

On March 9, 2017, the National School Boards Association (NSBA) released an updated guide discussing the various legal issues surrounding transgender students. The intent of this guide is to answer questions that school districts may have as they attempt to formulate policy which complies with state law, reflects community concerns and ensures all students are safe and learning at school. Click on the following link for the NSBA guide, [Transgender Students in Schools: Frequently Asked Questions and Answers for Public School Boards and Staff \(Version 11.0\)](#).

The updated guide summarizes significant developments from early 2017, including: the Trump administration's February 22, 2017 *Dear Colleague* letter withdrawing the Obama administration's May 13, 2016 transgender guidance; the U.S. Supreme Court's March 3, 2017 decision to vacate the Fourth Circuit Court of Appeal's order in *G. G. v. Gloucester Cnty. Sch. Bd.*; and the status of various transgender lawsuits filed across the nation. The updated guide particularly notes that "[t]here are no quick and easy answers to these questions" and its "primary aim is to offer a guide for spotting issues, understanding existing legal frameworks, and, where appropriate, offering recommendations to help schools ensure that all students, regardless of gender identity, are safe and learning at schools." [Transgender Students in Schools: Frequently Asked Questions and Answers for Public School Boards and Staff \(Version 11.0\)](#), p. 5, National School Boards Association.

The NSBA's Office of General Counsel also maintains a Transgender Student Litigation Chart, available online in the NSBA Resource Library under School Law Resources.

Additional legal issues specific to transgender students in Illinois listed below are discussed in detail on the following pages.

- A. [State Law Prohibiting Transgender Discrimination](#)
- B. [Case Updates](#)
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School districts' legal obligation to provide equal education and extracurricular opportunities to all students, including students identifying as transgender, is addressed in sample **PRESS** policy **7:10, *Equal Educational Opportunities***. Please pay specific attention to the sample policy's footnotes discussing the adoption of separate policies or inserting policy statements about accommodations and inclusion of transgender students in the educational program.

Guidelines for implementing sample policy 7:10 specific to accommodating transgender or gender non-conforming students are set forth in **PRESS** Administrative Procedure **7:10-AP, *Accommodating Transgender Students or Gender Non-Conforming Students***.

**PRESS** also provides a sample board exhibit for boards that want to inform their communities about the policies they have adopted that address the equal educational opportunities, health, safety, and general welfare of students within their districts. That exhibit is **7:10-E, *Equal Educational Opportunities Within the School Community***.

For further discussion of transgender student policy and practice issues, see [Transgender students: Law, policy, and practice](#) in the November/December 2017 issue of the *Illinois School Board Journal*.

*This document will be continually updated with new developments.*

## A. State Law Prohibiting Transgender Discrimination

The Illinois School Code requires public schools to provide all students with equal opportunities in all education programs and services. 105 ILCS 5/10-20.12; 23 Ill.Admin.Code §1.240(a). Illinois State Board of Education (ISBE) regulations further state that “no school system may exclude or segregate any pupil, or discriminate against any pupil on the basis of his or her race, color, religion, sex, national origin, ancestry, age, marital status, or physical or mental disability, sexual orientation, pregnancy [775 ILCS 5/1-102(A)], gender identity, or status of being homeless [105 ILCS 45/1-5 and 42 USC 11434a(2)].” 23 Ill.Admin.Code §1.240(b).

The Illinois Human Rights Act (IHRA) prohibits discrimination in places of public accommodation, including schools, based on sex and sexual orientation. 775 ILCS 5/1-102(A), 5/5-101(11). The IHRA defines *sexual orientation* as the “actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity whether or not traditionally associated with the person’s designated sex at birth.” 775 ILCS 5/1-103(O-1). Similar to Title IX regulation 34 C.F.R. §106.33, the IHRA permits schools to maintain single-sex facilities that are distinctly private in nature, e.g., restrooms and locker rooms. 775 ILCS 5/5-103(B).

