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Demystifying the Transgender Laws: How to Prevent Bathroom Battles from Becoming an Issue in Your Municipality

Illinois Municipal League
Attorneys' Session
Thursday, September 22, 2016 – 3:15 p.m.
Continental B & C

Keri-Lyn J. Krafthefer

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What are we talking about, anyway?

- “Transgender” is the umbrella term that describes individuals whose gender given to them at birth does not match the gender that they truly feel that they are, regardless of whether they have had gender reassignment surgery.



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Terms:

- “Assigned gender” – the gender given to everyone at birth based on physical anatomy
- Gender identity or “affirmed” gender – is a person’s deeply held sense of their own gender (regardless of body parts)
- “Transgender female” is a person born male who identifies as female
- “Transgender male” is a person born female identifying as a male
- NOTE: Courts use the word “sex” and “gender” interchangeably, but distinguish “gender identity”



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Terms:

- “*Transvestite*” is a person who derives pleasure from dressing in the clothes of the opposite gender
- *Reassignment surgery* – the surgical procedure that an individual undergoes to conform their body to their gender identity
- “*Gender nonconforming*” – describes people whose gender expression differs from stereotypical societal expectations related to gender.

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Transition

- “*Transition*” is the time when a person begins to live as the gender with which they identify instead of the gender with which they were born.
- Generally begins with a diagnosis of gender dysphoria
- First step is a court-ordered name change
- To change the gender marker on your IL driver's license,
 - either a certified copy of your amended birth certificate or
 - a letter or affidavit from your physician certifying that you have taken or are taking appropriate clinical steps to change your gender.

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Laws on Transgender Rights

Local laws
State and federal legislation
Governmental edicts
Court guidance


A Boy's Life



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Laws on Transgender Rights

- Changing rapidly
- Tied in with developments in society
- Emotionally charged
- All over the board
- Starts with Title VII's prohibition against discrimination on the basis of sex



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Chronology of Significant Transgender Events

1984	1989	1993-2002	2004
7th Circuit finds a transsexual pilot is not entitled to Title VII sex discrimination protection, interpreting sex discrimination as "against women because they are women and men because they are men." "The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder." <i>Ulane v. Eastern Airlines, Inc.</i> , 742 F.2d 1084	U.S. Supreme Court rules in <i>Price Waterhouse v. Hopkins</i> that Title VII grants relief to a (non transgender) woman who is treated differently because she is "too masculine" and brash. 490 U.S. 228 (1989)	Certain courts do not interpret the holding of <i>Price Waterhouse</i> as applying to transgenders. (E.D. Pa. 1993, D. Kansas 1995, E.D. La. 2002)	In <i>Smith v. Salem</i> , the 6th Circuit holds that Title VII's definition of "sex" extends to transgenders, and grants a transsexual firefighter protection. This is the first federal appellate ruling applying Title VII in this manner. 378 F.3d 566

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Chronology

January 21, 2005	October 27, 2006	April 20, 2012	May 8, 2013
The Illinois Human Rights Act is amended to include sexual orientation as a protected class. "Sexual orientation" is defined to include "gender-related identity." 775 ILCS 5/1-103	Washington D.C. Office of Human Rights issues ban from labeling of single-occupancy bathrooms, although this is not enforced until 2013. Also adopts rule that individuals can use restrooms and other gender-specific facilities such as consistent with their gender identity or expression.	EEOC rules that Title VII's definition of "sex" prohibits discrimination on the basis of gender identity or transgender status. <i>Macy v. Holder</i>	Philadelphia enacts an Ordinance requiring all new City construction to include gender-neutral bathrooms and making it an "unlawful public accommodations practice" to deny a person access to a bathroom correlating with his/her gender identity

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Chronology

August 28, 2014	December 15, 2014	April 24, 2015	June 1, 2015
Austin, Texas passes a gender neutral bathroom ordinance, requiring gender-neutral sign regulations for single use commercial restrooms	U.S. Attorney General Eric Holder issues a memo that the DOJ takes the position that protections of Title VII extend to gender identity and transgender, notwithstanding conflicting federal appellate court rulings.	Caitlyn Jenner comes out as transgender during a 20/20 interview with Diane Sawyer.	OSHA issues guidance for employers that "All employees, including transgender employees, should have access to restrooms that correspond to their gender identity."

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Chronology

August 10, 2015	November 2, 2015	November 13, 2015	March 23, 2016
Seattle passes a gender neutral bathroom ordinance for single occupancy bathrooms	U.S. Dept. of Civil Rights finds that Palatine Township H.S.D. 211 violated Title IX by denying transgender student access to girls' locker room. The parties settle by agreeing that the student may use the girls' locker room, changing behind a privacy screen. OCR Case 05-14-1055	Evanston passes an ordinance requiring certain single-occupancy bathrooms to be designated as gender neutral, others to be labeled as "male" or "female" and not addressing which restrooms transgenders should use	North Carolina enacts House Bill 2 – Local boards of education shall not permit students to use multiple occupancy bathrooms or changing facilities designed for a sex other than the student's biological sex.

