TOPIC:

TRANSGENDER ISSUES ON CAMPUS

INTRODUCTION:

In medicine, the media, and throughout American society, transgender issues have garnered increasing attention in recent years. Courts and agencies are confronting these issues directly – the EEOC recently determined, for the first time, that federal law protects transgender individuals from discrimination, and stated that a strategic enforcement priority for 2012-2016 will be targeting discrimination against transgender individuals under applicable federal laws. [1] As a result of these factors, and greater general acceptance and understanding of transgender issues, colleges and universities are eager to address the needs of transgender students and staff on campus.

The term “transgender” is really an umbrella term; it refers to a whole range of people who consider themselves gender non-conforming [2] and whose appearances may be perceived as gender atypical. This can include transsexual people, cross-dressers, androgynous people, and genderqueers. [3] Gender identity refers to an internal feeling of being male or female (or both or neither). Gender expression, on the other hand, is external: the social and behavioral characteristics associated with being male or female. A transgender person may not conform to traditional notions of gender identity or gender expression. Often, transgender people go through a process of gender transition, where they take steps to live (and perhaps appear) according to the gender with which they identify. This transition may include medical treatment or a change in wardrobe, and some take steps to change identification documents such as driver’s licenses or campus identification cards. It is important to note that gender identity is distinct from sexual orientation. A transgender person could be heterosexual, gay or lesbian, or bisexual.

Transgender students and employees may have difficult experiences as they move through a gender transition. Many institutions are eager to understand the measures they can take to best serve this part of the campus community, and recent judicial decisions and EEOC actions make clear that such measures may in fact be legally required. Institutions can foster a community of support and acceptance through clear and egalitarian policies, remaining sensitive to the needs of all students and employees on campus.

This Note is an update to the June 2, 2005 NACUANOTE by Francine Bazluke and Jeffrey Nolan entitled “Gender Identity and Expression Issues at Colleges and Universities” and should be consulted alongside that Note. [4] Specifically, this Note will briefly chart the progress of the law’s support for transgender individuals, evaluating recent legal developments and highlighting the analyses articulated by courts in several federal jurisdictions. It will also identify trends in the law’s acceptance of transgender rights. Lastly, it will address complexities that have arisen as college campuses have sought to accommodate transgender students, and the challenges administrators may face in doing so.

DISCUSSION:

I. Developments in the Law: Sex Discrimination Under Title VII and the Equal
Protection Clause

Congress passed Title VII of the Civil Rights Act of 1964 [5] to protect employees against, among other things, discrimination on the basis of sex. Congress did not contemplate discrimination against transgender individuals when it enacted the law. In federal cases, the term “sex” has traditionally been interpreted to mean a difference in biological gender, rather than gender identity, gender expression, or sexual orientation. [6] Thus, transgender plaintiffs may still face challenges when they sue based upon qualities expressive of their gender identity, rather than their sex. However, as the following discussion makes clear, courts have increasingly been willing to extend the definition of discrimination on the basis of sex, both for Title VII and Equal Protection Clause purposes, to gender stereotyping, which is more likely to protect transgender employees.

A. Price Waterhouse Framework

The landmark 1989 case Price Waterhouse v. Hopkins [7] set the current standard for Title VII sex discrimination. There, the U.S. Supreme Court held that it is not permissible to consider gender stereotypes (i.e. discriminating because someone is too “macho” or not “feminine” enough) in making hiring or promotion decisions. This rationale has been extended by some courts to protect transgender individuals who have been discriminated against for failing to fit into a traditional gender mold in the office. [8] However, some courts have noted that notwithstanding Price Waterhouse, discriminating against an individual solely on the basis of their transsexual or transgender identity is not actionable under Title VII, as further explained below.