Even so, school districts may be subject to Illinois Department of Human Rights (IDHR) complaints alleging gender-related identity discrimination in violation of the IHRA. Such complainants may also allege disability discrimination in violation of the IHRA based upon the student’s diagnosis of gender dysphoria. From January 1, 2016 through March 22, 2017, five IDHR complaints had been filed against school districts alleging discrimination on the basis of gender-related identity and/or disability based upon gender dysphoria. Unlike ED complaints, successful IDHR complainants are able to seek attorneys’ fees and costs in relief. 775 ILCS 5/8A-104(G).

## B. Case Updates

Updates regarding cases summarized in the updated NSBA guide, as well as additional noteworthy cases not otherwise summarized in the updated NSBA guide, include the following.

- ***Students and Parents for Privacy et al. v. Sch. Directors of Twp. HSD 211*, 2019 WL 1429664, at \*7-8 (N.D. IL. 2019).**

This case is first mentioned on p. 4 of the updated NSBA guide, and it originates with a settlement agreement that Township High School District 211 (District) reached with the U.S. Dept. of Education (ED) requiring the District to accommodate transgender students in restrooms and locker rooms conforming to students’ gender identities. After the settlement agreement, Plaintiffs sued the District and ED alleging that the settlement agreement violated cisgender students’ fundamental right to privacy and their parents’ constitutional right to instill moral values and standards in their children. Plaintiffs sought a preliminary injunction to bar the District from accommodating transgender students in District restrooms and locker rooms. On June 20, 2017, ED was dismissed as a defendant in the lawsuit. On December 29, 2017, Plaintiffs’ request for a preliminary injunction to halt implementation of the District’s accommodation policy was denied.

On February 15, 2018, Plaintiffs filed an amended complaint alleging that the District’s accommodation policy violated Title IX, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, the fundamental right of parents to direct the upbringing of their children, the Ill. Religious Freedom Restoration Act, and the right to free exercise of religion under the First

Amendment to the U.S. Constitution. The District moved to dismiss Plaintiffs' amended complaint, and on March 29, 2019 their motion was granted in part and denied in part.

#### UPDATE

The U.S. District Court for the Northern District of Illinois (Court) dismissed Plaintiffs' Due Process Clause allegation, in which Plaintiffs asserted that students have a fundamental right to bodily privacy that protects their partially- or fully-unclothed bodies from risk of exposure to the opposite sex. While the Court acknowledged that the Third Circuit Court of Appeals recognized a right to visual bodily privacy in *Doe v. Boyertown* (see summary, below), the Court did not find such a right and stated it was "not at liberty to expand the substantive rights protected by the Due Process Clause." 2019 WL 1429664 at \*8.

The Court then dismissed Plaintiffs' claim regarding parents' right to direct the education of their students, finding that Plaintiffs could not stretch this right so far as to say that parents have a right to determine whether their children will be exposed to opposite-sex children in restrooms and locker rooms. *Id.*

Three of Plaintiffs' claims – violation of Title IX, the Ill. Religious Freedom Restoration Act, and the Free Exercise Clause – were allowed to proceed, but the Court took pains to note that just because Plaintiffs have thus-far alleged enough facts to allow the case to survive a motion to dismiss does not mean they will be successful at a subsequent stage of litigation. 2019 WL 1429664 at \*1 n. 1.

Shortly following this ruling, on April 15, 2019, Plaintiffs voluntarily dismissed the rest of their claims.

