



is for
Transgender*

**Understanding Legal Protections
for K-12 Transgender Students**



Kasha Roseta, J.D.
Gender Odyssey | August 10, 2018

Handouts

Gender Expression and Gender Identity

Key Terms

People use many different experiences of gender. Their region, language, age, culture. Here are some commonly

Assigned Sex describes the usually based on anatomy within three categories: male, female, or intersex.

Cisgender is a term used to describe someone whose sex matches their gender identity and/or gender expression.

Gender Expression describes how a person expresses their gender through their behavior, emotions, habits, interests, and appearance.

Gender Identity refers to a person's sense of being female, male, or other—regardless of their assigned sex at birth.

Sexual Orientation refers to who it has to do with whom a person identifies. Like gender, people can have any sexual orientation: straight, lesbian, bi, queer, etc.

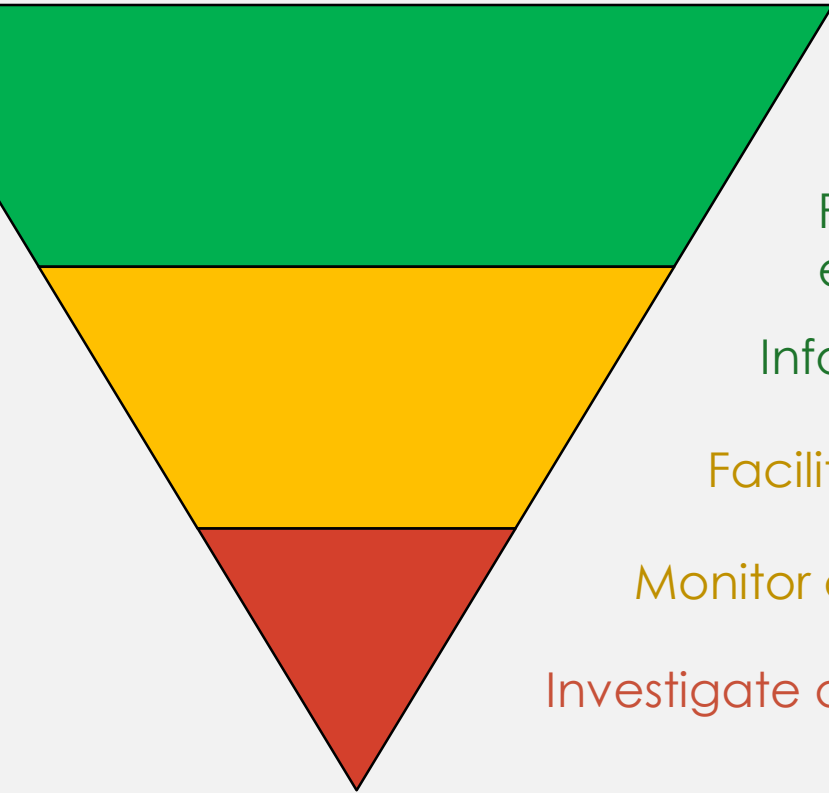
Transgender is a person whose assigned sex differs from their gender identity or both, e.g., someone assigned male whose gender identity is female.

UNITED STATES SUPREME COURT		
Mar 6, 2017	U.S. Supreme Court	<i>Gloucester Cnty. School Board v. G.G. ex rel. Grimm</i> , 137 S. Ct. 1239 (2017). Certiorari granted, but SCOTUS vacates 4th Circuit's judgment and remands case for further consideration by 4th Circuit in light of the Trump Administration's Guidance.

FEDERAL COURTS OF APPEAL		
Apr 19, 2016	4th Circuit	<i>G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.</i> , 822 F.3d 709 (4th Cir. 2016). Reverses trial court's dismissal of transgender student's Title IX claim. Relies on Obama Administration's Guidance to vacate trial court's denial of student's request for preliminary injunction (allowing him to use boys' bathroom) because wrong evidentiary standard was used. Remands case back to trial court for consideration under the correct evidentiary standard. Denies request to assign case to different trial court judge.
Dec 15, 2016	6th Circuit	<i>Dodds v. U.S. Dept. of Educ.</i> , 845 F.3d 217 (6th Cir. 2016). Denies district's request to stay the trial court's grant of a preliminary injunction allowing transgender student to use girls' restroom.
Apr 18, 2017	4th Circuit	<i>G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.</i> , 853 F.3d 729 (4th Cir. 2017). Grants transgender student's (unopposed) motion to vacate preliminary injunction.
May 30, 2017	7th Circuit	<i>Whitaker v. Kenosha Unified Sch. Dist. No. 1</i> , 858 F.3d 1034 (7th Cir. 2017). Affirms trial court's grant of a preliminary injunction allowing transgender student to use boys' restroom. Update: Case settled in favor of transgender student in January, 2018.
Aug 2, 2017	4th Circuit	<i>Grimm v. Gloucester Cnty. Sch. Bd.</i> , No. 4:15-CV-00054 (4th Cir. Aug. 2, 2017). Oral arguments on the merits were scheduled to occur Sep 12, 2017, but the 4th Circuit remanded the case back to trial court to consider whether case has become moot (due to transgender student having graduated from high school). Update: District court allows case to proceed on May 22, 2018.
Jun 18, 2018	3d Circuit	<i>Doe v. Boyertown Area Sch. Dist.</i> , No. 17-3113 (3d Cir. 2018). Affirms district court's decision to deny plaintiffs' motion for a preliminary injunction, agreeing that plaintiffs (cisgender students) could not demonstrate a likelihood of success on the merits and failed to establish irreparable harm. Transgender students permitted to use school facilities consistent with their gender identities.

FEDERAL DISTRICT COURTS		
Sep 17, 2015	E.D. Va.	<i>G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.</i> , 132 F. Supp.3d 736 (E.D. Va. 2015). Dismisses transgender student's Title IX claim and denies his request for preliminary injunction, which would have allowed him to use boys' restroom.
Aug 21, 2016	N.D. Tex.	<i>Texas v. U.S.</i> , 201 F. Supp.3d 810 (N.D. Tex. Aug. 21, 2016). Orders federal government not to rely on the Obama Administration's Guidance, which required schools to treat transgender students consistent with their gender identity. Creates exception for cases currently in litigation.