B. Recent Case Law Developments

Gender identity discrimination claims have been brought as equal protection claims under the U.S. Constitution and as Title VII statutory cases since Price Waterhouse, with varying results. In 2011, the Eleventh Circuit ruled in a constitutional case that “discrimination against a transgender individual on the basis of her gender non-conformity is sex discrimination, whether it’s described as being on the basis of sex or gender.” [9] In that case, Vandiver Elizabeth Glenn, who was born a biological male but was undergoing a gender transition, was terminated from her job as editor at the Georgia General Assembly’s Office of Legislative Council when she informed management that she would be making the transition to female, coming to work dressed as a woman and changing her name. Glenn was told she was fired because her “intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn’s coworkers uncomfortable.” [10] The court upheld summary judgment in Glenn’s favor, since classifications based on gender require a heightened standard of review, and the employer could offer no reason for Glenn’s termination that “could qualify as a governmental purpose, much less an ‘important’ governmental purpose, and even less than that, a ‘sufficiently important governmental purpose.’” [11]

The circuit courts evaluating Title VII claims raised by transgender plaintiffs have typically been willing to consider a Price Waterhouse-style gender stereotype argument, with the Sixth, Ninth and D.C. Circuits generally appearing more favorable to the claims of transgender plaintiffs.

The Sixth Circuit has used the Price Waterhouse analysis in two major cases that have permitted transgender people to pursue claims of sex discrimination. In Smith v. City of Salem, [12] the plaintiff firefighter was a male to female transsexual, and the court held that he was indeed discriminated against because of his sex, since his behavior was not stereotypically masculine, according to his employer’s assumptions. This, the court said, was sex stereotyping on the basis of non-conforming behavior, which is actionable under Title VII. The Sixth Circuit upheld this principle in Barnes v. City of Cincinnati, [13] the following year. In Barnes, Phillip (later Philecia) Barnes did not obtain a position as police sergeant in Cincinnati after failing the required probationary period. The circuit court held that the City violated Title VII and the Equal Protection Clause. The court noted that Barnes was a member of a protected class because his behavior did not conform to “sex stereotypes.”

A more recent case decided in favor of a transgender plaintiff in a Title VII action was Schroer v. Billington from the D.C. District Court. [14] In that case, the court held that the government employer discriminated against the plaintiff, a male who would be transitioning to female, when it withdrew an offer of employment. This violated Title VII because discrimination based on an employee’s transition
from one sex to the other is “literally” because of sex, explained the court. Schroer represents a significant step in the process of acceptance for transgender individuals in that it argues that sex stereotyping of any kind, regardless of the gender identity of the victim, constitutes sex discrimination actionable under Title VII.

The Ninth Circuit has been open to gender discrimination claims based on gender stereotyping for a number of years, and there are quite a few decisions in that jurisdiction that have resulted in favorable rulings for transgender plaintiffs. In Kastl v. Maricopa County Community College District, the court noted that it is unlawful to discriminate against a transgender employee because he/she does not behave in accordance with an employer’s male/female expectations. [15] In Jespersen v. Harrah’s Operating Company, Inc., [16] the court, in an en banc decision, held that dress and grooming codes may violate Title VII if the evidence shows that the policy was in place to make female employees wear stereotypically what women “should” wear. [17]

In a 2010 decision, the Eighth Circuit overturned a district court’s decision, finding that the non-transgender plaintiff’s sex discrimination and retaliation claims – based on the fact that she had a more masculine style of dress and appearance – survived summary judgment. [18] Specifically, “[t]he question is whether [the supervisor’s] requirements that Lewis be ‘pretty’ and have the ‘Midwestern girl look’ were because she is a woman. A reasonable fact finder could find that they were since the terms by their nature apply only to women.” [19]

Since Title VII does not include sexual orientation explicitly as a legally protected characteristic, there has been some resistance to recognizing gender discrimination claims brought by homosexuals who are also transgender. [20] However, in a 2009 case, the Third Circuit Court of Appeals vacated a lower court’s summary judgment rejecting a gender discrimination claim, noting that while a discrimination claim based on sexual orientation is not cognizable under Title VII, it is certainly possible for an effeminate homosexual man to bring a gender stereotyping claim in the same way that an effeminate heterosexual man could bring such a claim. [21]

Thus, while federal courts have not gone so far as to classify transgender individuals as a protected class under Title VII – indeed some courts expressly reject that notion [22] – there appears to be a trend toward recognizing claims for failure to conform to stereotypes. As the Eleventh Circuit noted in Glenn v. Brumby, “the majority of courts that have addressed this issue [have found] that discrimination against a transgendered individual because of their [sic] failure to conform to gender stereotypes constitutes discrimination on the basis of sex.” [23]