- ***Gavin Grimm v. Gloucester Cnty. Sch. Bd.*, 302 F.Supp.3d 730 (E.D. VA. 2018).**

First mentioned on page 3 of the updated NSBA guide, this case began when Grimm, who is transgender, was a high school student. Grimm sued the Gloucester County School Board (Board), alleging their policy prohibiting him from using the boys' bathroom violated Title IX and his constitutional rights, and he requested a preliminary injunction to enjoin the Board from enforcing the bathroom policy. The Virginia District Court (Court) denied Grimm's injunction request but he appealed to the Fourth Circuit Court of Appeals (Fourth Circuit), which held that the Court erred because it did not defer to U.S. Dept. of Education (ED) guidance dated May 13, 2016 directing schools to accommodate transgender students. On remand, the Court granted Grimm's injunction request, requiring the Board to allow Grimm to use the boys' bathroom while the suit was pending. The Board appealed all the way to the U.S. Supreme Court, and on October 28, 2016 the Supreme Court agreed to hear the matter. However, before the Supreme Court could hear this case, ED withdrew its May 2016 transgender guidance via a "Dear Colleague" letter dated February 22, 2017. The February 2017 Dear Colleague letter stated that "there must be due regard for the primary role of the States and local school districts in establishing educational policy." As a result, on March 3, 2017 the Supreme Court vacated the Fourth Circuit's order in favor of Grimm and remanded the case back to the Fourth Circuit for further consideration in light of the February 2017 Dear Colleague letter. The Fourth Circuit then remanded the case to the Virginia District Court.

#### UPDATE

On July 23, 2019, the Virginia District Court heard oral argument on cross motions for summary judgement and has taken the matter under advisement.

- ***Doe v. Boyertown Area School District et al.*, 276 F.Supp.3d 324 (E.D. PA. 2017)**

*Doe v. Boyertown* involves a complaint brought in the District Court for the Eastern District of Pennsylvania by four Boyertown Area Senior High School students against the Boyertown Area

School District (Boyertown) alleging that Boyertown's practice of permitting transgender individuals to use restrooms, locker rooms, and shower facilities designated for the sex with which they identify violates Plaintiffs' right to bodily privacy contrary to constitutional and statutory principles, including the Fourteenth Amendment and Title IX. In relief, Plaintiffs sought a preliminary injunction ordering Boyertown to cease their practice and to only allow students to use facilities based upon their biological sex at birth.

On August 25, 2017, the Court issued a Memorandum Opinion holding that Plaintiffs are not entitled to a preliminary injunction because they have not shown a likelihood of success on the merits of any of their causes of action and because they failed to show they would suffer irreparable harm without an injunction.

### **Plaintiffs' Constitutional Privacy Claims**

Following an extensive review of the facts (the Memorandum Order is 142 pages long), the Court first addressed whether Plaintiffs were, as they claimed, asserting a fundamental right to privacy. The Court extensively discussed *Students and Parents for Privacy v. United States Dept. of Education* (No. 16-cv-4945, 2016 WL 61341211 (N.D. IL. Oct. 18, 2016)), and "[it agreed] with *Students* that high school students such as the plaintiffs here...have no constitutional right not to share restrooms and locker rooms with transgender students whose sex assigned at birth is different from theirs."

Next, the Court found that to the extent that Boyertown's practice infringes upon Plaintiffs' privacy rights regarding the involuntary exposure of intimate parts of the body, such an infringement is narrowly tailored to serve a compelling state interest. Citing to *Evancho v. Pine-Richland Sch. Dist.* (2017 WL 770619 (W.D. PA. Feb. 27, 2017)) and *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.* (858 F.3d 1034 (7th Cir. 2017)) (summarized below), the Court determined that "defendants have a compelling state interest not to discriminate against transgender students." The Court also determined that Boyertown's practice is narrowly tailored because it: 1) does not coerce students to use the multi-user bathroom and locker rooms; 2) requires students seeking to use the facilities corresponding to their gender identity to first consult with the counselor and administration and receive permission before gaining access; 3) provides privacy protections in the nature of areas in the locker rooms and bathrooms where students can go if those students are uncomfortable seeing or being seen by transgender students; and 4) provides alternative single-user facilities that would provide uncomfortable students with complete privacy and security for changing or taking care of bodily needs.

