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Best Practices for an Evolving Legal Landscape

- Treat requests for leave to address health care needs related to an individual's sexual orientation in the same manner as requests for other medical conditions
- Review definitions of "spouse"/ "primary caregiver" in health benefit policies

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Best Practices for an Evolving Legal Landscape

- Train your employees on best practices involving LGBTQ employees in the workplace

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Policies and Resources

- Consider administrative support teams to ensure that LGBTQ students' needs are met and their privacy is protected.
- Resources include:
  - Brave Space Alliance
  - www.StopBullying.gov
- Promote Gay-Straight Alliances within in schools.

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Policies and Practices

Remove "arbitrary" gender dividers in classrooms.

Group students for the purpose of instruction rather than on the basis of sex.

If schools have a dress code, students should be allowed to dress in accordance with their gender identity.

Make sure any non-discrimination statement from the school includes discrimination based on gender identity and expression.

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Policies and Practices

1. Schools should have a LGBTQ liaison who is available to any students who may need to speak with him or her.

2. There should also be school counselors available who have relevant experience.

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Policies and Practices: Ways to Promote Diversity Initiatives

- Ensure the school engages in diverse hiring practices by:
  - Being aware of, and completing training on implicit biases;
  - Hiring intentionally, not simply to fill a need, but to build a "culture;"
  - Engage diverse employees in the interview process;
  - Offer training that encourages learning about different cultures.

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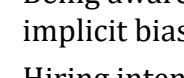
Policies Regarding Transitions



Alaska

Has a policy ensuring that students' families are contacted (with the students' permission) to set up "Transition Plans"

Washington

School policy provides an example of a prior student who transitioned during the school year.

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Protecting Transgender Students' Privacy

California	Illinois	Mass.
Has policies reminding administrators not to disclose student gender identity.	Has policies creating Administrative Support Teams to work with families and students.	Has a policy that ensures permission forms for activities do not request students' gender.

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Sex-Segregated Activities

- Some schools in Washington have instituted alternative restroom and changing areas open to any student to use, not just those who identify as transgender or gender nonconforming.
- With respect to school athletics, many schools have policies reflecting the guidelines that have been established through their state athletic leagues.
- Chicago, IL, and Boulder, CO, also each have express policies providing that no transgender student should be prevented from participating in an overnight field trip.

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Virtual Title IX Training – Husch Blackwell

- Sexual Harassment and Sexual Assault in K-12 Schools: Title IX Compliance and Response to New Regulations
- September 23 - 24, 2020
  - 10:00 a.m. - 1:30 p.m. CT
- **Register:** https://www.huschblackwell.com/newsandinsights/sexual-harassment-and-sexual-assault-in-k-12-schools

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Questions?

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Join us for our next webinar in 2020!

November 16, 2020

Topic: TBD

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