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Chronology

April 11, 2016	April 18, 2016	April 19, 2016	May 4, 2016
The City of Highland Park passes an ordinance requiring single-occupancy restrooms in all new developments within the City be designated as gender neutral.	Target announces that transgenders can use the store's bathrooms that match their gender identity.	The U.S. Court of Appeals for the Fourth Circuit rules in the case of <u>G.G. v. Gloucester County School Board</u> that the Gloucester County School Board violated Title IX by denying a transgender boy access to the boys' restrooms.	The DOJ writes to the Governor of North Carolina informing him that H.B.2 violates Title VII and demands that the Governor remedy the violations by no longer implementing H.B.2.

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Chronology

May 4, 2016 (same day)	May 9, 2016	Same Day	May 13, 2016
51 families of students who attend Palatine Twp S.D. 211 file suit against the DOJ and the DOE challenging the settlement agreement and the DOJ/DOE's interpretation of Title IX claiming "sex" does not equal "gender identity." Students and Parents for Privacy v. U.S. DOE, et al., 16 CV04945 N.D. IL.	The Governor of North Carolina files suit against the DOJ seeking declaratory relief confirming that H.B.2 does not violate Title VII. McCruy v. USA, et al., case no. 5:16-cv-00238, U.S.D.C. E. Dist. of NC	The DOJ files suit the same day against North Carolina seeking declaratory relief confirming that North Carolina is in violation of Title VII and Title XI by complying with the provisions of H.B.2. USA v. State of North Carolina, Case no. 1:16-cv-00425 U.S.D.C. Middle Dist. of NC	The DOJ and DOE release a "Dear Colleague Letter" to schools across the country Title IX compliance when it comes to transgender students. It states schools must allow transgender students to use facilities consistent with their gender identity, and that a school may not require a transgender to use individual-user facilities when other students are not required to do so. It also states schools could lose federal funding unless they comply.

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Chronology


May 25, 2016	June 10, 2016	July 8, 2016	July 28, 2016
Eleven states file suit against the DOJ, DOE, EEOC & DOL in Texas challenging the new interpretations of Titles VII and IX regarding gender identity. They allege that the new rules did not comply with the Fed. APA, which requires a notice and comment process, before a federal agency may finalize a new rule. State of TX v. USA, Case 7:16-cv-00054, N.D. of Texas, Wichita Falls	Highland Local School District in Ohio files suit against the DOE and the DOJ seeking to stop implementation of the DOJ and DOE guidance on transgender students. BOE of the Highland Local School District v. US Dept of Ed., case no. 2:16-cv-00524.	Ten additional states sue the DOJ, DOE, EEOC, and DOL challenging new interpretations of Title VII and Title IX regarding gender identity on the grounds that these new rules violated the Federal APA and several other federal laws.	The Seventh Circuit rules in <i>Kimberly Hively v. Ivy Tech Community College</i> that "sex" as used in Title VII does not include sexual orientation, urging the Supreme Court to clarify or Congress to act. Case No. 3:14-cv-1791

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July 20, 2016

Caitlyn Jenner says it was harder to come out as Republican than transgender

After a long wait, Jenner's appearance on the CBS reality show *The Contender* will air on Tuesday, July 26, 2016.



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Chronology

August 3, 2016	August 21, 2016	September 7, 2016	September 9, 2016
The Supreme Court of the United States issues a stay of the Fourth Circuit's ruling in <i>G.G. v. Gloucester County School Board</i> . The stay is granted pending the grant or denial of Gloucester County School Board's petition for a writ of certiorari.	The District Court for the N.D. of Texas issues a preliminary injunction enjoining the DOJ, DOE, EEOC, and DOL from enforcing the new guidance and rules interpreting Title VII and Title IX to protect discrimination based on gender identity.	The parents of several students who attend a Minnesota school district file suit against the DOJ and the DOE challenging the new guidance and interpretation of Title IX and alleging that the school district allowed a transgender girl access to the girls locker room based on the guidance contained in the May 13, 2016 "Dear Colleague Letter."	Texas Attorney General Ken Paxton publicly urges Target to revise their new policy allowing transgender individuals to use bathrooms consistent with their gender identity in response to two recent incidents of males spying on females in Target restrooms.