### **Plaintiffs' Title IX Claim**

Referencing *Students and Parents for Privacy*, the Court found that Plaintiffs failed to demonstrate a likelihood of success regarding their Title IX claim because Boyertown's practice does not target Plaintiffs based on their sex. Moreover, the Court determined that Boyertown's practice treats all students similarly because: 1) it applies to both the boys' and girls' locker rooms and bathrooms; 2) transgender boys and transgender girls are treated similarly; and 3) the alternative facilities are open to all students who may be uncomfortable using the locker rooms or multi-user facilities. "Simply because the plaintiffs feel a particular way which they equate to their sex does not take away from the fact that [Boyertown's] practice is not targeting any group or individual because of their sex." Plus, even if Boyertown's practice were based on sex, "the plaintiffs ignore that Title IX deals with 'discrimination' based on sex and there can be no discrimination when everyone is treated the same."

The Court further noted that though Plaintiffs "are clearly opposed to having themselves viewed by a transgender student in a state of undress or potentially viewing a transgender student in a state of

undress...there are numerous privacy protections for students at the school that significantly reduce or eliminate any potential issues.”

## UPDATE

Following the above ruling, Plaintiffs filed an interlocutory appeal to the Third Circuit Court of Appeals (Third Circuit). On July 26, 2018, the Third Circuit affirmed the lower Court’s decision, holding that “under the circumstances here, the presence of transgender students in the locker and restrooms is no more offensive to constitutional or Pennsylvania-law privacy interests than the presence of the other students who are not transgender. Nor does their presence infringe on the [P]laintiffs’ rights under Title IX.” *Doe v. Boyertown Area School District et al.*, 897 F.3d 518 at 521 (3rd Cir. 2018). In its ruling, the Third Circuit stated that “a person has a constitutionally protected privacy interest in his or her partially clothed body.” *Doe* at 527. Note: this is contrary to position of the Seventh Circuit Court of Appeals, which has not recognized visual bodily privacy as a protected substantive due process right. *Students and Parents for Privacy et al. v. Sch. Directors of Twp. HSD 211*, 2019 WL 1429664, at \*7-8 (N.D. IL. 2019).

On November 19, 2018, Plaintiffs filed a petition for writ of certiorari asking the U.S. Supreme Court to review the case. The U.S. Supreme Court has yet to decide whether it will accept the case for review.

- ***Hively v. Ivy Tech Comm. Coll.*, --- F.3d ---, 2017 WL 1230393 (7th Cir. Apr. 4, 2017)**

Plaintiff Hively, who is openly lesbian, filed suit against Defendant Ivy Tech Community College (Ivy Tech) alleging that she was denied full-time teaching positions and that her part-time teaching position was not renewed based upon her sexual orientation in violation of Title VII of the Civil Rights Act of 1964 (Title VII). Ivy Tech filed a motion to dismiss Hively’s claim, arguing that sexual orientation is not a protected class under Title VII, and the District Court for the Northern District of Indiana agreed and dismissed Hively’s case. Hively appealed to a panel of the Seventh Circuit Court of Appeals, which affirmed the District Court’s dismissal. Hively then petitioned for rehearing before the entire Seventh Circuit and her request was granted.

On April 4, 2017, the Seventh Circuit issued a groundbreaking decision, becoming the first appellate court to hold that “discrimination on the basis of sexual orientation is a form of sex discrimination” prohibited by Title VII. As a result, Hively’s claim is allowed to proceed at the District Court level.

This holding is significant because, prior to this case, plaintiffs alleging sexual orientation discrimination under federal civil rights statutes prohibiting sex discrimination (Title VII for employment and Title IX for education) were required to frame their argument as sex discrimination based on the plaintiff’s failure to adhere to sex-based stereotypes. Since judicial analysis of cases brought under Title VII is applied to cases under Title IX, this case clears the path for sexual orientation based sex discrimination claims under Title IX.