II. Agency Decision and Enforcement: EEOC

In an agency decision issued on April 20, 2012, the Equal Employment Opportunity Commission (“EEOC”) ruled explicitly for the first time that transgender discrimination is a form of sex discrimination under Title VII. In that case, Macy v. Holder, [24] the plaintiff, who was born male, was offered a job at the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) while presenting as a male in 2010. Macy claims that after she was offered the job, she informed the agency that she would be transitioning to a female gender, and her offer of employment was withdrawn. The EEOC held that the term “sex” includes both biological sex and gender for Title VII purposes. The Commission explained: “When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment ‘related to the sex of the victim.’” [25] The Commission did not rule on the merits of the case but sent the case back to the ATF for a ruling as to whether the employer’s decision not to hire Macy was based upon her transgender status.

Although the decision does not bind federal courts, the ruling will certainly strengthen a transgender plaintiff’s ability to successfully state a claim under Title VII, and likely will increase EEOC enforcement of such discrimination claims. Indeed, in September 2012, the EEOC released a draft Strategic Enforcement Plan that specifically identified discrimination against transgender individuals under Title VII as one of the “emerging” areas that it intends to target for enforcement in 2012-2016. [26]
III. Developments in the Law: Title IX

The Office for Civil Rights of the Department of Education has explicitly noted, most recently in the April 4, 2011 “Dear Colleague” Letter, that Title IX “prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in th[e] letter also apply to gender-based harassment.” [27] While there are few cases explicitly invoking sex-stereotyping harassment or discrimination in the Title IX context, this statute may also support viable claims by transgender students and employees facing harassment or discrimination on campus.

One federal court has ruled explicitly that Title IX would protect a biological male who was sexually harassed while the harasser and everyone else on campus perceived the individual as a female. [28] In that case, Jennifer Miles complained of unwelcome sexual advances made by her professor, and was ultimately forced to leave her doctoral program early because of the harassment. NYU argued that because she was a biological male at the time of the harassment, Title IX did not protect her. In dismissing the university’s summary judgment claim, the court found that it was no defense to a Title IX discrimination claim that the student harassed was biologically male at the time of harassment when she was perceived by her professor and others as female.

IV. State and Local Government Protections

While federal law does not specifically protect transgender individuals from discrimination, an increasing number of states and municipalities have passed laws specifically prohibiting discrimination based on gender identity or expression (often in addition to sexual orientation). To date, 16 states [29] (including 3 last year alone), the District of Columbia, and more than 140 cities or municipalities have passed such laws. Since 2009, 17 additional states have proposed or are in the process of passing such laws. [30] In addition, some jurisdictions specifically prohibit discrimination in public employment for transgender people, and some have policies of gender inclusive bathrooms. [31] Such statistics indicate a strong trend toward recognizing equal rights for transgender persons, although many jurisdictions still do not allow such claims or have such laws.

V. Specific Considerations for Colleges and Universities

There are a number of issues facing university administrators who have policies that protect transgender individuals against discrimination and harassment or who wish to set an example of inclusion for a productive campus environment by making their institutions more accommodating to transgender students and employees.

A. Athletics

1. NCAA Issues

In the fall of 2010, Kye Allums, a student at George Washington University, became the first openly transgender student-athlete competing in NCAA Division I. Allums, a basketball player, is transitioning from female to male, and although he now identifies as a male, he plans to postpone any hormone treatments until after he completes his collegiate basketball career, in order to remain eligible to play on the women’s basketball team. [32]

The NCAA recently clarified its policies on participation in college athletics for transgender students. The policy balances the NCAA’s commitment to inclusion with a need for maintaining competitive equity. The new policy was approved in August 2011 and distributed the next month. [33] The policy now provides that a trans male (female to male) student athlete who has received a medical exception for treatment with testosterone for gender transition may immediately compete on a men’s team but is no longer eligible to compete on a women’s team. If the student continues to compete on the women’s team, that team must change its status to a “mixed” team, which is only eligible for men’s championships. Alternately, a trans female (male to female) student treated with testosterone suppression medication for gender transition may not compete on a women’s team (without changing
that team to "mixed" status) until completing one calendar year of such treatment. That athlete may continue to compete on the men’s team during that year.