OSPI's Equity & Civil Rights Office



Develop civil rights policy,
guidance, and tools

Provide training and assistance to
educational professionals

Inform families about their rights

Facilitate local resolutions to concerns

Monitor district compliance

Investigate and resolve complaints

Agenda

Introduction

- Why legal protections at school matter

Federal Legal Landscape

- Federal laws, regulations, and guidance
- Overview of federal case law

State Legal Landscape

- State laws, regulations, and guidance
- Hot topics

Why Legal Protections at School Matter

Judge in Texas blocks Obama transgender bathroom rules

Trump administration withdraws federal protections for transgender students

Supreme Court Won't Hear Major Case on Transgender Rights

Anti-Trans Ballot Measure Fails in Washington State

Appeals court sides with transgender student in Wis. school bathroom case

Prevent discrimination



Protect students



Safeguard student health



Improve long-term outcomes



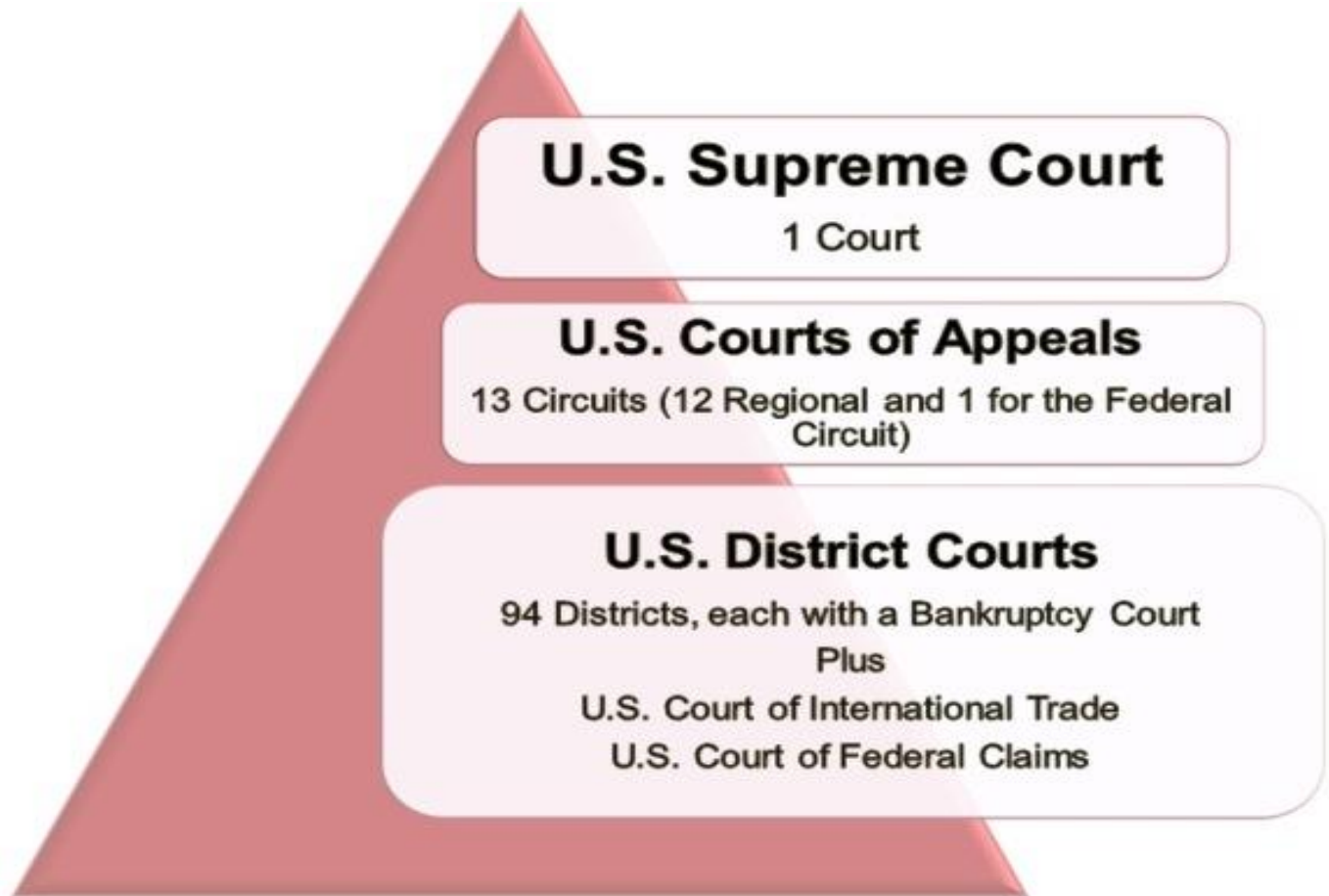
Key Takeaway

A safe and supportive school environment for transgender students leads to better outcomes—academically, emotionally, socially, and psychologically.