Moreover, the opinion states “...discriminatory behavior does not exist without taking the victim’s biological sex (either as observed at birth or as modified, in the case of transsexuals) into account.” *Hively*, 2017 WL 1230303 at \*5. This broad definition of biological sex opens the door for a court to hold that sex discrimination in violation of Title VII and, by extension, Title IX includes discrimination based on gender identity. Such an opportunity may present itself to the District Court for the Northern District of Illinois in *Students and Parents for Privacy v. U.S. Department of Education*, whose October 2016 decision specifically referenced *Hively* as follows:

...[I]t appears the law in the Seventh Circuit concerning the interpretation of the term ‘sex’ in Title VII, as relevant to the almost identically worded Title IX, may be in flux. When the Seventh Circuit rules after its en banc review of *Hively*, whether with one voice or otherwise, it very well

could shed important new light on the question of whether the term ‘sex’ as used in Title VII, and by implication in Title IX, encompasses gender identity.

*Students and Parents for Privacy v. U.S. Dept. of Ed.*, 2016 WL 6134121 at\*13 (N.D. IL. 2016).

## UPDATE

Following the Seventh Circuit’s decision, Hively was permitted to amend her complaint to add a retaliation claim. The parties then successfully mediated the matter and settled the case on July 25, 2018.

- ***Evancho v. Pine-Richland Sch. Dist.*, 2017 WL 770619 (W.D. PA. Feb. 27, 2017)**

Plaintiffs, three high school transgender students, filed a motion for a preliminary injunction to prohibit the Pine-Richland School District (District) from limiting their use of bathrooms consistent with their gender identity. Plaintiffs were previously allowed to use bathrooms consistent with their gender identify until the school board passed Resolution 2, requiring students to use either single unit bathrooms or the bathrooms labeled as matching their assigned sex. Plaintiffs claimed that Resolution 2 violated both the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972 (Title IX).

The District Court for the Western District of Pennsylvania granted Plaintiffs’ Motion for a Preliminary Injunction in part, finding that Plaintiffs have a reasonable likelihood of success on the merits of their Equal Protection claims but not on the merits of their Title IX claim.

Under the Fourteenth Amendment Equal Protection Clause, states may not “deny to any person within its jurisdiction the equal protection of the law.” Plaintiffs argued they are being treated differently from other students who are similarly situated on the basis of their transgender status. The Court reasoned that laws targeting transgender individuals are subject to heightened scrutiny. Under a standard of intermediate scrutiny, a state must demonstrate an “exceedingly persuasive justification” for an action that intentionally treats one person, or a group of people, differently from another, when they are “similarly situated in all other material respects.” The Court concluded that Plaintiffs have a reasonable likelihood of success on the merits of their claim, finding that the District did not demonstrate an exceedingly persuasive justification of applying Resolution 2 to common restroom use by Plaintiffs that is substantially related to an important government interest because there is not sufficient evidence on record of “any actual threat to any legitimate privacy interests of any student by the Plaintiffs use of such restrooms consistent with their gender identify, or that the set-up of the High School restrooms fail to fully protect the privacy interests of any and every student.” *Evancho*, 2017 WL 770619 at\*16.

In addressing Plaintiffs’ Title IX claim, the Court noted that this issue is a more complex legal matter and held that Plaintiffs are not entitled to preliminary injunctive relief under this claim. Plaintiffs argued that sex discrimination prohibited by Title IX includes discrimination based on transgender status. The Court concluded that “the law surrounding the [Department of Education] Regulation and its interpretation and application to Title IX claims relative to the use of common restrooms by transgender students, including the impact of the 2017 [Department of Justice and Department of Education] Guidance, is at this moment so clouded with uncertainty that this Court is not in a position to conclude which party in this case has the likelihood of success on the merits of that statutory claim.” The Court, therefore, held that the necessary showing of likely success on the merits of the Plaintiffs’ Title IX claim could not be made at this time.

Although not binding in Illinois, this case reminds public schools that transgender students must be afforded equal protection of the law as guaranteed under the Fourteenth Amendment.