These rules affect championships and tournament play, but the NCAA allows individual institutions to make their own decisions about eligibility during regular-season play. The NCAA has also published various resources to assist member institutions on transgender issues and has released a comprehensive booklet on transgender athletes and inclusion. [34]

2. Locker Rooms and Bathrooms

In addition to eligibility requirements, any transgender student-athlete (or any student using athletic facilities on campus) must address the issue of locker room use. In Kye Allum’s case, although he has traditionally used the women's locker room, the university planned to work with him and his teammates on this issue. District of Columbia law does guarantee "the right to use gender-specific restrooms and other gender-specific facilities such as dressing rooms...that are consistent with [one's] gender identity or expression." [35] Of course, not all municipalities or states have such a law. [36]

While locker rooms create an opportunity for camaraderie amongst members of the same sex, they can often produce dangerous or harmful situations for vulnerable students such as transgender students. Although a clear-cut solution does not exist, some schools have designated an individual changing room or makeshift locker room as gender-neutral. For transgender students, this may not be a complete solution, but has acted as a stopgap measure at some universities. Adoption of individual gender-neutral bathrooms is typically considered an appropriate accommodation to comply with state and local civil rights laws protecting on the basis of gender identity or expression.

B. Record-Keeping

Institutions sometimes ask for gender information on forms when such information is not truly necessary, creating problems that could be avoided. Reviewing institutional forms and records and removing the question when it is not relevant could go a long way towards creating a welcoming environment for transgender individuals. In addition, a transgender student or employee may request that his or her name be changed in order to reflect the appropriate gender. Institutions may want to develop comprehensive policies to deal with each circumstance in order to be sensitive to the individual’s needs.

1. Changing Names on Diplomas

Some universities may choose to allow graduates who have officially changed their name because of a gender change to receive a duplicate diploma reflecting that name change. This is somewhat analogous to universities offering duplicate diplomas to students who change their names upon marriage or for other reasons. Institutions may want to develop a policy for handling these requests so that they can be dealt with in a uniform way rather than on a case-by-case basis. [37]

2. Class Rosters

Transitioning students may choose to use a more gender-appropriate name than the one that appears in their official school records. Allowing students to opt to use only a first initial on the class roster or perhaps a preferred name can avoid the embarrassment of asking a professor to use a different name, or having to publicly announce that the student prefers an alternate name.

3. Scholarships

Regarding the issue of scholarships, some donors fund scholarships for specific groups of people, for example, for women only. Institutions may want to consider whether their policies effectively take into account students who transition, or begin the transition, from one gender to another while in college or while receiving the scholarship.

C. Women's/Single Sex Colleges

Several women’s colleges have faced the difficult challenge of having to determine what to do with students who transition after being admitted. For example, some women’s colleges have had trouble crafting policies to address instances where a female applicant is admitted and transitions to become
a male after being admitted but before classes begin. Another such situation arises where a female student enrolled in the university transitions to become a male part way through his education. Several women’s colleges take the position that applicants for admission must be female, but will graduate any student who has completed the requirements, regardless of that student’s gender.

The concerns of non-transgender students over the inclusion of transgender students may create issues as well. Some parents and students may object to having male students on an all-women’s campus (both females transitioning to male and vice versa). For those who see single-sex education as an important part of the institution’s mission, this may be a controversial issue. Where a male student transitions to become a female and enrolls at a women’s college, administrators can be in a difficult position as they attempt to address the concerns of parents who do not want their child in school with students whose sexual identity may be in transition.

### D. Facilities

Creating facilities that accommodate the unique needs of transgender students is the first step to creating a welcoming campus for these students. Unfortunately, this is both expensive and complicated. Modifying existing facilities is not always effective or feasible, and creating new ones may be cost prohibitive for some schools. Below is a list of some of the more common facilities that may need alteration and some schools that have begun the process successfully.