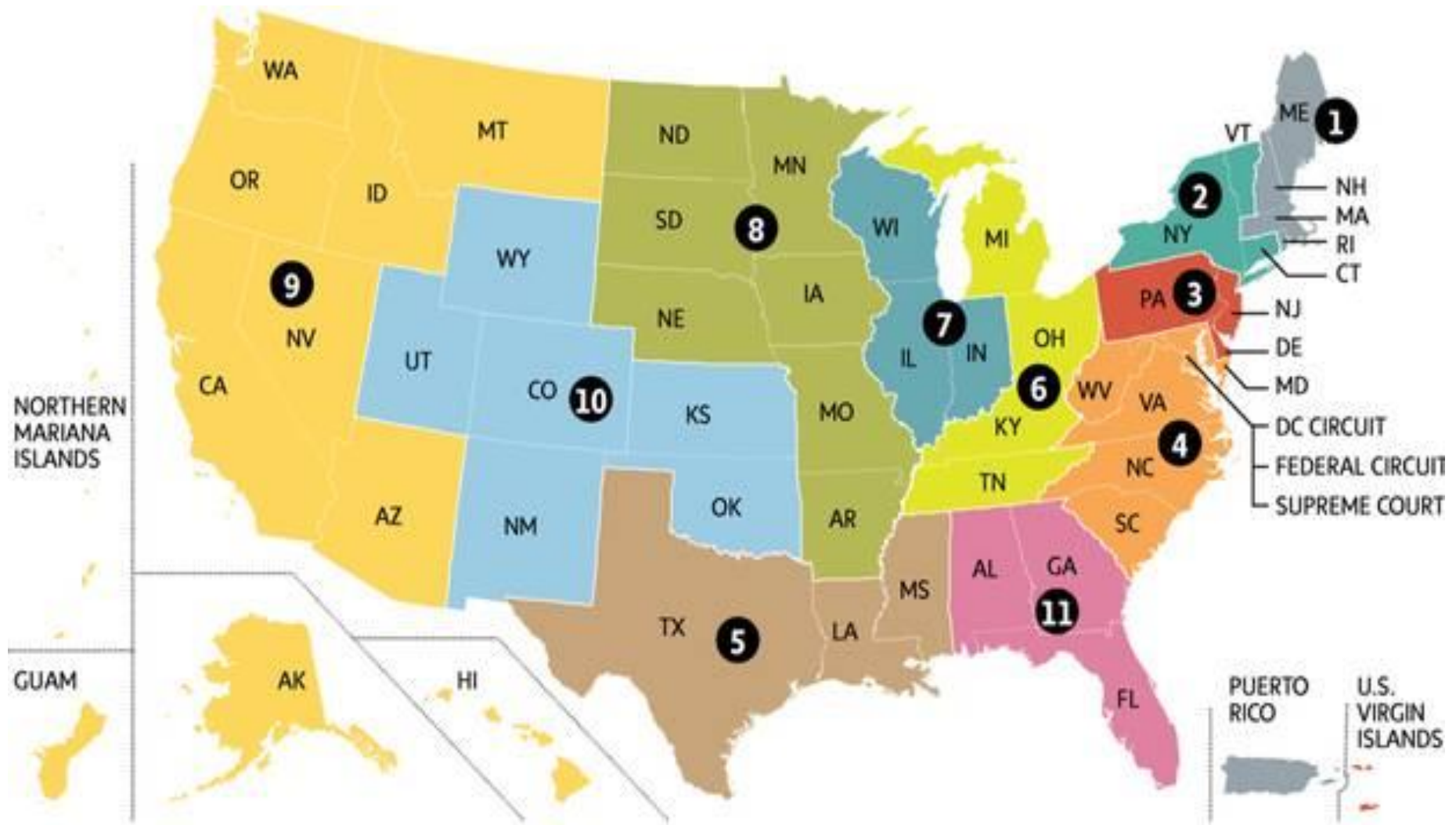


Legal Protections

Federal Court System



Federal Court System



U.S. Constitution

*“No state shall...deny to any person within its jurisdiction the **equal protection** of the laws.”*

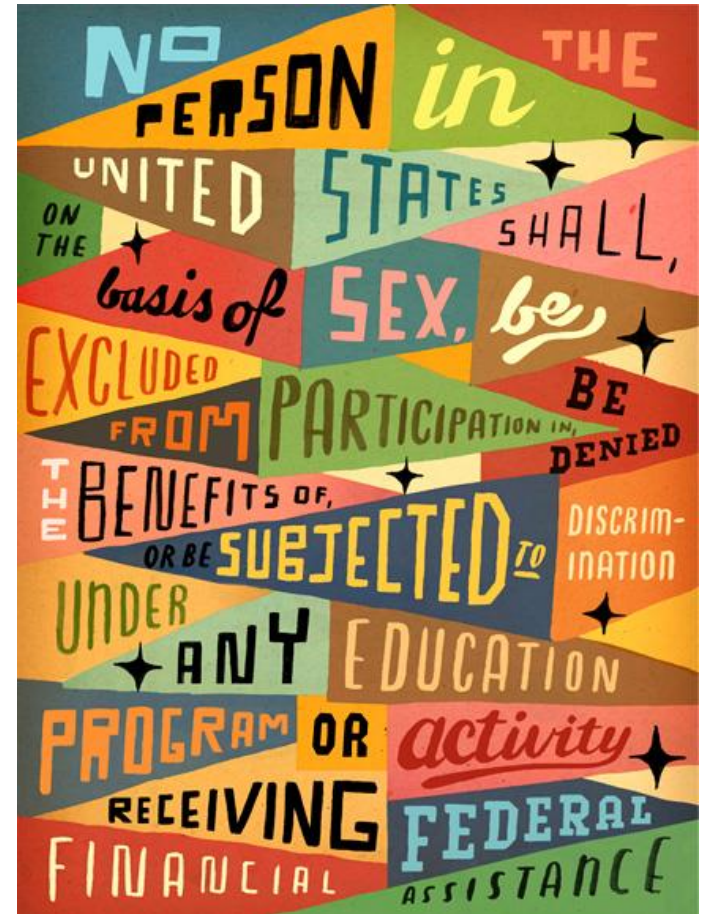
U.S. Const., Amend. XIV
 (“Equal Protection Clause”)



Title IX

“No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Title IX of the Educ. Amendments of 1972
20 U.S.C. §§ 1961 et seq.



Title IX

Exceptions



Schools may have separate facilities segregated by **sex**, so long as the facilities for each sex are comparable.

20 U.S.C. § 1681; 34 C.F.R. § 106.33

Title VII

*“It shall be an unlawful employment practice...to discriminate against any individual ...because of such individual’s...**sex**...”*

42 U.S.C. § 2000e-2(a)(1)



Title VII

“Assigned sex” only
(male/female binary)



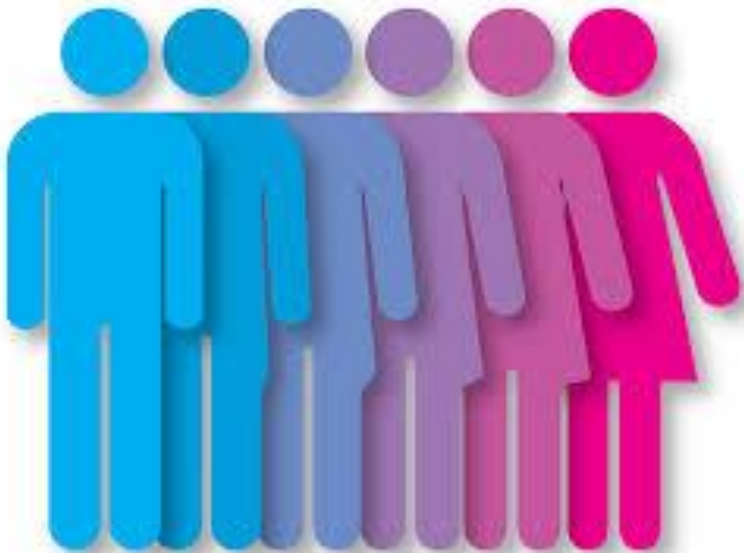
Price Waterhouse v. Hopkins

490 U.S. 228 (1989)



Title VII

Post-*Price Waterhouse*



Assigned sex
and beyond

2014 Federal Guidance



*“Title IX’s sex discrimination prohibition extends to claims of discrimination based on **gender identity or failure to conform to stereotypical notions of masculinity or femininity...**”*