- Cassandra Black, IASB Law Clerk

- ***Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 2016 WL 5239829 (E.D. WI. Sept. 22, 2016 and 858 F.3d 1034 (7th Cir. 2017)**

Plaintiff, a high school transgender student, filed a claim against the Kenosha Unified School District (KUSD) alleging that the treatment he received at the high school after starting his female-to-male transition violated the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972 (Title IX). In response to the Plaintiff's request to use the boys' bathroom, KUSD told him he could use the girls' restroom or the single-user, gender-neutral restroom in the school office. Plaintiff first chose to avoid drinking liquids and using the bathroom at school and experienced a number of symptoms such as depression, anxiety and suicidal thoughts. The following year, he began using the boys' restroom without incident, but KUSD eventually informed Plaintiff that he could not use the boys' bathroom. While Plaintiff generally tried to avoid the restroom, he used the boys' restroom when needed to avoid the psychological stress associated with using the girls' restroom or the single-user restroom.

Plaintiff requested that the District Court prohibit KUSD from: 1) enforcing any policy that denies him access to the boys' restroom; 2) taking any disciplinary action against him for using the boys' bathroom; 3) using or permitting school employees to refer to Plaintiff by his female name and pronouns; and 4) taking any other action that would reveal his transgender status to others at school. Plaintiff also filed a motion for a preliminary injunction prohibiting KUSD from taking any of the above action prior to a final resolution.

The District Court granted Plaintiff's Motion for a Preliminary Injunction in part, finding that he demonstrated several bases upon which the Court could rule in his favor, including possible success on a Title IX, Equal Protection, or gender stereotyping claim, indicating a reasonable likelihood of success on the merits of his claims. The District Court prohibited KUSD from denying Plaintiff access to the boys' restroom, enforcing any policy against Plaintiff that would prevent him from using the boys' restroom, disciplining him for using the boys' restroom, or monitoring his restroom use. KUSD appealed this decision to the Seventh Circuit Court of Appeals, a panel of which heard oral argument on March 29, 2017.

On May 30, 2017, the Seventh Circuit affirmed the District Court's order granting Plaintiff's Motion for a Preliminary Injunction. The Seventh Circuit found: 1) sufficient evidence for the Plaintiff's claim that he would suffer irreparable harm absent preliminary relief, as the use of the boys' restroom was integral to Plaintiff's transition and emotional well-being; 2) that Plaintiff established that there was no adequate remedy of law available, as it could not conclude that the potential harm of suicide can be compensated by monetary damages, nor is there an adequate remedy for preventable "life-long diminished well-being and life-functioning;" and 3) that Plaintiff had a reasonable likelihood of success on the merits of both his Title IX claim and his Equal Protection claim.

Regarding the Title IX claim, the Seventh Circuit reasoned that though Title IX does not define "sex," courts often look to Title VII to construe Title IX and that, based on previous decisions under Title VII, a transgender student may bring a claim under a theory of sex-stereotyping. The Seventh Circuit stated that "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identify punishes that individual for his or her gender non-conformance, which in turn violates Title IX."

Regarding the Equal Protection Claim, the Seventh Circuit reasoned that heightened scrutiny applies because KUSD's policy is based on a sex-classification. Since KUSD treats transgender students who do not conform to the sex-based stereotypes associated with their assigned birth differently, the burden falls to KUSD to demonstrate that its justification for its bathroom policy is "exceedingly persuasive," and KUSD had not met this burden.

- Cassandra Black, IASB Law Clerk

## UPDATE

On August 25, 2017, KUSD filed a petition for a writ of certiorari, the formal mechanism for requesting that the United States Supreme Court hear the case. The two questions which KUSD wanted the Supreme Court to consider were: 1) whether a school policy requiring boys and girls to use separate bathroom facilities that correspond to their biological sex is sex stereotyping that constitutes discrimination “based on sex” in violation of Title IX; and 2) whether a school policy requiring boys and girls to use separate bathroom facilities that correspond to their biological sex is a sex-based classification triggering heightened scrutiny under an Equal Protection analysis. Whitaker’s response to the petition was filed on December 27, 2017. However, on January 9, 2018, before the Supreme Court decided whether to hear the case, the KUSD Board of Education voted to settle the case for \$800,000.00.

