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**Common Legal Questions Regarding Accommodating Transgender Students**

The following general information provides background information for members on common legal questions that come forth in accommodating transgender students.

WASB staff attorneys are not aware of a specific federal court decision in the 7th circuit or a state court’s decision in Wisconsin that addresses a student’s ability to use the locker room that aligns with the student’s personally identified gender rather than the gender assigned to the student at birth.

According to the National School Board Association’s publication [NSBA Transgender Students In School 2017](https://cdn-files.nsba.org/s3fs-public/reports/Transgender_Guide_101217_V11.pdf?qkRqeN_CKoKzjsOpzKQ62VT98vfhzgkv):  “(f)or school activities like physical education and same sex curricular activities (i.e., sex-segregated reading or mathematics classes), ideally a transgender student should have the same opportunities to participate as non-transgender students, although a school board’s determination whether a transgender student should be permitted to participate in the activities aligned with the student’s gender identity must carefully consider social, community and legal issues related to privacy, safety, and constitutional protections.”

**Restrooms and Locker Room Access**:  In researching this issue from a legal perspective, as of the date of publication, WASB is aware of two cases from the seventh circuit court of appeals that specifically address transgender students access to facilities (the cases address bathroom access, but not locker room access).  The cases provide for the following:

[Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education](http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D05-30/C:16-3522:J:Williams:aut:T:fnOp:N:1971382:S:0), 858 F.3d 1034 (7th Cir. 2017), cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker, 138 S. Ct. 1260 (2018).  To interpret the term “sex.” the Whitaker court relied on employment law cases discussing the prohibition on sex discrimination under Title VII.

The Seventh Circuit held that the school district violated Title IX when it enforced a district policy “requir[ing] an individual to use a bathroom that does not conform with his or her gender identity ….” The Court held that the policy “punishe[d]” transgender individuals for their “gender non-conformance” and “subject[ed] Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students…”

The court rejected the district’s claim that Ash had failed to make use of readily available alternatives and dismissed the district’s individual privacy argument as “based upon sheer conjecture and abstraction.”

Applying similar reasoning to Ash’s equal protection claim, the Seventh Circuit ruled that the restroom policy, which “cannot be stated without referencing sex,” was a sex-based classification. Courts subject sex-based classifications to higher scrutiny (“intermediate”), meaning the school district had to show that the policy’s “classification serve[d] important

governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”

By declaring it a sex-based classification, the Whitaker court avoided having to decide whether the restroom policy also discriminated on the basis of “transgender status.”

The Seventh Circuit affirmed the district court’s preliminary injunction and enjoined the school district from:

“(1) denying Ash access to the boys’ restroom;

(2) enforcing any written or unwritten policy against Ash that would prevent him from using the boys’ restroom while on school property or attending school-sponsored events;

(3) disciplining Ash for using the boys’ restroom while on school property or attending school-sponsored events; and

(4) monitoring or surveilling Ash’s restroom use in any way.”

The school district sought review in the U.S. Supreme Court but then [settled the case](http://www.kenoshanews.com/news/local/unified-settles-transgender-lawsuit/article_b90c8ac8-9b9e-511c-b01b-f59102c7578a.html) before a decision was reached.

A decision of the United States District Court for the Southern District of Indiana, [J.A.W. v. Evansville Vanderburgh Sch. Corp](https://ecf.insd.uscourts.gov/cgi-bin/show_public_doc?32018cv0037-103)., No. 3:18-cv-37-WTL-MPB (June 7, 2019), applied Seventh Circuit precedent and granted partial summary judgment in favor of the plaintiff student on claims that the school district violated Title IX and the Equal Protection Clause in the manner in which the district addressed the use of school restroom facilities access by a transgender student.  The court granted the student access to the bathroom that aligned with the student’s identified gender.

State law does not specifically provide protections for transgender and gender non-conforming students.

Based upon the foregoing case law many attorneys recommend that a district accommodate a student’s request to utilize the restroom that aligns with the student’s personally identified gender rather than the gender assigned to the student at birth.

The question regarding locker room use by a transgender student is one that many schools are grappling with in the face of a lack of federal law, a lack of a specific state law, and conflicting signals from the Office of Civil Rights.  For these reasons, WASB staff attorneys recommend that districts proceed with caution when developing policies and/or a plan to address this student’s request and have such policies reviewed by the district’s local legal counsel.

**Local Protections and Athletics:**  Many school districts in Wisconsin have added gender identity/expression to their local non-discrimination policies.   Others have not added the terms, but cover such items underneath a local interpretation of sex.  In addition, others may cover it under Anti-bullying policies.  [**See also:  DPI Safe Schools for Lesbian, Gay, Bisexual, and Transgender Students**](https://dpi.wi.gov/sspw/safe-schools/lgbt).

In addition, the [WIAA provides pupil non-discrimination guidelines](https://www.wiaawi.org/Portals/0/PDF/nondiscrimination.pdf) for athletics.  The WIAA also has a [Transgender Participation Policy](https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAAtransgenderpolicy.pdf).The WIAA policy permits transgender students who meet certain criteria to participate in athletics. Schools must determine whether a transgender student may play on girls or boys teams based on documentation of certain items.

**Student’s Names:**  Under Family Education Rights and Privacy Act (FERPA), students, current or former, have a right to seek to amend their school records if said records are “inaccurate, misleading, or in violation of the student’s rights of privacy.” (34 C.F.R. § 99.7(a)(2)(ii)). Transgender students wishing to change their name and gender marker on their educational records can seek such an amendment under this federal law.

[Section 786.36](https://docs.legis.wisconsin.gov/document/statutes/786.36) of the state statutes provides a method for any citizen—including minors—to petition the circuit court of the county where he/she resides to have his/her name changed.  Children younger than 14 may not file a petition on their own behalf. Instead, the petition must be brought by a parent, both parents, the child’s guardian or legal custodian as specified in state law. Although prudence would dictate obtaining a copy of the court order, districts need not hesitate to comply with requests to modify a student’s name in school records following an official name change pursuant to state law.  Though a statutory name change has the advantage of providing an official record, the general rule of common law in Wisconsin is that all persons, including minors, can adopt whatever name they please.

Under the common law, students who are capable of making informed decisions can change their name by simply adopting whatever name they please; as long as the name is not adopted for improper purposes, it will constitute the student’s legal name.  The attorney general advises school administrators generally to honor requests from students who have obtained new names (whether pursuant to statute or common law) to make corresponding changes in school records. Nevertheless, because student name changes create administrative burdens and may involve disagreements between parents (or between a student and his/her parents) over a child’s name, boards may find it useful to provide guidance for handling name-change requests in district policies or procedures.  For example, a name change may be recognized through a system that permits records to be located under either the student’s original name or his/her new name.

Under the common law you would be able to refer to the child by the requested name on the pupil’s name tag, locker, announcements, birthdays and addressing the child verbally as requested if the student makes the common law name change request and the parent or guardian has been notified of the student’s request for a name change and does not object.   Do not change the child’s official name or gender, on other pupil records until the name change or gender process is finalized through a court order or through the FERPA process.  If the pupil is over age 14, the pupil can commence the name change without parental consent.  Please find linked here a [WASB Boardman Clark](https://wasb.org/legal-human-resources-services/school-law-resources/legal-comments-list/c199202/)legal comment that describes the public name change process and suggestions for districts based upon different fact patterns.