OCR’s Q & A on Title IX and Sexual Violence (April 29, 2014)

2017 Federal Guidance



“[The Obama Administration’s] guidance documents **do not...contain extensive legal analysis or explain how the position is consistent with the express language of Title IX**, nor did they undergo any formal process.”

OCR’s Dear Colleague Letter
(February 22, 2017)

Where does that leave us?



- Title IX
- Any OCR guidance documents still remaining in effect
- Federal court decisions that interpret Title IX

Federal Case Law

What is being litigated?

School district policies on student restroom* use.



What are the issues?

EQUAL PROTECTION

Whether the district's policy violates the Equal Protection Clause?

- *What is the appropriate standard of review?*

TITLE IX

Whether the district's policy is sex-based discrimination under Title IX?

- *What is the definition of "sex" under Title IX?*

What are the arguments?

EQUAL PROTECTION

District:

- *Constitutional.*
- *No heightened scrutiny.*

Students:

- *Unconstitutional.*
- *Heightened scrutiny required.*

TITLE IX

District:

- *Not discrimination.*
- *Sex = Assigned at birth*

Students:

- *Discrimination.*
- *Sex = Transgender status, gender identity*

How are federal courts ruling?

A “steady drumbeat” of preliminary rulings **in favor** of transgender students.



Federal District Courts

Virginia* (2015)

Texas (2016)

North Carolina (2016)

Wisconsin (2016)

Ohio (2016)

Pennsylvania (2017)

Florida* (2017)

Pennsylvania (2017)

Pennsylvania (2017)

Illinois (2017)

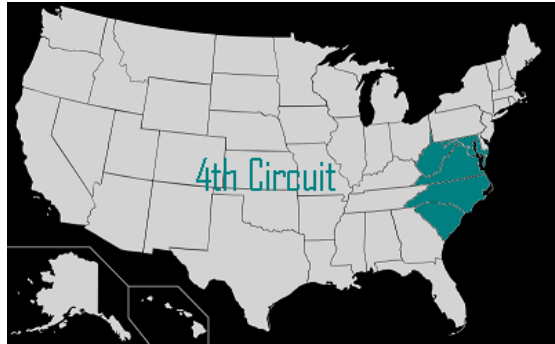
Maryland (2018)

Virginia* (2018)

Oregon (2018)

Florida* (2018)

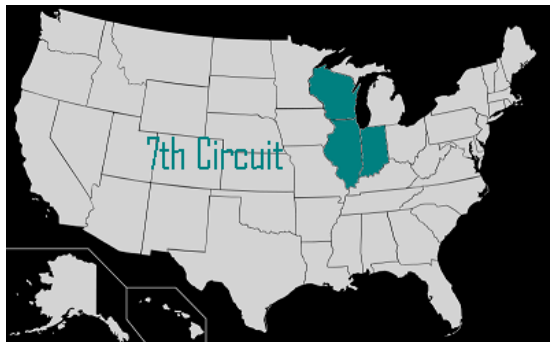
Federal Appellate Courts



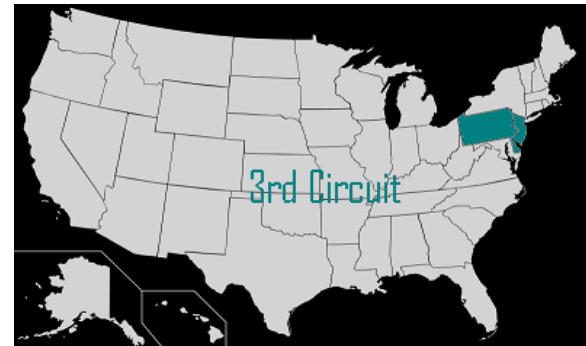
Grimm (April, 2016)
Grimm (August, 2017)



Dodds (December, 2016)



Whitaker (May, 2017)



Doe (June, 2018)

A Closer Look:
Whitaker v. Kenosha

Defendant:

Kenosha Unified School District



Plaintiff:
Ash Whitaker



Tremper High School



**KEEP
CALM
AND
SURVIVE
JUNIOR YEAR**

Preliminary Injunction



The court rules for
Ash.

The school district
appeals.

How to Win on Appeal



“Reasonable likelihood
of success” on the
merits

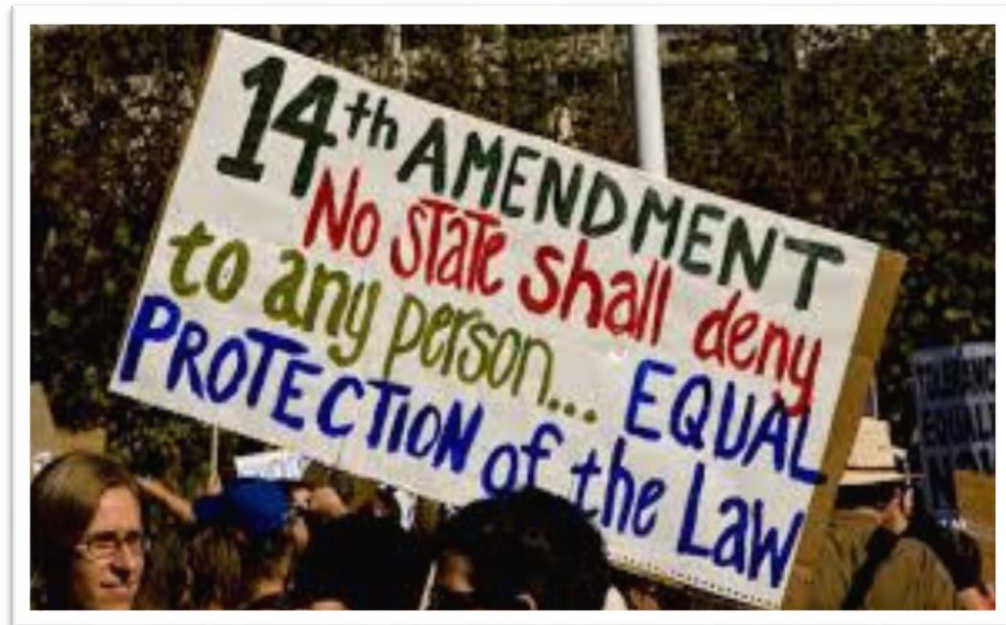
AND

*Harm to Ash outweighs
harm to district*

Equal Protection Claim

Does the district policy (requiring students to use the restroom consistent with their sex assigned at birth) violate the Equal Protection Clause?