1. **Bathrooms**

   Similar to the solution developed by some institutions for locker rooms, many schools have marked separate bathrooms for transgender students as gender-neutral. Having a gender-neutral bathroom removes the difficulty around guessing the sex of the student who wants to use the bathroom and decreases the chance of offending other students who may feel uncomfortable sharing a bathroom with students who may not have fully transitioned yet. Several schools including San Diego State, University of Chicago, and Beloit College have all implemented this policy. Institutions may also consider simply allowing a transgender individual to use whichever bathroom facility they choose.

2. **Dorm Rooms**

   The issue of dormitory accommodations also presents a unique challenge to university administrators when working with transgender students. As it may be difficult to place such students in single sex residences, given the potential ambiguity of their sex as well as potential complaints from other residents, some universities have designated single occupancy rooms for transgender students. Other universities have not necessarily designated specific housing for such students but have a written commitment to finding comfortable housing for students of transgender status. Finally, some progressive institutions have dedicated gender neutral housing for upperclassmen, where students can choose to live regardless of their biological sex or gender identity. An additional question faced by administrators is whether the institution should ask about gender at all when a student fills out a housing application, or whether there should be a third box for “transgender” in addition to “male” and “female.”

### E. Health Insurance

Health insurance is a major concern for schools and transgender individuals alike. Transgender students and employees would benefit from having their university health insurance cover their transition procedures as well as any therapy (hormone, mental health) that may accompany it. Most private health insurance policies exclude transgender-related care. Indeed, for many institutions, it is impractical to cover these services because of the exorbitant costs. An insurance policy specifically exempting transgender-related services could be challenged in courts as discriminatory, and the legality of such an exclusion is not yet clear. Proponents of coverage will argue that the procedures and services needed for gender transition are neither cosmetic nor experimental, and that a policy that specifically excludes transition services is a form of gender discrimination. Many policies, however, will cover mental health services for transgender students and employees, since mental health services are generally covered for all students or employees, regardless of psychological diagnosis. While the cost of sex reassignment surgery and hormone treatment is high, institutions may wish to at least examine whether it is practicable to offer insurance plans that cover those treatments in the near term.
F. Recommendations

Institutions should design comprehensive policies to deal with all of the issues discussed here. All university processes should be nondiscriminatory, and processes that may historically involve requests for gender information should be examined to determine whether making such distinctions is actually important and necessary. Even for colleges and universities located in jurisdictions without statutory protections for transgender people, institutions would be well advised to start devising policies now given the growing acceptance of related discrimination claims in the federal courts. Further, addressing this promptly is particularly advisable given the very real likelihood of increased EEOC enforcement action against institutions that discriminate based on gender identity or expression. Many more jurisdictions may continue to adopt gender identity as part of human rights laws. Strong policies can also create a more supportive environment for all students and employees on campus, fostering morale and supporting the free exchange of ideas because students feel comfortable to be who they are. A written policy can alleviate the stress associated with an awkward housing or facilities situation and can provide some comfort to incoming students with transgender-related needs. It also creates consistency, which can ward off claims of discrimination.

In addition to having clear policies, appropriate training for employees and students will be integral in dealing with issues on campus before they arise. In addition to training on the nuts and bolts of the institutional policies, there should also be a strong element of sensitivity training. Members of the campus community should be advised of the factors that can contribute to a hostile working, living, or educational environment for a transgender person. Employees and students should also be reminded of basic conduct codes and that respect for others’ privacy and personal lives is essential to a productive campus environment.

CONCLUSION:

As the arena of transgender issues grows larger due to increased societal acceptance and media attention, colleges and universities should be proactive in their policies. Although this issue is a complicated one with much room for confusion and ambiguity, it may also affect the well-being of a number of students who will be educated at college campuses across the country. If colleges are to preserve their commitment to addressing student needs and promoting a safe and productive learning and working environment, this is one issue that requires careful, measured action.

FOOTNOTES

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RESOURCES:

- Transgender Law and Policy Institute Homepage
  - Ways that Colleges and Universities Meet the Needs of Transgender Students
  - Examples of institutions with gender-inclusive housing and other housing policies


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