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Chronology

September 12, 2016	Same Day	Same Day	September 14, 2016
The NCAA announces that it will relocate all seven of its championships, including March Madness outside of North Carolina due to H.B. 2.	The Virginia Supreme Court agrees to hear an appeal of a case where the Fairfax County S.D. amended its anti-discrimination policy to include "sexual orientation," "gender identity," and "gender expression." The circuit court had dismissed the suit.	The DOJ files a request for clarification in <i>State of Texas v. USA</i> , requesting that the District Court Judge clarify that his preliminary injunction order applies only to schools and not to workplaces.	The Atlantic Coast Conference (ACC) announces that they will pull all of their championship games out of North Carolina.

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Where does this leave us????

- Conflicting laws, court opinions and agency direction
- The real legal issues involve states' rights + agency rulemaking
- High emotions on all sides
- Events are occurring almost daily
- Congress has not acted to amend Title VII or Title XI to include gender identity

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Target

April 19, 2016 Target announces transgender customers can use bathrooms and fitting rooms matching their gender identity

To date 1,420,336 people have signed a petition vowing to boycott Target as long as such policy is in place.

Target's revenues drop by \$10 million in the next seven weeks. CEO Brian Cornell says sales decline is due to "difficult retail environment."

Target's revenues for the second quarter fall to lowest level since 2014; Wal-Mart's sales increase for the same period


August 17, 2016: Target announces it will spend \$20 million installing single stall bathrooms in all stores



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Bathroom issues



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Let's chat about body parts

Body parts + multi-stall bathrooms:

Gender reassignment surgery = who cares?

Male parts on transgender female + ladies' room = inside stall

Female parts + transgender male + men's room = inside stall

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What is everybody afraid of?

- Haters gonna hate
- Deeply held gender identity beliefs v. deeply held privacy or religious beliefs
- Many instances of non-transgenders abusing transgender-friendly laws to gain access to facilities for perverted reasons

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Man strips in front of girls in locker room, says transgender law allows it

By David A. Shields | **October 11, 2016** | **www.breitbart.com**

BRITAIN'S Daily Mail reports that a transgender man has been arrested after allegedly stripping in front of girls in a locker room. The man, who is 21 years old, was arrested on charges of sexual assault and indecent exposure. The incident occurred at a public locker room in a school. The man claimed that he was using the locker room because he was transgender and that the school's policy allowed him to do so. The school's policy stated that transgender students could use the locker room of their assigned gender. The man was released on bail and is currently facing charges of sexual assault and indecent exposure.

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What is everybody afraid of?

- A few instances of transgenders doing the same
- Fear of the unknown

Frightening Incidents Begin in Target's Transgender-Friendly Bathrooms



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Municipal issues

- Labeling of bathrooms
- Locker rooms
 - Police
 - Fire
 - Parks Departments
- Parks programs

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“The End of Girls’ Sports...”

- Her dreams of a scholarship shattered, your 14-year-old daughter just lost her position on an all-girl team to a male, and now she may have to shower with him.”

a full page newspaper ad placed by the Minnesota Child Protection League after the Minnesota State High School League voted to allow transgender student athletes to play on the team with which they identify

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How to Comply With Transgender Protections

- Workplace - employees
- Public services - patrons



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Best practices

- Have a policy before it becomes a problem
- Have a policy for employees and a policy for patrons

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Workplace

- EEOC advises implement a policy against discrimination
- Policy should address the following issues:
 - Terminology
 - Prohibition on discrimination

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Workplace

- Who to complain to about violations
- Rights of transgender individuals in the workplace
 - Privacy rights
 - Name to be used – Be careful of pronouns

Gender Pronouns

Please note that these are not the only pronouns. There are an infinite number of pronouns in use and people may use multiple pronouns at different times.

Subjective	Objective	Possessive	Reflexive	Example
She	Her	Hers	Herself	She is a wonderful person. I respect her. She belongs to her.
He	Him	His	Himself	He is a wonderful person. I respect him. He belongs to him.
They	Them	Theirs	Themselves	They are wonderful. I respect them. They belong to them.
It	Its/Its'	Its/Its'	Itself/Itself'	It is a wonderful person. I respect it. It belongs to it.

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Workplace

- Employee responsibilities to respect
- Employer responsibilities to enforce
- Responsibilities of transitioning employees
- Dress code
- Complaints by co-workers
- Transgender employees
- Educate, educate, educate!

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For Patrons It's a Bit More Complicated

- EEOC and DOJ advise to have a policy which prohibits discrimination and addresses the following:
 - Restrooms – ideally gender neutral otherwise according to gender identity
 - Locker rooms – according to gender identity but private area for transgender and other individuals who do not want to change in a group setting

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For Patrons It's a Bit More Complicated

- The best practice is to accommodate those who feel uncomfortable, whether or not they are transgender themselves

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What about gender specific programs, especially sports?