Yes.



Equal Protection Claim

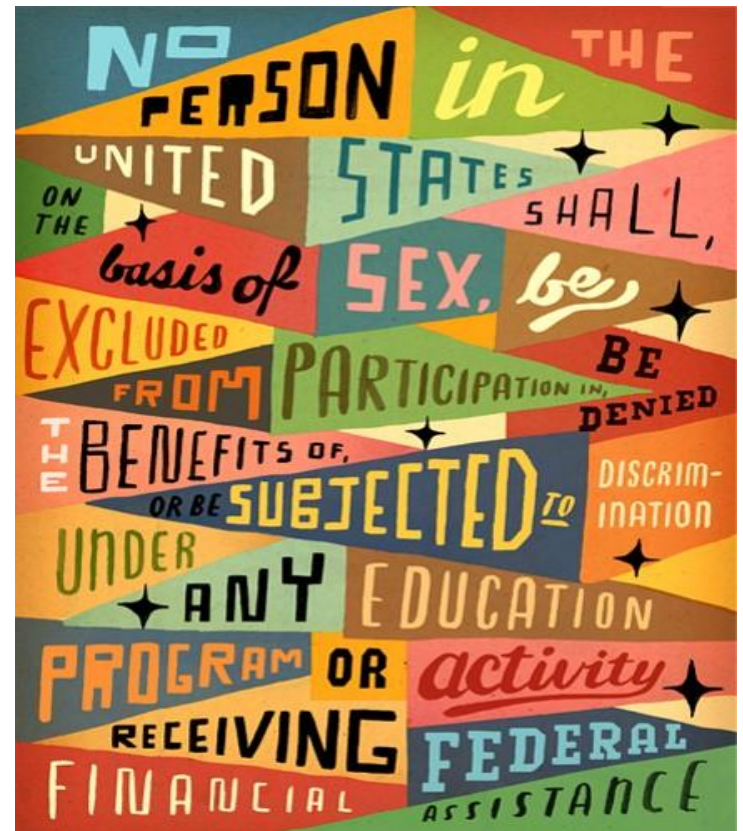
*“Here, the School District’s policy cannot be stated without referencing sex, as the [District] decides which bathroom a student may use based upon the sex listed on the student’s birth certificate. **This policy is inherently based upon a sex classification and heightened review applies.**”*



Title IX Claim

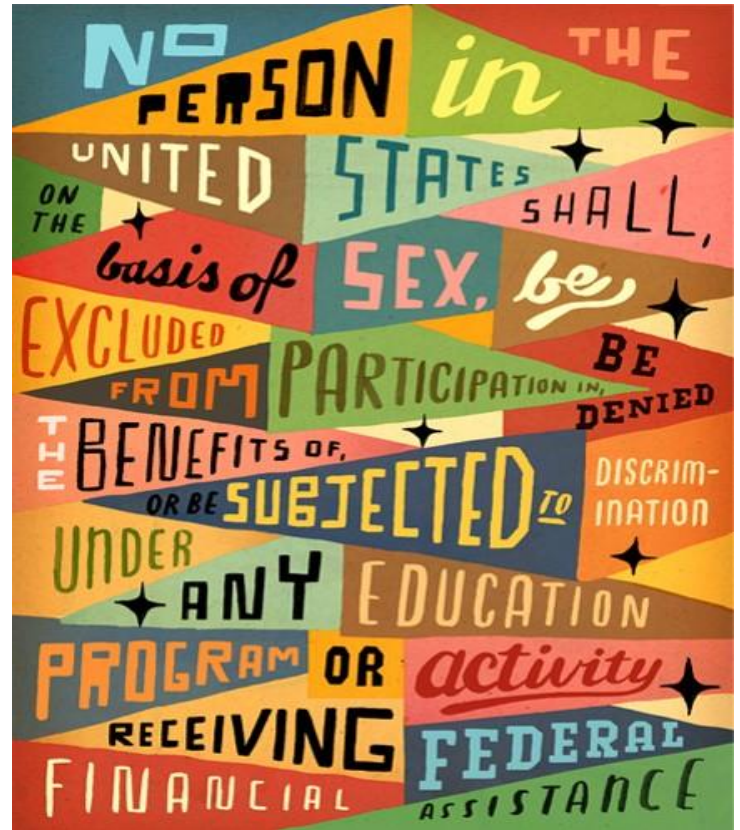
Does discrimination based on either transgender status or sex-stereotyping constitute sex discrimination under Title IX?

Yes.



Title IX Claim

“A policy that requires an individual to use a bathroom that does not conform with [his] gender identity **punishes that individual for [his] gender non-conformance**, which in turn **violates Title IX.**”



A Word on “Privacy”

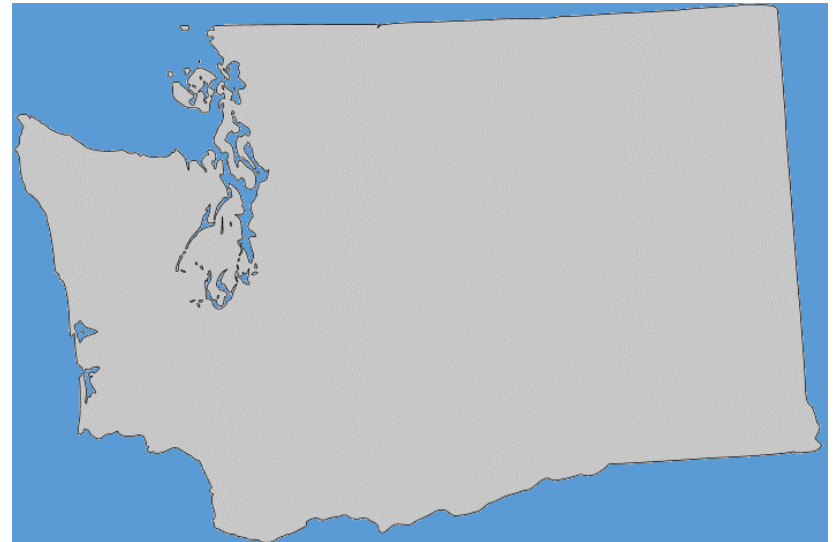


*“Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy, and **those who have true privacy concerns are able to utilize a stall.**”*

Transgender Students in Washington

State Law

“Discrimination in Washington public schools on the basis of...**sexual orientation, including gender expression or identity**...is prohibited.”



