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# COMMON QUESTIONS ABOUT TRANSGENDER STUDENTS

Submitted by Thrun Law on Mon, 11/13/2023 - 00:00

Thrun Law Firm has recently experienced an uptick in transgender student questions. We are also monitoring pending Michigan litigation and Office for Civil Rights complaints filed against schools for their approaches to accommodating transgender students.

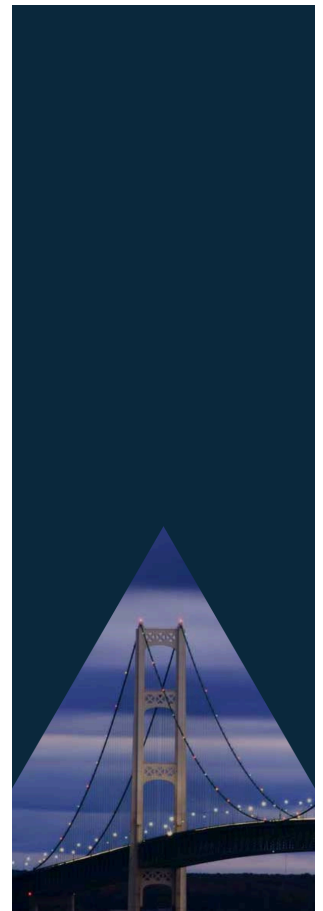
Conflicting court decisions and varying guidance from state and federal agencies render this topic complex. Below is general guidance on three frequent questions we receive from clients regarding transgender students.

## 1. *What if a parent does not agree with their student's gender identity?*

Schools are often faced with a situation where the student and parent(s) do not agree on how to address the student's transgender status. The Michigan State Board of Education has long taken the position that the best person to determine a student's gender identity is the individual student. If you find that a parent does not agree with the student's viewpoint, we recommend first discussing the issue with the family to determine if there is a potential adequate solution that works for the family. If those efforts are unsuccessful, consider contacting legal counsel.

## 2. *Which bathroom should transgender students use?*

The U.S. Department of Education interprets Title IX to prohibit discrimination based on a person's sexual orientation or gender identity. This USDOE guidance aligns with the U.S. Supreme Court's decision in *Bostock v Clayton*



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*Cty*, 140 S Ct 1731 (2020), which held that employers may not discriminate against employees because of sexual orientation or gender identity. Additionally, Michigan's Elliott-Larsen Civil Rights Act was recently amended to protect individuals from discrimination based on sexual orientation or gender identity. The amendment is effective on the 91<sup>st</sup> day after the final adjournment of Michigan's 2023 legislative session.

In the January 2023 edition of *School Law Notes*, we provided an overview of transgender student issues regarding bathroom use after an Eleventh Circuit Court of Appeals' ruling that a Florida school's policy of segregating bathrooms by a student's "biological sex" did not violate the Fourteenth Amendment or Title IX. *Adams v School Bd of St. John's Cty*, 57 F 4<sup>th</sup> 791 (CA 11, 2022). Notably, the *Adams* decision (which is not binding precedent in Michigan) conflicts with the majority of federal court decisions across the country, which have generally held that schools must allow students to use facilities, including bathrooms, that correspond with their gender identity, rather than their sex assigned at birth. Based on all available legal authority, the most defensible legal position in Michigan is for schools to allow students to use bathrooms that correspond with their gender identity.

Schools undoubtedly will face questions from parents of students who have expressed discomfort with bathroom arrangements. We recommend reminding all students and parents that privacy in school private areas like bathrooms and locker rooms is paramount, regardless of gender identity. No individual should engage in conduct that violates another student's privacy rights, including taking photos or videos or "peeping" on students. If any student engages in such misconduct, discipline is generally appropriate. Additionally, any student who is uncomfortable using a group bathroom should be provided access to alternate facilities.

### 3. *What is a Gender Support Plan?*

Recognizing that each student's situation is different, schools may wish to consider developing "Gender Support Plans." In general, a Gender Support Plan is a collaborative document that is created during a meeting between building staff (principal, counselor, and others with whom the student has a relationship), the student, and, in most cases, the student's parent or guardian.

During this meeting, school personnel should address potential issues that the student may face, including bullying or harassment. If concerns arise, the school should address those issues in accordance with the Student Code of Conduct and board policy.

A Gender Support Plan generally will identify how the school will support the student. The Plan may address: (1) bathroom usage, (2) locker room usage, (3) preferred name, (4) preferred pronouns, and (5) notifying classmates and teachers. Importantly, a Gender Support Plan is a fluid document that can be modified throughout the school year.

### *Conclusion*

No “one-size-fits-all” procedure appropriately accommodates transgender students. We encourage school officials to approach these situations on an individualized basis, recognizing that one student’s desires and needs may be different than another student’s.