- More complicated
- This needs to be addressed on a case by case basis, considering the following factors:
 - age of the participant
 - sport or program
 - gender identified on legal documents

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Other Supporting Information

- Physician statement (including psychiatric reports)
- Court ordered change of name
- Requirements of sponsoring organization (most require some confirming documentation)
- Whether the minor is pre or post pubescent
- Current medical treatments

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Your To Do List

- Be aware of the developing trends and law on transgender rights
- Adopt policies for employees/patrons/participants


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More To Do List

- Create gender neutral bathrooms and private areas in locker rooms
- Train employees



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Collective bargaining obligations


- Remember that these issue may have collective bargaining implications

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Frequently Asked Questions



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Question 1

- Transgender rights only apply to individuals who have undergone reassignment surgery.



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Answer 1

- False! One aspect in the demystification of transgender individuals and rights is understanding what it means to be transgender. The word transgender is an umbrella term for people who identify with the gender that does not conform to the one assigned to them at birth. This may mean that a transgender person has undergone or is undergoing gender reassignment surgery, or it may mean that a person is simply living as the gender with which they identify without surgical reassignment.

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Question 2

- If most co-workers are uncomfortable with a transgender co-worker, the comfort of the majority comes first.




Answer 2

- In fact, the opposite is true. Who uses which bathroom, for instance, is currently a huge topic of debate in some places. OSHA and EEOC have issued guidelines on the subject of bathrooms (as has President Obama to schools) which clearly state that while gender neutral, single bathrooms are best, if an individual complains about a transgender person's use of the bathroom that they use, it is the one who complains who should be offered an alternative facility – not the transgender individual.

Question 3

- A public body can comply with the law if it provides a separate facility to the transgender individual.




Answer 3

- Perhaps, if there is an agreement with the parties about this. Be careful in making something like a privacy screen in a locker room a mandatory requirement.

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Question 4

- Transgender employees must use their legal name at work.



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Answer 4

- It is true that employers must report earnings to the IRS and Social Security Administration under an employee's legal name, even if that name does not conform to the employee's gender identity, but a transgender employee must be allowed to use at work any name they have chosen to match their gender identity. Repeated or malicious use of a name or pronoun which does not match an employee's preferred name may be considered harassment under the law.

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Question 5

- Employers do not have to have a separate policy for transgender issues.




Answer 5

- While this might be technically true, the best practice is to establish a policy or procedures for addressing transgender issues in the workplace. First of all, a solid policy and procedures will aid in defense of any claims of discrimination. Secondly, these issues are still new and unfamiliar to many in the workforce. Policies, procedures and training demystify many questions that people ask about transgender rights in the workplace.

Question 6

- If a member of public asks about the gender of a patron or participant, what should you do?




Answer 6

- Patron and program participant information, like that of employees is private. It is no more appropriate for someone to ask about a person's gender assignment or identity than it is to ask about their marital status, their home address or their social security number. If ever asked this question or one similar to it, simply respond that the Village does not release any private information about participants or patrons but if they have any concerns about programs or services, you would be happy to assist them.

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Question 7

- A parent wants to register a minor in girls' soccer. As proof of age eligibility, the parent produces a birth certificate that reflects that the child was assigned the male gender at birth. Now what?



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Answer 7

- This requires a case by case analysis. Generally, participants should be allowed to register consistent with their gender identity but even the DOJ and DOE acknowledge exceptions.

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Question 8

- Our parks department offers a summer camp and we just learned that we are going to have a transgender camper. What should we do?



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Answer 8

- First, speak with the camper or the campers' parents. They may have a clear idea of how particular issues or concerns that may arise should be handled – and their proposals may eliminate problems in advance.

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Question 9

- A co-worker announces he or she is transitioning to the opposite gender, you would like to talk about it with him or her. Is that okay?



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Answer 9

- Yes, it is okay to ask about a co-worker's transition provided they are comfortable speaking with you about it. Remember to follow their lead as to how they want to be treated, what name they want to be called and how private they want to keep the information.

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Question 10

- You strongly suspect that a patron is pretending to be transgender as a joke or to mock those that really are or to have access to gender specific areas for criminal motive. How do you handle this?

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Answer 10

- This is the biggest fear of all with concerns about misuse of transgender rights. Any good faith suspicion that someone is pretending to be transgender for any of these reasons should be handled like any other misconduct by employees, patrons or participants.

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Question 11

- When transgender participants are using the facility that corresponds to their gender identity, what do we do about open spaces such as changing areas?

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DISCUSSION
& KAPAPUTUHA


Answer 11

- The transgender person has the right to be in the locker room. If they are comfortable changing in the open, then that's where they should change. If anyone is uncomfortable with this, then they will need to be accommodated.

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& KAPAPUTUHA

Question 12

- What if a parent, participant or patron has a bona fide religious belief which does not agree with our gender identity policy?



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Answer 12

- The idea is to accept people as they are. Bona fide religious beliefs should be accommodated by providing an alternative restroom or locker room for that person.

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Questions

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