RCW 28A.642.010

State Regulations

”...it is unlawful for any public school district or public charter school to discriminate on the basis of...**sexual orientation, gender expression, gender identity**...with regard to any program or activity conducted by or on behalf of a school district or public charter school...”

WAC 392-190-005



Prohibiting Discrimination in Washington Public Schools

*Guidelines for school districts to implement
Chapters 28A.640 and 28A.642 RCW and Chapter 392-190 WAC*

OSPI Guidelines



Randy I. Dorn
State Superintendent of
Public Instruction

February 2012

Key Takeaway

In Washington, all students have a right to be treated consistent with their gender identity at school



Don't forget to talk with your students.



Frequently Asked Questions

1. Policy and Procedure
2. Names, Pronouns & School Records
3. Dress Codes
4. Restrooms / Locker Rooms
5. PE / Athletics
6. Student Privacy
7. Discriminatory Harassment



Does a district need a policy and procedure?

Transgender Students

The board believes in fostering an educational environment that is safe and free of discrimination for all students, regardless of sex, sexual orientation, gender identity or gender expression. To that end, the board recognizes the importance of an inclusive approach toward transgender students with regard to official records, confidential health and education information, communication, restroom and locker room accessibility, sports and physical education, dress codes and other school activities, in order to provide these students with an equal opportunity for learning and achievement. This policy and its procedure will support that effort by facilitating district compliance with local, state and federal laws concerning harassment, intimidation, bullying and discrimination.

Section: 3000 - Students Policy: 3211

Transgender Students

The board believes in fostering an educational environment that is safe and free of discrimination for all students, regardless of sex, sexual orientation, gender identity or gender expression. To that end, the board recognizes the importance of an inclusive approach toward transgender students with regard to official records, confidential health and education information, communication, restroom and locker room accessibility, sports and physical education, dress codes and other school activities, in order to provide these students with an equal opportunity for learning and achievement. This policy and its procedure will support that effort by facilitating district compliance with local, state and federal laws concerning harassment, intimidation, bullying and discrimination.

Cross References:

- 2145 - Suicide Prevention
- 3207 - Prohibition of Harassment, Intimidation and Bullying
- 3210 - Nondiscrimination
- 3231 - Student Records

Legal References:

- RCW 28A.642 Discrimination Prohibition
- 20 U.S.C. 1232g, 34 C.F.R., Part 99 - Family Education Rights and Privacy Act

Management Resources:

- 2014 - December Issue
- 2013 - December Issue
- Prohibiting Discrimination in Washington Public Schools - OSPI Guidelines for school districts to Implement Chapters 28A.640 and 28A.642 RCW and Chapter 392-190 WAC (February 2012)

Adoption Date:
Classification: **Discretionary**
Revised Dates: **12.13; 12.14**

A policy and procedure are **strongly encouraged**, but not required.

Transgender Student

The board believes in fostering an educational environment that is safe and free of discrimination for all students, regardless of sex, sexual orientation, gender identity or gender expression. To that end, the board recognizes the importance of an inclusive approach toward transgender students with regard to records, confidential health and education information, communication, restroom and locker room accessibility, sports and physical education, dress codes and other school activities, in order to provide students with an equal opportunity for learning and achievement. This policy and its procedure will support that effort by facilitating district compliance with local, state and federal laws concerning harassment, intimidation, bullying and discrimination.

Cross References:

Legal References:

Management Resources:

Adoption Date:
Classification: **Discretionary**
Revised Dates: **12.13; 12.14**

© 2014-2016 Washington State School Directors' Association. All rights reserved.

Transgender Students

Section: 3

The board believes in fostering an educational environment that is safe and free of discrimination for all students, regardless of sex, sexual orientation, gender identity or gender expression. To that end, the board recognizes the importance of an inclusive approach toward transgender students with regard to records, confidential health and education information, communication, restroom and locker room accessibility, sports and physical education, dress codes and other school activities, in order to provide students with an equal opportunity for learning and achievement. This policy and its procedure will support that effort by facilitating district compliance with local, state and federal laws concerning harassment, intimidation, bullying and discrimination.

Cross References:

2145 - Suicide Prevention
3207 - Prohibition of Harassment, Intimidation and Bullying
3210 - Nondiscrimination
3231 - Student Records

Legal References:

RCW 28A.642 Discrimination Prohibition
20 U.S.C. 1232g, 34 C.F.R., Part 99 - Family Education Rights and Privacy Act

Management Resources:

2014 - December Issue
2013 - December Issue
Prohibiting Discrimination in Washington Public Schools - OSPI Guidelines for school districts to implement Chapters 28A.640 and 28A.642 RCW and Chapter 392-190 WAC (February 2012)

Adoption Date:
Classification: **Discretionary**
Revised Dates: **12.13; 12.14**

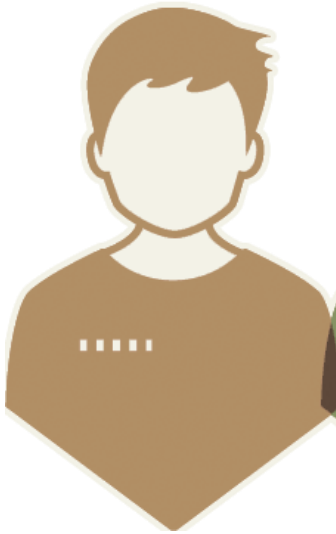
© 2014-2016 Washington State School Directors' Association. All rights reserved.