- ***Sommerville v. Hobby Lobby Stores*, Charge Nos. 2011 CN 2993 and 2011 CP 2994 (Illinois Human Rights Commission May 15, 2015)**

Complainant Sommerville, a transgender female, filed a complaint with the Illinois Human Rights Commission (IHRC) against Hobby Lobby Stores, claiming sexual orientation discrimination related to gender identity, concerning both employment and public accommodation. Sommerville was hired as an employee of Hobby Lobby and during the course of her employment began the process of transitioning from male to female. While Hobby Lobby changed her personnel records and benefits information to identify her as female, they did not consent to her request to use the store’s designated women’s restroom. Hobby Lobby argued that the Illinois Human Rights Act (IHRA) does not require them to allow Sommerville to use the women’s restroom until she undergoes anatomical surgery.

The IHRC held that Hobby Lobby violated the IHRA as it concerns both employment and public accommodation when they prohibited Sommerville from using the women’s restroom on account of her gender related identify. The IHRA is intended to provide individuals within Illinois the freedom from discrimination because of a variety of factors including sexual orientation. The IHRA defines sexual orientation as “gender related identity, whether or not traditionally associated with the person’s designated sex at birth.”

The IHRC held that an “employee’s rights under sexual orientation, including sexual related identify, is broadly interpreted and protected against all listed civil rights violations.” Additionally, Hobby Lobby is a statutory public accommodation under the IHRA and cannot “deny or refuse to another (customer) the full and equal enjoyment of the facilities, goods and services of any public place of accommodation.”

The IHRC rejected Hobby Lobby’s argument that the IHRA also says that “discrimination based on sex, which is distinctly private in natures such as restrooms” can occur, and that being an anatomically correct female is a prerequisite before Sommerville can use the women’s restroom. The IHRC reasoned that the definition of sex must incorporate the IHRA’s definition, and therefore sex is related to a person’s sexual related identify, not a person’s designated sex at birth. The IHRC clarified that nothing in the IHRA makes surgical procedure a prerequisite for its protection of sexual related identity.

- Cassandra Black, IASB Law Clerk

- ***Doe v. Regional Sch. Unit 26*, No. 12-582 (Me. Jan. 30, 2014)**

Plaintiff Doe, a transgender female, filed a claim against Regional School Unit 26 (District) for unlawful discrimination in education and unlawful discrimination in a place of public accommodation after she was prohibited from using the communal girls’ restroom at school. Doe had

been allowed to use the girls' restroom until two highly publicized incidents occurred in which a male student, acting on instruction of his guardian, followed her into the restroom, claiming that he was also entitled to use the girls' bathroom. Following these incidents, the District no longer allowed Doe to use the girls' bathroom, instead requiring her to use a separate, single-stall bathroom. The Does claimed that the District's actions violated the Maine Human Rights Act (MHRA), which prohibits discrimination based on sexual orientation in a variety of contexts, including public accommodations. The Superior Court granted summary judgment to the District and the Does and the Maine Human Rights Commission appealed.

The Supreme Judicial Court held that the District's decision to ban Doe from the girls' bathroom constituted discrimination based on her sexual orientation because Doe was treated differently from other students solely because of her status as a transgender female, which is prohibited by the MHRA. The Court found that sexual orientation, as defined by the MHRA, includes "a person's actual or perceived gender identify or expression." The Court also reviewed a provision of the Sanitary Facilities subchapter of title 20-A (section 6501), which regulates educational settings and requires schools to provide clean toilets that shall be separated according to sex. In reviewing these two statutes together, the Court reasoned that they serve different purposes and "although school buildings must, pursuant to section 6501, contain separate bathrooms for each sex, section 6501 does not—and school officials cannot—dictate the use of the bathrooms in any way that discriminates against students in violation of the MHRA." The District's decision cannot be excused by the school's compliance with section 6501.