Which name and pronouns should a district use?



Use the student's **requested**
name and pronouns

Cole



She



They



He



Alex



Name Changes

“Districts should change a student’s legal name in CEDARS if the student or his or her parent provides **documentation of a legal name change.**”



CEDARS Reporting Guidance

Gender Designations

“School districts may change a student’s gender designation **upon parent/student request**, by using a process similar to the one they use to change a student’s ethnicity.”





*Can a district
re-issue records
to alumni to
reflect a name
change?*



Yes.

1. Document the transaction;
2. Issue a new record; and
3. Retain:
 - a. The original record,
 - b. The newly issued record, &
 - c. Appropriate documentation.



*Should a
district
request proof
of medical
treatment?*



No.

Schools do not need proof of medical treatment to respect a student's gender identity.

*Can a
district
have (and
enforce)
dress
codes?*



“Boys are not to wear make-up.”

“Prohibited conduct includes dress of the opposite sex.”



Yes. But, all dress codes should be **gender-neutral** and **applied equally** to boys and girls.

*Which restroom
and locker
room should
students use?*



Students may use the restroom or locker room that corresponds with their gender identity.



Schools may provide
any student—
transgender or not—
access to an
alternative facility if
they'd like increased
privacy.



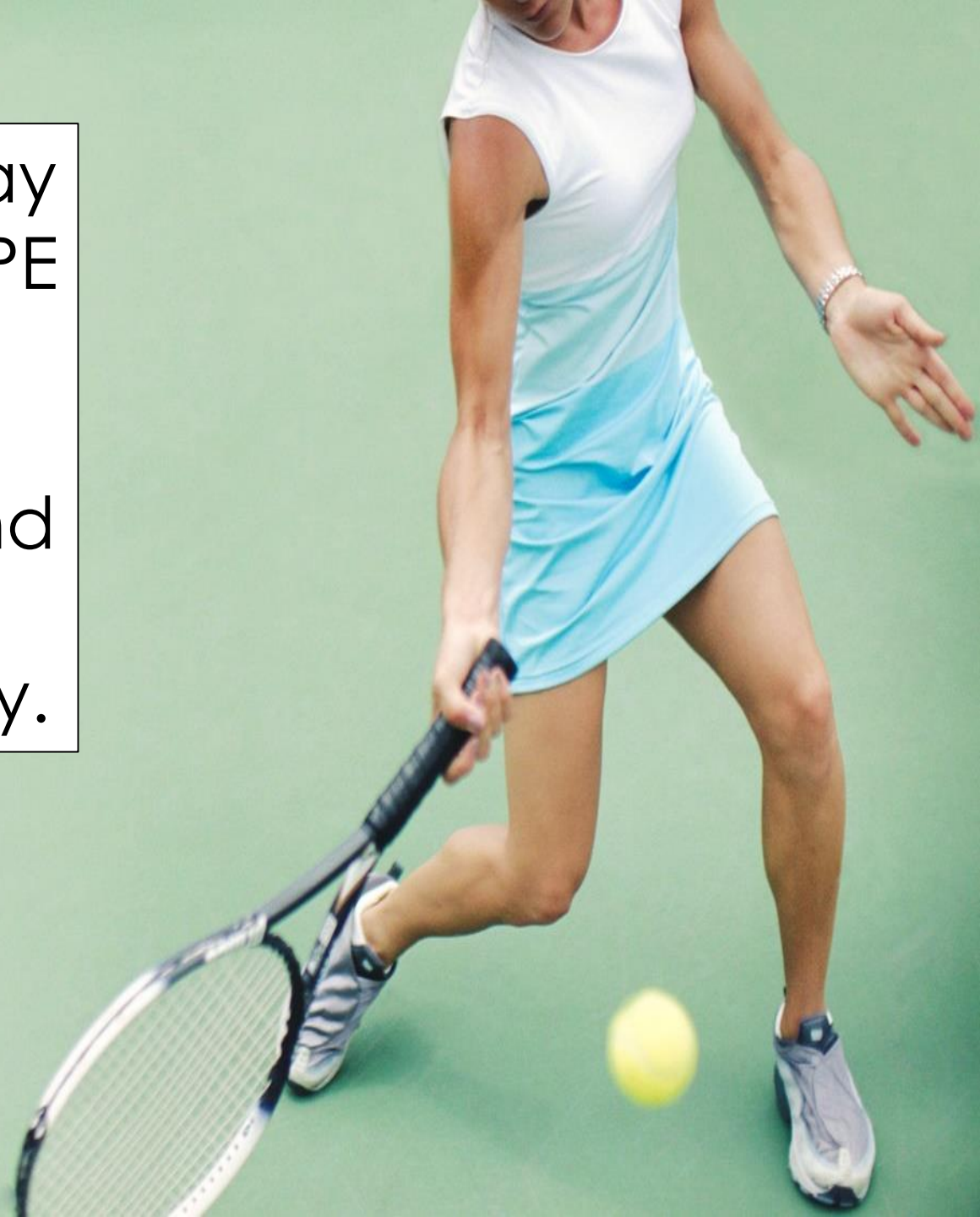


What if he just
wants to
peep in the
girls'
restroom?

*What about
P.E. and
athletics?*



All students may participate in PE or athletics opportunities that correspond with their gender identity.



WIAA Gender Identity Participation Procedure

WIAA Handbook, Section 18.15





Should a district keep a student's transgender status private?



Yes.

Staff should not disclose a student's transgender status unless:

1. The student authorized the disclosure; or
2. It is legally required to do so.

Dispute Resolution

Discrimination, Discriminatory Harassment, and Sexual Harassment Dispute Resolution

In Washington State, each student should have equal access to public education without discrimination. If parents, school staff, or community members believe that a student has experienced discrimination or discriminatory harassment, there are steps they can take to resolve these concerns and eliminate the conduct or conditions that led to the problem.

Discrimination is the unfair or unequal treatment or harassment of a person *because* they are part of a group, defined by law, as a **protected class**. A protected class is a group of people who share common characteristics and are protected from discrimination and harassment under federal and state law.

These groups are protected classes under Washington State law:¹

Race and color	Sexual orientation
National origin	Gender expression
Religion and creed	Gender identity
Sex	Veteran or military status
Disability	Use of a trained dog guide or service animal

Discriminatory harassment is harassment based on a protected class. It can take many forms. Threats, name-calling, derogatory jokes, physical assault, or other conduct that is physically threatening, harmful, or humiliating could be a few examples of discriminatory harassment.

Staff in the **Equity and Civil Rights Office at OSPI** can answer questions about rights and responsibilities under civil rights law and what you can do to resolve concerns about discrimination in your child's school. Be aware that we do not provide legal advice or advocate on anyone's behalf.

Phone 360-725-6162 | TTY 360-664-3631 | equity@k12.wa.us

Talk to Your Civil Rights Compliance Coordinator. Try to Resolve the Issue.

A discussion with your civil rights compliance coordinator at the school district is often the best action you can take to address your concerns. These staff members can make sure your student has equal access to all the programs and services your school has to offer.

This **informal first step** will bring your issue to the attention of school officials and could lead to a practical and beneficial solution quickly.

- **Focus on the facts** related to discrimination and harassment, as you understand them, AND
- Let the principal or coordinator know **what you want them to do to resolve the problem**

Civil Rights Coordinators Play an Important Role

We encourage families and district and school staff to work closely to resolve disagreements and concerns about discrimination and discriminatory harassment at the local level.

Get in touch with your district's **civil rights compliance coordinator**. Find the contact list at OSPI's Equity and Civil Rights website, www.k12.wa.us/Equity/ContactList.aspx.



BULLYING (HIB)

**Harassment, Intimidation, and
Bullying Law: RCW 28A.300.285**

May or may not be discrimination
(Based on any characteristic)

**Response might be limited
to disciplining the
perpetrators**

**HIB Policy/
Procedure
(3207)**

DISCRIMINATORY HARASSMENT

**State and Federal
Nondiscrimination Laws**

A form of discrimination
(Based on a protected class)

**Often requires a systemic response,
beyond simply disciplining the
perpetrators**

**Sexual Harassment and
Nondiscrimination
Policies/Procedures (3205 & 3210)**

Informal Complaints

Equity & Civil Rights
Home

Contact your District

Complaint Options

Resources for Districts

Guidelines: State Policy

Civil Rights

Contact Us

For more information
about Equity & Civil Rights:
Para más información
sobre Equidad y Derechos
Civiles:
360-725-6162
equity@k12.wa.us



School District and Charter School Compliance Coordinators



[Your Equity Contact Information](#)

Contact your school district's or charter school's Compliance Coordinator to report and resolve concerns of discrimination or to [File a Complaint of Unlawful Discrimination](#).

What's your question or concern?

- Sex discrimination or sexual harassment — Contact your district's **Title IX Officer**.
- Disability discrimination, including Section 504 or accessibility — Contact your district's **Section 504/ADA Coordinator**.
- All other questions or concerns of discrimination or harassment based on sex, race, creed, religion, color, national origin, age, veteran or military status, sexual orientation, gender expression or identity, disability, or the use of a service animal — Contact your district's **State Compliance Coordinator**.
- Bullying — Contact your district's Harassment, Intimidation, and Bullying Compliance Officer

NOTE: This directory information may not be used for commercial purposes (RCW 42.56.070(8)).

[Click on column headings to sort.](#)

SCHOOL DISTRICT/CHARTER SCHOOL	COMPLIANCE COORDINATOR	TITLE IX OFFICER	SECTION 504 COORDINATOR
Aberdeen School District	Jim Sawin Human Resources/Title 1/LAP Director 360-538-2222 jsawin@asd5.org	Jim Sawin Human Resources/Title 1/LAP Director 360-538-2222 jsawin@asd5.org	Roger Heinrich Special Education Director 360-538-2017 rheinrich@asd5.org
Adna School District	James Forrest 360-748-0362 forrestj@adnaschools.org	Lisa Dallas 360-748-7029 dallasl@adnaschools.org	James Forrest 360-748-0362 forrestj@adnaschools.org
Almira School District	Shauna Lee Schmerer 509-639-2414 sschmerer@achsd.org	Shauna Lee Schmerer 509-639-2414 sschmerer@achsd.org	Shauna Lee Schmerer 509-639-2414 sschmerer@achsd.org
Applegate School District	Cynthia Cisneros	Cynthia Cisneros	Genie Martin

What can we help you with? ▾

Questions?

equity@k12.wa.us
360-725-6162

FAX: 360-664-2967
TTY: 360-664-3631

Discrimination Complaint Procedure



Other Complaint Options



Resources: Gender Identity & Gender Expression in Schools

Students' Rights
Gender Expression and Gender Identity

Civil rights laws prohibit discrimination and discriminatory harassment based on gender expression and gender identity in K-12 public schools.

Discrimination is the unfair or unequal treatment or harassment of a person because they are part of a defined group, known as a protected class. **Gender expression and gender identity** are protected classes under Washington law.

Discriminatory harassment is harassment based on a protected class, such as gender expression and gender identity, that includes many forms, such as threats, name-calling, derogatory jokes, physical contact, or conduct that is physically threatening, harmful, or humiliating.

Common Terms and Definitions

People use many different words to describe their gendered experiences. Terms used vary based on region, language, age, culture, and other factors.

Here are some commonly used terms:

Gender Expression describes the ways in which a person expresses their gender through emotions, mannerisms, dress, grooming habits, interests, and activities. Gender expression is how people express gender.

Gender Identity refers to a deeply felt internal sense of being female, male, or neither—regardless of their gender assigned at birth.

Gender Non-conforming describes a person whose gender expression differs from stereotypical expectations about how they should look or act based on the gender assigned at birth. People who identify outside traditional gender categories such as transgender, genderqueer, or gender non-binary are examples of gender non-conforming.


Biological Sex/Sex refers to a person's internal and external anatomy, chromosomes, and hormones.




Transgender is a general term often used to describe a person whose gender expression, or both, are different from those traditionally associated with their sex assigned at birth.

Transitioning refers to the process in which a person goes from living and identifying as one gender to living and identifying as another.

Schools In Transition

A Guide for Supporting Transgender Students in K-12 Schools



www.k12.wa.us/Equity/GenderIdentity/default.aspx

Contact Us!

OSPI Equity and Civil Rights Office

P: (360) 725-6162 | TTY: (360) 664-3631

equity@k12.wa.us

www.k12.wa.us/equity