The Court clarified that this decision does not suggest that schools are required to permit casual access to any bathroom of their choice, but that when it has been "clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identify, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the MHRA."

Although not binding in Illinois, the MHRA is similar to the Illinois Human Rights Act, which also defines sexual orientation as including "gender related identify, whether or not traditionally associated with the person's designated sex at birth."

- Cassandra Black, IASB Law Clerk

### C. Official Records

- **Birth Certificate – Name Change**

An individual may change the name on his or her birth certificate by submitting a certified copy of a *Court Order of Legal Name Change* to the Illinois Department of Public Health (IDPH), Office of Vital Records. 410 ILCS 535/22(4); 77 Ill.Admin.Code §500.40(l).

- **Birth Certificate – Gender Change**

To change gender on a birth certificate, an individual with an existing Illinois birth certificate must submit an [\*Affidavit and Certification of Correction Request form along with a Declaration of Gender Transition/Intersex Condition\*](#) form to the IDPH. . The *Affidavit and Certification of Correction Request* form must be signed and notarized. The *Declaration of Gender Transition or Intersex Condition* form must be completed by either a licensed health care professional or a licensed mental health professional. See 410 ILCS 535/1 and 535/17, as amended by P.A. 100-360 (eff. 1-1-18).

- **Illinois State Board of Education Demographic Data**

Gender is a mandatory student demographic data element within the ISBE Student Information System, and two gender options are available: male or female. ISBE advises, however, that “for students identifying as transgender, districts may choose to enter the gender with which the student identifies rather than the student’s biological gender. If necessary, the district may also enter the first name the student uses if it differs from the birth certificate.” For managing demographic information in the ISBE Student Information System, [click here](#).

#### D. Recent State Legislation

- [PA 100-360](#)

Public Act 100-360 amended the Vital Records Act (410 ILCS 525/) to, as of January 1, 2018, allow an individual to change the gender on their birth certificate without having to first undergo an operation. Instead, an individual will need to support their gender change application with a declaration by a licensed health care professional or licensed mental health professional stating that the individual has undergone “treatment that is clinically appropriate for that individual for the purpose of gender transition, or that the individual has an intersex condition.”

#### UPDATE

- [HB 3640](#)

HB 3640 would amend the Ill. Human Rights Act to delete language from the definition of “sexual orientation” concerning gender identity and instead provide a separate definition of “gender identity” meaning “a person’s deeply felt, inherent sense of who the person is as a particular gender” and specifying that “gender identity may be the same or different from the sex of the person assigned at birth.” It would also include gender identity (rather than just gender) within the definition of a hate crime in the Criminal Code of 2012.

#### E. Other Considerations

The participation of transgender high school students in competitive athletic activities and contact sports is governed by Illinois High School Association policy #34, *Policy and School Recommendations for Transgender Participation*, at [Policy and School Recommendations for Transgender Participation](#).

A [similar policy](#) for elementary students in competitive athletics and activities has been adopted by the Illinois Elementary School Association.

#### UPDATE

On July 1, 2019, Gov. Pritzker issued [Executive Order 19-11, \*Strengthening Our Commitment to Affirming and Inclusive Schools\*](#), establishing the Affirming and Inclusive Schools Task Force to identify strategies and best practices for ensuring welcoming, safe, supportive, and inclusive school environments for transgender, nonbinary, and gender nonconforming students and to promote cooperation and collaboration between relevant stakeholders and the State. The Executive Order also requests that the Ill. State Board of Education: 1) develop non-regulatory guidance on the legal rights of transgender, nonbinary, and gender nonconforming students in schools; 2) develop a model policy or procedures setting forth best practices for inclusion of such students in schools, including but not limited to, access to facilities, participation in physical education classes and school-based programs and activities, student records, names and pronouns, and dress codes; and 3) make available other published resources to support transgender, nonbinary, and gender nonconforming students in schools.